

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke :
Energy Ohio for Authority to Establish a : Case No. 14-841-EL-SSO
Standard Service Offer Pursuant to :
§4928.143, Revised Code, in the Form of :
an Electric Security Plan, Accounting :
Modifications, and Tariffs for Generation :
Service. :

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

POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

This initial post-hearing brief represents Staff of the Public Utilities Commission of Ohio's ("Staff") position regarding Duke Energy Ohio's ("Duke" or the "Company") latest standard service offer application. Duke proposes new riders in its application, and also proposes modifications to some existing riders. Staff will first discuss its recommendations for the new riders, then address proposed changes to existing riders, and finally, Staff discusses its recommendations regarding other aspects of Duke's application. Staff believes that, with Staff's proposed modifications, the Commission should approve Duke's application.

DISCUSSION

A. Staff's Position Regarding New Riders Proposed by Duke

1. Price Stability Rider ("PSR")

a. **The PSR conflicts with the Commission's policy goal of transitioning to a fully competitive market.**

i. **The PSR contradicts the primary goal of Duke's last ESP case, which was to transition Duke to a fully competitive market.**

Staff opposes Duke's PSR. Staff's primary concern is that the PSR conflicts with the Commission's goal of transitioning the Ohio electric distribution companies (EDUs) toward a fully-competitive retail-market construct. The Commission has been moving towards full market competition for over a decade.¹ In Duke's last ESP case ("*ESP II case*"), the Commission ordered that "all of Duke's generation assets will be transferred to an affiliate."² This transfer is to occur no later than December 31, 2014.³ In the *ESP II case*, the Commission cited Duke witness Janson's discussion of this transition to full competition, and the role Duke's *ESP II* case played:

¹ Staff Ex. 1, *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 14-841-EL-SSO, et al. ("*ESP III Case*") (Prefiled Direct Testimony of Dr. Hisham M. Choueiki at 9) (October 2, 2014) ("Choueiki Direct").

² OMA Ex. 2, *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-3549-EL-SSO, et al. ("*ESP II case*") (Opinion and Order at 45) (Nov. 22, 2011).

³ Staff Ex. 1 (Choueiki Direct at 6).

Duke witness Janson further avers that the stipulation complies with all relevant and important principles and practices, and furthers those through the advancement of the competitive market in Duke's service territory in Ohio, by embracing a full competitive auction SSO and full legal separation of Duke's generating assets from its distribution utility.⁴

The objective was to expeditiously transition Duke's generation assets to a fully-competitive market. This transition was a significant non-quantifiable benefit of the stipulated *ESP II case*.⁵ As part of the *ESP II case* stipulation terms, the parties agreed that Duke was permitted to collect \$330 million from customers for its Electric Stability Service Charge ("ESSC") settling the issue of Duke's capacity revenues.⁶ The ESSC was an important element that would ensure that Duke would achieve a fully-established competitive electric market where market forces dictate the success or failure of Duke's former generation assets, *not* the Commission. Again, the Commission ordered that Duke transfer all its generation assets; regulated cost-of-service recovery for Duke's generation assets should cease to exist when this goal is reached.

Duke Energy Ohio has not been in the business of selling electric generation service since January 1, 2012, but rather, Duke is a "wires only" company that no longer

⁴ OMA Ex. 2 (*ESP II case*, Opinion and Order at 44).

⁵ *Id.* at 76.

⁶ OCC Ex. 2 (*ESP II Case*, Stipulation and Recommendation at 15-16) (Oct. 24, 2011).

sells electricity to Ohio ratepayers.⁷ Duke, however, now asks to the Commission to reverse course and begin “reregulating”⁸ some of Duke’s generation assets – its 9% stock-ownership interest in the Ohio Valley Electric Corporation (“OVEC”), generation facilities originally built for the U.S. Department of Energy. The proposed PSR will move Duke in the opposite direction of market-based competition by providing Duke a guaranteed revenue stream for these generation assets, irrespective of market forces. The Inter-company Power Agreement (“ICPA”) in effect is Duke’s purchase power agreement with OVEC.⁹ Under the ICPA, Duke is required to pay OVEC a traditional cost-based rate (including a return on investment).¹⁰ Regardless of the amount of power that Duke takes from OVEC, Duke is required to pay the embedded cost of the OVEC units.¹¹ Because Duke is one of the owners of OVEC, its payment of a cost-based rate

⁷ Staff Ex. 1 (Choueiki Direct at 10). As of June 30, 2014, 76.62% of the MWHs consumed by Duke Energy Ohio customers are being supplied by competitive retail electric service (CRES) providers. The remaining 23.38% are consumed by non-shoppers and are procured via a Commission-administered SSO auction. In other words, all of Duke Energy Ohio’s distribution customers currently either shop (individually or via aggregation) for their generation needs or have their electricity needs procured through a Commission-administered SSO auction.

⁸ Staff uses the term “reregulation” lightly because the regulatory role the Ohio Commission would play in Duke’s PSR proposal would be much more limited than the Commission’s traditional role. The Ohio Commission’s jurisdiction (or lack thereof) over the proposed PSR is discussed more fully below.

⁹ IGS Ex. 12 (Hamilton/Haugen Direct at 4-5).

¹⁰ Duke Ex. 6 (Wathen Direct at 13); IGS Ex. 12 (Hamilton/Haugen Direct at 5).

¹¹ IGS Ex. 12 (Hamilton/Haugen Direct at 5).

ensures that its investment is protected.¹² Further, Duke would receive this nonmarket-based cost recovery despite the fact it will no longer sell electricity to Ohio ratepayers.

Given Staff's recommendation to deny rider PSR, it is only fair to assign not only the risks but the potential rewards associated with Duke's entitlement in the OVEC generation to the owners of Duke Energy Ohio.¹³ To accomplish this objective, Staff recommends that all expenses and revenues associated with Duke's interests in the OVEC generating stations be excluded from the Significantly Excessive Earnings Test ("SEET") calculation.¹⁴

Staff is concerned that going down the PSR path may ultimately be a mistake. Not only would it defeat the whole point of Duke's stipulated *ESP II case*, it will also invite the other Ohio EDU's to seek guaranteed cost recovery for generation assets that are *not* committed to Ohio ratepayers and are *not* regulated by the Commission.

ii. The PSR is unwarranted because there are more appropriate methods of stabilizing customer prices that are currently being used by the Commission and shopping customers.

Instead of focusing on the guaranteed cost recovery aspect of the PSR, Duke promotes the PSR as a rider that "will serve to mitigate some of the volatility in overall

¹² IGS Ex. 12 (Hamilton/Haugen Direct at 5).

¹³ Staff Ex. 1 (Choueiki Direct at 12).

¹⁴ *Id.*

rates that customers pay for generation service.”¹⁵ Staff believes, however, that there are currently more effective methods of mitigating market volatility than the PSR. The practice of staggering and laddering SSO auction products has successfully addressed market volatility.¹⁶ Duke witness Lee acknowledges that the laddering and staggering of auction products “achieve[s] consistent, price-smoothing benefits for customers over the long term.”¹⁷ Staff agrees with Duke that the energy prices in the PJM footprint have been quite volatile recently, especially during the polar vortex this past January.¹⁸ Although the Company claims that rider PSR will provide a hedge for consumers against market volatility, Staff believes that a more effective approach for mitigating price volatility, an approach that does not violate any state policies, is the staggering and laddering approach that the Commission has adopted in administering all past SSO procurement auctions.

Duke witness Lee stated that SSO customers pay a blended auction price, and are not exposed to real-time energy market volatility.¹⁹ While the SSO auction structure mitigates market volatility for SSO customers, shopping customers have market-based options that alleviate market volatility. Most commercial and residential customers that

¹⁵ Duke Ex. 2 (Henning Direct at 10).

¹⁶ Staff Ex. 3 (Strom Direct at 4-5).

¹⁷ Duke Ex. 3 (Lee Direct at 8).

¹⁸ Staff Ex. 1 (Choueiki Direct at 13).

¹⁹ Tr. Vol. II at 307.

are shopping purchase electricity on a fixed-price basis. Very few customers – primarily large customers – buy on an index that is tied to PJM’s hourly or day-ahead market. Only these few customers are sophisticated enough to buy hedges or call options, which mitigate market volatility.

Although the current market contains these various hedging options for customers, Duke wants to force a nonmarket-based, nonbypassable hedge on all of its customers. The risk should be on the Company, not the customer. This proposal is unwarranted. The current market, where customers can shop and voluntarily choose fixed-price arrangements or other hedging options, should be allowed to run its course. Allowing the market to continue developing is consistent with the Commission’s policy goals, while PSR is not.

iii. If the PSR is granted, the Commission would lack the authority to disallow or challenge PSR costs.

Under the PSR, the Commission’s role in regulating the prudence of Duke’s generation-related costs will be very limited or potentially nonexistent. The PSR will be subject to the Federal Energy Regulatory Commission’s (“FERC”) jurisdiction, not the Commission’s.²⁰ PSR costs will not be subject to prudence review by the Commission, and the Commission will not have the ability to independently disallow any costs Duke will assess its retail customers. Rather, if the Commission disagreed with certain PSR

²⁰ Tr. I at 31-33.

costs, the Commission would have to file a complaint at FERC and the Commission would have the burden of proving that these costs were unreasonable.²¹

And, to make matters worse, a heightened burden of proof would be applied because the Commission would be challenging a rate established by a FERC-approved contract. The U.S. Supreme Court has held that, under the *Mobile Sierra* doctrine, FERC must presume that a rate set by a wholesale-energy contract is just and reasonable.²² The only way to overcome this presumption is to show that the contract “seriously harms the public interest.” The U.S. Supreme Court stated that this requires a finding of “unequivocal public necessity” or “extraordinary circumstances,” which goes well beyond the “just and reasonable” standard.²³

Staff believes market forces should determine whether Duke can recover its OVEC costs. The PSR would only burden all of Duke’s distribution customers with generation-related costs that the Commission no longer regulates.

²¹ Tr. I at 34.

²² *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165, 130 S. Ct. 693 (syllabus) (2010).

²³ *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 528, 128 S. Ct. 2733, 2735, 171 L. Ed. 2d 607 (2008).

iv. There are more appropriate and effective ways to address concerns about the PJM wholesale markets than the PSR.

Like many of the parties, Staff has concerns about market volatility and the continuing development of the wholesale markets.²⁴ The PSR, however, is not a proper solution to issues in the wholesale markets. The Commission determined in the *ESP II case* that Duke's generation service should be market based. This determination is consistent with SB 3 and SB 221. To the extent Duke has concerns about the wholesale market, the competitive wholesale market is under FERC's jurisdiction, and that is the proper forum to address those concerns. Staff witness Choueiki testified regarding the continuing development of PJM's wholesale markets. He testified that the PJM energy market is already a competitive market.²⁵ To the extent the PJM capacity market is not fully competitive, Staff's focus is on improving the capacity market in PJM because that benefits Ohio.

Duke claims that the PSR will help address reliability because the OVEC generating stations reflect actual "steel in the ground," providing reliable power at times when other generating stations are not.²⁶ The last three Base Residual Auctions ("BRAs") administered by PJM in May of 2012, May of 2013, and, more recently, in May of 2014 demonstrate that there are sufficient supply resources procured and

²⁴ Staff Ex. 1 (Choueiki Direct at 12-13).

²⁵ Tr. Vol. XII at 3389.

²⁶ Duke Ex. 6 (Wathen Direct at 15).

contracted to satisfy the projected peak load demand and the associated necessary reserves during the period starting on June 1, 2015 and ending on May 31, 2018. In other words, all the necessary resources required for reliability during the term of the proposed ESP have already been procured for the entire PJM footprint; including the Duke Energy Ohio footprint.²⁷ Therefore, in Staff's opinion, granting the PSR will neither decrease nor increase the reliability of the grid in the PJM footprint.

Additionally, Staff witness Choueiki testified that the Commission has the necessary tools to address other potential reliability needs in the future.²⁸ For example, the Commission could approve a nonbypassable rider to fund the construction of a new generating facility if the Commission determines that there is a need for the facility.²⁹ This process is more effective than granting the PSR because it would require proof that a capacity need exists, the construction of the facility would involve a competitive bidding process, and the facility would actually supply power to Duke's customers.³⁰

In short, there are a number of systems in place to address price volatility and reliability concerns. Staff intends to continue working within these systems, and encourages Duke to do the same. But, the PSR is not a proper or an effective remedy to the concerns with the PJM markets.

²⁷ <http://www.pjm.com/markets-and-operations/rpm/rpm-auction-user-info.aspx#Item07>

²⁸ Tr. Vol. XII at 3393-3396.

²⁹ *Id.*; R.C. 4928.143(B)(2)(b).

³⁰ *Id.* at 3393-3396.

b. The PSR should be denied because it violates the stipulation from the *ESP II* case.

In *ESP II case*, the Commission ordered that “all of Duke’s generation assets will be transferred to an affiliate.”³¹ According to Company witness Wathen, Duke does not “directly” own the OVEC generating stations. The Stipulation adopted by the Commission in the *ESP II case*, however, required the Company to transfer all of the generating assets “directly owned” by Duke Energy Ohio by the end of 2014.³² Duke witness Wathen concludes that the requirements in Section VIII of the *ESP II* stipulation are not applicable because OVEC generating stations are not “directly” owned by Duke Energy Ohio.³³ Whether the Company owns “directly” a generating asset or owns an equity/stock in a generating asset, it is Staff’s opinion that the Company owns entitlement to all energy and capacity that comes out of the generating asset.³⁴ Section VIII of the *ESP II* stipulation that was signed by Staff, the Company, and a large number of interveners required all generation assets to be transferred out of Duke Energy Ohio no later than December 31, 2014.³⁵ There was no provision in Section VIII of the *ESP II*

³¹ OMA Ex. 2 (*ESP II case*, Opinion and Order at 45).

³² OCC Ex. 2 (*ESP II case*, Stipulation at 25-28).

³³ Duke Ex. 6 (Wathen Direct at 11).

³⁴ Staff Ex. 1 (Choueiki Direct at 6).

³⁵ *Id.*

stipulation that specifically excluded from the transfer requirement Duke Energy Ohio's entitlement in the OVEC generating stations.³⁶

The objectives of Section VIII of the *ESP II* stipulation were for Duke to: become a wires only company; put its generation fleet on an equal footing with other generation, and compete in the retail and wholesale market for generation service.³⁷ Duke contends that OVEC was not contemplated in the *ESP II* stipulation process and Duke witness Whitlock's supplemental testimony³⁸ in support of the *ESP II* stipulation listed the generation assets. This is misguided. Mr. Whitlock's list only included legacy generation assets; OVEC is not a legacy generation asset. Staff witness Choueiki explained this distinction on cross:

Q. [Ms. Spiller] And you understood that Mr. Whitlock delineated on his testimony in support of the ESP stipulation all of the then operating and retired generating assets that Duke Energy Ohio directly owned, correct?

A. Mr. Whitlock didn't talk about all generation assets. He only talked about the legacy generation assets of Duke Ohio. OVEC was never a legacy asset. As a matter of fact, you never used to report it in the long-term forecast report because it wasn't built for Ohio. Duke and OVEC was built for the U.S. Department of Energy. They were a one customer company.

Q. And, sir, I appreciate that, but I'm going to go back to my question. You know that Mr. Whitlock delineated in his testimony filed in support of the stipulation all of the

³⁶ Staff Ex. 1 (Choueiki Direct at 6-7).

³⁷ Tr. Vol. XII at 3366-3367

³⁸ Duke Ex. 25 (*ESP II case*, Whitlock supplemental testimony) (October 28, 2011)

operating generating assets that Duke Energy Ohio directly owned as well as all of the retired generating assets that Duke Energy Ohio directly owned, correct?

A. I think I answered you. I said Mr. Whitlock defined all legacy assets. He didn't define all generation assets because Duke Energy Ohio owns more than the legacy assets.

Q. And those delineations in Mr. Whitlock's testimony did not at all mention the contractual entitlement in OVEC, correct?

A. That's correct. But that didn't mean that the OVEC entitlement was not going to be separated too.

Q. Is OVEC, sir, anywhere mentioned in the ESP stipulation filed in case 11-3549?

A. No, it's not. That's my point. There was no exclusion in the stipulation for OVEC generating stations.

Q. There was no inclusion, was there, sir?

A. So I guess the Commission will have to decide whether they agree with the ones who are promoting exclusion of OVEC or the ones who are promoting inclusion of OVEC. That's what it boils down to.³⁹

Duke's OVEC entitlement is a function of generation and customers do not receive generation from the OVEC output.⁴⁰ As a result, Duke should transfer its

³⁹ Tr. Vol. XII at 3420-3423.

⁴⁰ *Id.* at 3368-3369.

entitlement in the OVEC generating stations in accordance with Section VIII of the *ESP II* Stipulation prior to December 31, 2014.⁴¹

To the extent it can demonstrate to the Commission an inability to transfer or sell its entitlement in the OVEC generating stations prior to December 31, 2014, Duke Energy Ohio should file with the Commission a request for a waiver.⁴² This would be similar to the waiver that the Ohio Power Company requested from the Commission on October 4, 2013 in its corporate separation docket.⁴³

c. The PSR should be denied because it would violate both Ohio and federal law.

The PSR is contrary to the Commission's policy goals, but even if approved, it is unclear whether the PSR would be lawful. Even if the Commission favors the general concept of the PSR, both Ohio and federal law preclude the rider as currently proposed by Duke.

⁴¹ Staff Ex. 1 (Choueiki Direct at 6).

⁴² *Id.*

⁴³ *Id.*

i. The PSR is not permitted under Ohio law.

a. OVEC costs are generation-related costs that Duke cannot recover in an ESP.

No provision in R.C. 4928.143 justifies the PSR. Duke would recover generation-related costs through the PSR.⁴⁴ The general rule is that generation service is not regulated by the Commission, and EDU's are only allowed to recover generation-related costs if the costs are permitted under R.C. 4928.141 to 4928.144.⁴⁵ The PSR is not permitted under R.C. 4928.141 to 4928.144 because Duke is a "wires only" company and Ohio law does not allow Duke to recover OVEC's generation-related cost through an ESP.

b. Forcing all of Duke's distribution customers to subsidize Duke's generation-related assets would violate R.C. 4928.02(H).

Granting the PSR shifts the risk associated with the OVEC generating stations to Duke Energy Ohio's customers and violates the state's policy goals in R.C. 4928.02(H).⁴⁶ R.C. 4928.02(H) states that the Commission should:

⁴⁴ Duke Ex. 2 (Henning Direct at 10).

⁴⁵ R.C. 4928.05(A)(1) ("On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation ... by the public utilities Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.")

⁴⁶ Staff Ex. 1 (Choueiki Direct at 11).

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

The PSR would force all of Duke’s distribution customers, including shopping customers, to subsidize Duke’s generation assets. Duke’s ownership interest in OVEC is generation-related.⁴⁷ The Supreme Court of Ohio has criticized similar anti-competitive subsidies for EDU’s in the past. In *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990, 117 Ohio St. 3d 486, 487-88, 885 N.E.2d 195, 198, the Court reversed a Commission decision that allowed AEP-Ohio to charge all of its distribution customers for costs related to the potential construction of a generation facility. The Court held that it was unlawful for the Commission to allow AEP-Ohio to use “revenues from noncompetitive distribution service to subsidize the cost of providing a competitive generation-service component.”⁴⁸

⁴⁷ Duke Ex. 11 (MEH-2 at 39 and 65).

⁴⁸ *Indus. Energy Users-Ohio* at ¶ 37. See also, *Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-Ohio-4164, 114 Ohio St. 3d 305, 315, 871 N.E.2d 1176, 1188. In *Elyria*, the Court reversed a Commission decision that allowed FirstEnergy to defer and recover fuel costs from all of FirstEnergy’s distribution customers. The Court stated that the Commission violated R.C. 4928.02(G) - which subsequently became R.C. 4928.02(H) - “by allowing that generation-cost component to be deferred and subsequently recovered in a distribution rate case, or alternatively allowing FirstEnergy to apply generation revenues to reduce distribution expenses.” *Elyria Foundry* at ¶ 47.

The Commission has previously addressed why it is important to comply with R.C. 4928.02(H).⁴⁹ In the *Sporn Case*, the Commission rejected AEP-Ohio's request to establish a nonbypassable charge that would recover plant closure costs for from all distribution customers, and discussed why such a charge would violate R.C. 4928.02(H):

Additionally, the Commission notes that [AEP-Ohio's] recovery of the closure costs would be contrary to the state policy found in Section 4928.02(H), Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. [AEP-Ohio] seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR. Approval of such a charge would effectively allow the Company to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of the statute. Accordingly, we find that [AEP-Ohio's] request for cost recovery should be denied.⁵⁰

The *Sporn Case* is instructive because the Commission not only explained that AEP-Ohio's request for a nonbypassable charge would result in an anti-competitive subsidy, but also explained that recovery would be unlawful because there was no statutory justification for recovery of plant closure costs under R.C. 4928.143.⁵¹ Duke's PSR request in this case suffers from the same flaws as AEP-Ohio's request in the *Sporn Case*. Both requests seek recovery of generation-related costs, but neither is allowed under any

⁴⁹ *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 (“*Sporn Case*”).

⁵⁰ *Sporn Case* (Finding and Order at 19) (Jan. 11, 2012).

⁵¹ *Id.*

provision of the ESP statute. As it did in the *Sporn Case* with AEP-Ohio, the Commission should reject Duke’s current attempt to “recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of the statute.”⁵²

Additionally, in Case No. 13-2385-EL-SSO, Staff also argues that AEP Ohio’s similarly proposed Purchased Power Agreement (PPA) rider would force all of AEP-Ohio’s distribution customers, including shopping customers, to subsidize AEP-Ohio’s generation assets. Duke’s proposed OVEC-related rider is almost identical to what AEP Ohio proposed in its pending ESP.⁵³ Staff recommended that the Commission deny AEP Ohio’s proposed PPA rider. Accordingly, Staff recommends that the Commission deny Duke’s proposed rider PSR.

ii. The PSR would be preempted by the Federal Power Act.

The PSR runs afoul of federal law, as well. The United States Court of Appeals, Fourth Circuit, recently held in *PPL EnergyPlus, LLC v. Nazarian* that Maryland’s scheme to subsidize generators participating in the PJM markets was preempted under the

⁵² *Sporn Case* (Finding and Order at 19) (Jan. 11, 2012).

⁵³ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO (Staff Initial Brief) (September 23, 2014).

Federal Power Act.⁵⁴ At issue in *Nazarian* was an order issued by the Maryland Public Service Commission that required electric utilities to enter into long-term purchase power agreements with generators.⁵⁵ In these long-term contracts (“contracts for differences” or “CfDs”), the generators were required to sell energy and capacity in the PJM market. The CfDs provided a guaranteed revenue stream to the generators, so long as the energy and capacity cleared the PJM markets. The CfDs did not require the generator to actually sell any energy or capacity to the electric utilities. In addition, the electric utilities would pass the differences between the PJM market revenues and the “contract price” on to ratepayers as charges or credits.⁵⁶

The Court held that Maryland’s order was unlawful because “it functionally sets the rate that [the generator] receives for sales into the PJM market.”⁵⁷ The Court indicated that Maryland’s “system of rebates and subsidies” supplanted the prices offered in the PJM capacity and energy market, which ultimately “compromise[d] the integrity of the federal scheme and intrude[d] on FERC’s jurisdiction.” The Court explained how Maryland’s scheme had the “potential to seriously distort the PJM auction’s price signals, thus “interfer[ing] with the method by which the federal statute was designed to reach its

⁵⁴ *PPL EnergyPlus, LLC v. Nazarian*, 4th Cir. No. 13-2419, 2014 WL 2445800 (Jun. 2, 2014). See also *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372, 406 (D.N.J. 2013) (the U.S. District Court of New Jersey held that similar New Jersey program that required utilities to enter into CfDs with generators was preempted by the Federal Power Act).

⁵⁵ *Nazarian*, at *2-3.

⁵⁶ *Id.* at *2-3.

⁵⁷ *Nazarian* at *5.

goals.”⁵⁸ Because Maryland ratepayers would be providing a generator (a bidder in the PJM auction) with a guaranteed revenue stream, the generator would be indifferent about the price it bid into PJM auctions and potentially drive down the auction prices. This would not only send inaccurate price signals regarding the need for new generation, but it would also disadvantage other bidders that do not receive guaranteed cost recovery. The similarities between Duke’s PSR and Maryland’s CfDs are aplenty. The PSR, like the CfDs, establishes a “cost plus” recovery mechanism that provides guaranteed recovery for the generator, regardless of the revenues actually received from the PJM markets. Like the Maryland CfDs, the PSR is characterized as a “hedge”⁵⁹ or “financial arrangement,” and not a contract for the sale of energy or capacity.⁶⁰ And, most importantly, the PSR would result in Duke being compensated for its participation in the wholesale market in a manner that conflicts with FERC jurisdiction, just like Maryland’s CfDs. This is the crux of the preemption problem. The PSR would remove any incentive

⁵⁸ *Nazarian* at 8.

⁵⁹ Duke Ex. 6 (Wathen Direct at 12).

⁶⁰ The unsuccessful defendants in New Jersey and Maryland tried to characterize the CfDs as “hedgies” or “financial arrangements.” *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 835 (D. Md. 2013)) (The U.S. District Court, Maryland, “agree[d] ... that the CfD is critically distinguishable from a swap or similar agreement and *cannot be categorized as a ‘purely financial arrangement’...*”(emphasis added); and *Hanna*, 977 F. Supp. 2d at 406 (“In the defendants’ view, the [CfDs] are purely financial contracts that do not involve physical sales of electricity....The Court finds that the [CfDs] occupy the same field of regulation as the [FERC] and *intrude upon the [FERC’s] authority to set wholesale energy prices* through its preferred RPM Auction process.”) (emphasis added).

for Duke to bid a price into the PJM auction that is based on marginal costs, and would be inherently anti-competitive to other wholesale generation owners.

As demonstrated above, Duke asks the Commission to create legal uncertainty with its PSR request. The Commission should avoid this uncertainty and simply deny the PSR.

d. Duke failed to prove that the PSR will actually stabilize customer rates.

Duke's rationale for proposing the PSR is to "mitigate some of the volatility in overall rates."⁶¹ Duke has the burden of proving that this stabilizing effect exists.⁶² Duke failed to meet this burden. Other interveners will, presumably, discuss in their post-hearing briefs how Duke failed to prove that the PSR will stabilize customer rates. Staff, however, would point out some evidentiary flaws in Duke's PSR.

i. The PSR will impose significant costs on customers during the ESP Period.

A substantial amount of evidence shows that the PSR will impose significant costs on customers during the term of *ESP III*. Duke projects that annual OVEC costs will exceed revenues from 2015 through 2018, resulting in a net charge to customers under the Company's PSR proposal.⁶³ The PSR could be extremely costly for customers during

⁶¹ Duke Ex. 2 (Henning Direct at 10).

⁶² R.C. 4928.143(C)(1).

⁶³ IGS Exhibit 12 (Hamilton/Haugen Direct at TH-4)

the *ESP III term*. In 2019, Duke projects that revenues from the sale of its OVEC entitlement will exceed its costs, resulting in a credit to customers.⁶⁴ Thus, the claimed customer benefits of the PSR are not expected to be realized until after the proposed *ESP III term*.⁶⁵ However, the projected benefits are dependent on market-price assumptions several years into the future, which may or may not prove to be accurate.⁶⁶

ii. Various unknown factors make it difficult to determine whether the PSR will stabilize rates for customers.

Other unknowns regarding the PSR hurt Duke’s “price stability” claim. Potential fluctuations in OVEC’s costs and changes in market prices may erase any potential stability that the PSR can purportedly provide. Duke’s proposed hedge and the results of this hedge will depend on future market prices. Another unknown factor is potential changes in OVEC’s costs. The success or failure of the PSR depends on the stability of OVEC’s costs. Although Duke touts the relative stability of OVEC costs, a number of factors could greatly increase the costs of operating the OVEC units over the next few years. Some of these factors include additional capital expenditures, increases in coal prices, and future environmental regulations.⁶⁷ Whether or not customers will benefit

⁶⁴ Kroger Ex. 1 (Higgins Direct at 6).

⁶⁵ *Id.* at 6-7.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.*

financially from the PSR also depends largely on the market, which cannot be predicted by Duke.

OCC witness Wilson provided further analysis of the volatility of future market prices:

Customers under the proposed SSO will be served under one-to three-year full requirements contracts established through periodic auctions, and, therefore, would not be exposed to substantial market price volatility. The PSR could add a potentially volatile element to such customers' bills.

Customers choosing competitive retail electric service would select among the available offerings according to their preferences, and could choose offerings that hedge process and provide greater stability to the extent that is desired. For such customers, the PSR could potentially move contrary to, or in the same direction as, the market-based prices they pay at any time. This is because the proposed PSR would be updated on a quarterly basis, so the net OVEC cost incurred in one quarter would appear in customers' bills the next quarter.⁶⁸

Duke's OVEC entitlement is also a small amount of Duke's customer load and generation cost is about half the customers' bill, so any impact of a hedge would be modest.⁶⁹

Furthermore, because its contractual entitlements extend beyond the term of the proposed *ESP III* term, Duke proposes the PSR to extend beyond the term of the ESP.⁷⁰

⁶⁸ OCC Ex. 4 (Wilson Direct at 12).

⁶⁹ *Id.* at 12-13.

⁷⁰ Duke Ex. 2 (Henning Direct at 11).

Duke improperly compares this extension to its Alternative Energy Resource Rider (“AERR”) approved in its *ESP II case*. The AERR, however, is distinguishable. The AERR is a bypassable rider intended only to recover costs that occurred during the *ESP II* term.⁷¹ The proposed PSR, on the other hand, would be a nonbypassable rider that would, if the OVEC projections are accurate, potentially recover costs beyond the *ESP III* term.⁷²

iii. The PSR will destabilize prices for customers currently in fixed-price arrangements and force these customers to pay twice for non-existent price stability.

The market already provides a method for hedging against market volatility – fixed price contracts. The PSR will effectively eliminate the value of these fixed price contracts by introducing an unwanted element of variability and market risk. Also, shopping customers on fixed-price contracts would be forced to pay twice for nonexistent price stabilization. They would pay once (voluntarily) through contract premiums for the fixed-price arrangement and again (involuntarily) through the nonbypassable PSR. Such a result would not constitute “price stability.”

⁷¹ Tr. Vol. I at 263.

⁷² *Id.* at 264-269.

e. If the Commission adopts the PSR, it should place the conditions on the rider recommended by Staff.

If the Commission approves the PSR, Staff witness Choueiki made a number of recommendations regarding conditions that should be placed on the PSR. The following are Staff's recommended conditions⁷³:

- 1) Expanding Rider PSR: Since Duke Energy Ohio has filed an application at FERC to sell all of the DECAM assets to Dynegy Resource I, Staff's concern for expanding rider PSR to include other Duke Energy Ohio owned generation assets is no longer applicable. As for Duke Energy Ohio's interest in the OVEC generating stations, *it is Staff's opinion that prior to the Commission granting rider PSR, the Company should request in its corporate separation docket a waiver from the requirement articulated in Section VIII of the Stipulation and Recommendation Agreement.*
- 2) Limiting the Term of Rider PSR: Should the Commission grant Duke Energy Ohio a waiver from the requirement to transfer its interest in the OVEC generating stations to an affiliate, and should the Commission then grant Duke Energy Ohio rider PSR, *Staff recommends that the term of the rider should be no longer than the term of ESP III. This would be an incentive for Duke Energy Ohio to transfer, as soon as it possibly can, its interest in the OVEC generating stations to an affiliate or sell to a third party.*
- 3) Rider PSR Expenses: In the formulaic approach that Company witness Wathen proposes in his testimony, the *fixed* and *variable* expenses will be components of a wholesale contract between Duke Energy Ohio and the entity that is managing Duke Energy Ohio's interests in the OVEC generating stations. This contract would be under the jurisdiction of the FERC. As a result, if the Commission believed that any *fixed* or *variable* expense items in the contract were not prudent, the Commission would have to file at FERC challenging these expense items, and the burden of proof would be on the Commission to demonstrate its case. A

⁷³ Staff Ex. 1 (Choueiki Direct 13-17.)

method to mitigate this concern would be for Duke Energy Ohio to accept that all expense items (fixed and variable expenses) in the contract will be audited annually by Staff (or by an outside consultant representing Staff) and for the Company to accept a Commission's finding to the extent there is a disagreement between the Company and Staff and a hearing is conducted.

- 4) Rider PSR Revenues: Similar to the expenses, all the revenues from Duke Energy Ohio's interest in the OVEC generating stations will be components in the wholesale contract. Staff is concerned that the company would not have the incentive to use a profit-maximizing bidding strategy when liquidating the energy and capacity associated with its interest in the OVEC generating stations on behalf of its distribution customers that are carrying all of the risk. *A method to mitigate this concern is for Staff to periodically monitor/evaluate the bidding strategies used for the OVEC generating stations with those used by other generation owners in PJM.*
- 5) Loss of a Potential SSO Supplier: In his testimony, Company witness Wathen states that rider PSR is competitively neutral; neither CRES providers nor *wholesale suppliers* will be impacted by this rider.⁷⁴ Staff disagrees with this competitive neutrality concept. Staff's concerns are two-fold. First, there is a concern that future SSO auctions in Ohio (post May 31, 2015) could potentially result in higher prices than otherwise might be obtained. This is because about 200 MWs⁷⁵ of economic generation would be excluded from participating as competitive supply in these auctions. Second, Staff is concerned that to the extent the Commission grants permission to the 200 MWs of OVEC supply to participate in SSO auctions, other wholesale suppliers might be discouraged from bidding for tranches as they would be competing, in one sense, with "subsidized" generation. *Staff*

⁷⁴ Duke Ex. 6 (Wathen Direct at 15).

⁷⁵ Duke Energy Ohio's 9% interest in the OVEC generating stations represents about 200 MWs. Assuming a non-shopping load in Duke Energy Ohio's service area of about 1,000 MWs, the Company's interest in the OVEC generating stations represents about 20 tranches (an amount that is significant enough to impact the results of an SSO auction).

is unable at this time to make a recommendation that would resolve this dilemma but thought that the Commission should be aware of it. The only way to avoid the dilemma pertaining to OVEC capacity participating in SSO auctions is to accept Staff's recommendation to deny rider PSR. The OVEC capacity will then be free to participate or not participate in SSO auctions, just like all other capacity.

These conditions may minimize some of Staff's concerns; however, they will *not* cure the many ills discussed above. The only sure way for the Commission to do so is deny the PSR.

2. Distribution Capital Investment Rider ("DCI")

In general, Staff supports the Distribution Capital Investment Rider ("DCI").⁷⁶ Staff believes, however, that a number of changes should be made to the rider as proposed by Duke.

a. General Plant accounts should not be included in the DCI.

Staff opposes the inclusion of General Plant in the DCI – which would include, but is not limited to, communications equipment, office furniture and security equipment.⁷⁷ The request to include the recovery of General Plant in a rider is an example of the Company's efforts to recover every capital expense that it would through a distribution rate case. Staff submits that such recovery is neither consistent with the

⁷⁶ Staff Ex. 6 (McCarter Direct at 2).

⁷⁷ Tr. Vol. XIV at 3902-3904.

intent of the ESP statute, nor the Commission's directives with respect to distribution capital expense recovery riders.

Duke states that the purpose of the DCI is "intended to allow the Company to timely recover the incremental revenue requirement on distribution-related capital investments" and "the Company's current portfolio of infrastructure programs and level of spending are not sufficient to maintain the present level of service reliability."⁷⁸ The Commission has repeatedly emphasized the importance of Commission oversight, and the need for EDUs to quantify the actual reliability improvements achieved as a result of implementation of distribution-capital-investment plans.⁷⁹ Staff respectfully requests Duke's DCI spending should be focused on components that will *best* improve or maintain reliability.⁸⁰ General Plant does not satisfy that criteria. The overall nature of the assets recorded in the General Plant accounts are more appropriately considered for

⁷⁸ Duke Ex. 6 (Wathen Direct at 5).

⁷⁹ *In the Matter of the Application of Columbus Southern Power and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4828.143, Revised Code, in the Form of an Electric Security Plan ("AEP-Ohio ESP II Case")*, Case No. 11-346-EL-SSO, et. al. (Opinion and Order at 47) (Aug. 8, 2012) (For AEP-Ohio's similar Distribution Investment Rider ("DIR"), the Commission found that "granting the DIR mechanism requires Commission oversight. We believe that it is detrimental to the state's economy to require the utility to be reactionary or allow the performance standards to take a negative turn before we encourage the electric utility to proactively and efficiently replace and modernize infrastructure and, therefore find it reasonable to permit the recovery of prudently incurred distribution infrastructure investment costs. AEP-Ohio is correct to aspire to move from a reactive to a more proactive replacement maintenance program. The Company is directed to work with Staff to develop a plan to emphasize proactive distribution maintenance that focuses spending on where it will have the greatest impact on maintaining and improving reliability for customers.")

⁸⁰ Staff Ex. 6 (McCarter Direct at 3).

recovery in a distribution rate case and expenses such as office furniture are not directly related to maintaining reliability of distribution service, which is the purpose of a distribution capital expense recover rider.⁸¹ Expenses to be recovered in the DCI should be directly related to maintaining reliability of distribution service.⁸² OCC witness Mierzwa also asserts General Plant should be excluded.⁸³

The type of General Plant expenses the Company requests to include in the DCI do not directly relate to the reliability of distribution service.⁸⁴ OCC also asserts that General Plant expenses are not directly related maintaining reliability of distribution service.⁸⁵ At best, the expenses proposed to be included would be incurred for plant that would support maintaining reliability, but not directly relate to it. Virtually everything the Company does could be an improvement or support an improvement or maintenance of reliability. And General Plant is very far removed from the “the replacement of aging infrastructure” that the Commission has relied on for approving the other company’s distribution investment plans.⁸⁶

⁸¹ Staff Ex. 6 (McCarter Direct at 3).

⁸² *Id.*

⁸³ OCC Ex. 45 (Mierzwa Direct at 22).

⁸⁴ Staff Ex. 6 (McCarter Direct at 3).

⁸⁵ OCC Ex. 45 (Mierzwa Direct at 6-12).

⁸⁶ *In the Matter of the Commission’s review of Ohio Power Company’s Distribution Investment Rider Plan*, Case No. 12-3129-EL-UNC (Finding and Order at 10) (May 29, 2013) (“2013 DIR Plan Case”).

The DCI should not allow Duke to recover the costs of all capital expenditures and should not serve as a substitute for distribution rate cases. Rather, the DCI should encourage the electric utility to proactively and efficiently replace and modernize infrastructure. General Plant does not satisfy this objective, and the costs of investing in merely “supportive” facilities should be excluded from the DCI.

b. Projected Plant Balances

Staff opposes the incorporation of projected plant balances in the establishment of the revenue requirement.⁸⁷ As a general matter, Staff believes that only plant that is used and useful should be permitted in the calculation.⁸⁸ In addition, given the frequency of the rider updates, very little lag exists in the commencement of capital cost recovery and therefore, the need for the use of projections is extremely minimalized.⁸⁹

c. Information Duke should include in subsequent filings

If the Commission approves a continuation of a DCI, Staff also recommends that the Commission continue to require Duke to use the jurisdictional allocations and accrual rates for each account and subaccount that was approved in Duke’s prior rate case.⁹⁰ In each DCI filing, Duke should include the same information that was provided in this case

⁸⁷ Staff Ex. 6 (McCarter Direct at 3).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 4.

for each account and subaccount, as well as detailed workpapers showing the jurisdictional allocation, accrual rates and reserve balances of each account and subaccount.⁹¹ Duke should be directed to provide this information for any rider being used to collect costs recorded in the Distribution Plant Accounts, by rider and as a grand total. Staff needs this information to determine whether the appropriate allocation of cost recovery is occurring between the DCI and other riders.⁹² This information will also help Staff ensure that the Company is adhering to the schedules ordered in the previous rate case.⁹³

Duke should also be directed to detail the DCI revenue collected by month and to date in its filings to demonstrate compliance with the revenue caps authorized by the Commission.⁹⁴ Staff also recommends that any further changes Duke proposes to make to its capitalization policy should be highlighted and quantified in the DCI filing preceding the implementation of the change.⁹⁵ This would allow the Commission to consider the proposed change and ensure that there is no inappropriate recovery from Duke customers.⁹⁶

⁹¹ Staff Ex. 6 (McCarter Direct at 4).

⁹² *Id.*

⁹³ *Id. citing, In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates, Case No. 12-1682-EL-AIR (Opinion and Order) (May 1, 2013).*

⁹⁴ *Id.* at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*

d. DCI Caps

Staff recommends the annual caps to be the following: \$17 million for 2015, \$50 million in 2016, \$67 million in 2017, and \$35 (which is the five month prorated amount associated with an annual cap of \$85 million in 2018 based on the staff adjusted prorated capital budget for 2018).⁹⁷ This rate reflects the removal of common and general plant and the adjustment of the gross up factor to 10.68%.⁹⁸

e. Sunset of the DCI Rate

Staff recommends that the DCI and associated rate(s) sunset with the end of the *ESP III* on May 31, 2018.⁹⁹ After that time, should Duke wish to recover any of the incremental plant in service incurred since the inception of the ESP, Duke should file a rate case to recover the incremental plant in service unless a subsequent ESP has been approved by the Commission which continues the DCI recovery mechanism for the incurred incremental plant in service.¹⁰⁰ In addition, due to the timing of the quarterly filings and quarterly update process, no additional costs should be included in the DCI after May 31, 2018 and a reconciliation filing should be filed within 90 days of May 31, 2018.¹⁰¹

⁹⁷ Staff Ex. 6 (McCarter Direct at 5).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 5-6.

¹⁰¹ *Id.* at 6.

Because this will be the third major distribution infrastructure rider in Ohio, Staff proposes that the quarterly filings occur on or about February 10, May 10, August 10 and November 10 of each year.¹⁰² Staff does not object, however, if Duke files at the beginning of each month.¹⁰³ The filings should be permitted to be automatically approved 60 days after filing unless suspended.¹⁰⁴ The annual compliance review would occur with the August 10th filing.¹⁰⁵ Similar to the annual compliance audit mechanism utilized to review the AEP DIR and FE DCR, the annual compliance audit could be conducted by either Staff or an independent auditor chosen by and under the direction of Staff.¹⁰⁶ The costs associated with the annual compliance audit would be recovered in the next quarter via the DCI Rider.¹⁰⁷ Recommendations or objections could be filed by either Staff or interested parties within 120 days of the filing of the application.¹⁰⁸ If after 150 days, Duke is unable to resolve objections or agree to recommendations made by Staff or interested parties, the Commission will set the matter for hearing.¹⁰⁹ If no

¹⁰² Staff Ex. 6 (McCarter Direct at 6).

¹⁰³ Tr. Vol. XIV at 3930.

¹⁰⁴ Staff Ex. 6 (McCarter Direct at 6).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

objections or recommendations are raised, or have been resolved, the rates will go into effect without adjustment.¹¹⁰

3. Distribution Storm Rider (“DSR”)

The Company is proposing to establish a regulatory asset or liability to defer the amount of prudently-incurred costs of major storm repairs above or below the \$4.4 million in operation and maintenance storm costs that are included in base distribution rates.¹¹¹ The Company proposes to recover the balance of this deferral in the next distribution rate case by amortizing the balance over a certain number of years¹¹² and including the yearly amortization in the revenue requirement, unless the cumulative balance exceeds \$5 million at the end of a calendar year. If the balance exceeds \$5 million, the Company proposes to adjust Rider DSR to collect (or refund) the entire balance in the regulatory account, with carrying charges at the latest-approved long-term

¹¹⁰ Staff Ex. 6 (McCarter Direct at 7).

¹¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case No. 12-1682-EL-AIR (Opinion and Order at 6) (May 1, 2013).

¹¹² For example, if the deferral balance is \$3 million, the Company’s proposal would mean that it may choose to spread the amount (amortize) over 3 years, which means that \$1 million would be part of the revenue requirement in the next base rate case.

cost of debt.¹¹³ If the balance is more than a positive \$5 million (a debit), the amount would be recovered from customers. If it is more than a negative \$5 million (a credit), the amount would be refunded to customers.

The Company does not propose to include capital in this request; rather, any capital additions will be addressed in Rider DCI or in a future distribution rate case.¹¹⁴

The Company proposes to collect the balance of the deferral in its next base distribution rate case, unless the balance reaches \$5 million, after which the Company plans to file for recovery.¹¹⁵ Staff believes that deferring the balance until the next base rate case could be problematic.¹¹⁶ To be included in base rates, as stated above, the Company's proposal is to amortize the amount of the deferral over a three-year period to be included in the revenue requirement for the next base rate case.¹¹⁷ If there is an extended period between base rate cases, these base rates would be collected every year, which means that the amount of deferral included in the base rate calculation could be

¹¹³ For example, assume in year one the Company sustained \$6.4 million in storm damage. Of that \$6.4 million, \$4.4 million would be accounted for in base rates, and the remaining \$2 million (\$6.4 million - \$4.4 million) would go in the deferral balance. Assume in year two the Company sustained \$7.4 million in storm damage. Of that \$7.4 million, \$4.4 million would be accounted for in base rates, and the remaining \$3 million (\$7.4 million - \$4.4 million) would go in the deferral balance. Because the deferral balance is now \$5 million (\$2 million from year one + \$3 million from year two), the Company could now file a rider case seeking to collect that \$5 million from customers. This example does not include carrying charges.

¹¹⁴ Staff Ex. 4 (Hecker Direct at 2).

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

collected multiple times because the allowed recovery amount stays in base rates until the next rate case.¹¹⁸ For example, because the deferral amount would be amortized over three years, if the same base rates are in effect longer than three years, the amount of the deferral is collected more than once from customers.¹¹⁹

a. Staff's Recommended Alternative

Staff believes recovery should only be done through the DSR.¹²⁰ At the end of a year, the Company would determine the amount spent for major storm repairs.¹²¹ If the amount spent is over the \$4.4 million already included in base rates, the difference is deferred as a regulatory asset.¹²² If the amount spent is less than \$4.4 million, the difference is a regulatory liability, or a credit to the regulatory asset.¹²³ The deferral balance would be carried over from one year until the next until a year in which the net balance, positive or negative, exceeds \$5 million.¹²⁴ After a year in which the balance of the asset or liability exceeds \$5 million, the Staff proposes that the Company file an

¹¹⁸ Staff Ex. 4 (Hecker Direct at 3).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 3-4.

¹²² *Id.* at 4.

¹²³ *Id.*

¹²⁴ *Id.*

application for recovery with the Commission, including calculating a monthly rider charge, if the amount is a positive, or monthly rider credit, if the amount is a negative.¹²⁵

b. Staff's Proposed Audit

Because rates are only affected when the deferral amount is \$5 million or more, there is no need to audit the deferral each year.¹²⁶ Rather, at the end of each year in which the deferred amount of storm repair dollars exceeds \$5 million, Staff plans to perform an audit of all of the expenses and offsetting revenues that are part of the deferred amount, regardless of what year those expenses and revenues occurred.¹²⁷ This will include a review of contractor invoices, labor transactions, material requisitions, etc. to confirm that they were incremental and prudently incurred.¹²⁸ This audit would also include a review of revenue received from other utilities for mutual assistance efforts, if any.¹²⁹

Once the recovery amount is determined, generally, Staff recommends a one-year recovery period for each year's storm costs.¹³⁰ However, if the amount of the deferral is

¹²⁵ Staff Ex. 4 (Hecker Direct at 4).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 5.

a large amount,¹³¹ then the Company could have the option of filing for a longer recovery period to mitigate customers' monthly bill impact.¹³² The Commission can ultimately determine the recovery period based on all factors presented in the Company's application.¹³³

c. Carrying Charges

In responses to data requests, the Company was inconsistent in its explanation of carrying charges. In one instance, it said that carrying charges would begin at the end of the year when the balance is determined.¹³⁴ In another data request response, it said that the carrying charges were to be calculated on the monthly balance once total storm costs exceed \$4.4 million.¹³⁵ Staff agrees with the approach that carrying charges would not begin until the end of the year when the amount of the deferral (the amount greater than or less than \$4.4 million) is determined and also believes that there should be no carrying charges during any recovery period.¹³⁶

¹³¹ For example, if an extraordinary event such as Hurricane Ike or the 2012 derecho occurs, to recover the amount of storm repair costs over one year could have a major impact on customers' bills.

¹³² Staff Ex. 4 (Hecker Direct at 5).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

d. Labor Expenses

Staff believes that the only labor that should be included in the deferral is labor that is in addition to what would normally be incurred - the incremental labor.¹³⁷ Typically, the first forty hours of straight-time labor for those Company employees working in storm restoration are built into the Company's base rates and, therefore, are already being paid for by customers.¹³⁸ Staff recognizes that, due to union contracts, union employees are typically compensated at overtime rates (time-and-a-half or double-time) for storm restoration from the time that a major storm is declared.¹³⁹ However, customers are already paying for the first 40 hours of straight-time labor for the Company employees via base rates.¹⁴⁰ The Company's recovery request should not include the straight-time portion of the first 40 hours of work for each employee during a week of storm repairs or double-recovery would occur.¹⁴¹ However, any premium time (the overtime portion of the first 40 hours) and the total cost of the hours above 40 is incremental and would be eligible for recovery.¹⁴²

¹³⁷ Staff Ex. 4 (Hecker Direct at 6).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

In situations where the employee works some hours other than for storm repairs during a week, because the first 40 hours of straight-time labor for an employee are included in base rates, any hours worked performing other work would count against the 40 hours of straight-time not allowed for storm recovery.¹⁴³ For example, if a lineman worked 60 hours in a week, and 30 hours were for normal work and 30 hours were for storm repair, the 30 hours of non-storm related work plus the straight-time portion of the first 10 hours of storm-related work would account for the 40 hours that are in base rates and are not considered incremental.¹⁴⁴ The premium portion of the 10 storm-related work hours and the full pay of the other 20 hours of storm work would be eligible for deferral and recovery.¹⁴⁵ Another example is if an employee worked 80 hours in a week, of which 40 hours were for non-storm related work, then the entire 40 hours of storm repair (straight-time plus premium time) would be incremental and eligible for recovery.¹⁴⁶ Lastly, if an employee worked only 20 hours for storm work in a given week, only the premium portion of the employee's labor would be considered incremental labor and eligible for deferral and recovery.¹⁴⁷

¹⁴³ Staff Ex. 4 (Hecker Direct at 6).

¹⁴⁴ *Id.* at 7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Duke's management-overtime pay should not be included in the deferral.¹⁴⁸ As Staff has stated in prior storm restoration cases, management personnel is paid to do a job and not necessarily to work a certain number of hours.¹⁴⁹ The Company may have a policy to pay these employees for their roles in storm restoration and may pay them, but its customers should not be expected to pay for this labor.¹⁵⁰ Staff believes that the goal for the Company should be to restore service as safely, efficiently, and quickly as possible.¹⁵¹ If management employees can be utilized safely and efficiently to accomplish certain tasks, it would be a cost-efficient course of action, but whether the Company gets recovery should not be the determining factor.¹⁵²

i. Mutual Assistance

Mutual assistance refers to voluntary agreements that allow for one utility to provide another utility with resources, labor (both utility employees and contractors), and equipment to perform restoration services.¹⁵³ Under mutual assistance agreements, it is the responsibility of the requesting utility to reimburse any assisting utilities for costs incurred and not paid for directly by the host utility.¹⁵⁴ Mutual assistance performed by

¹⁴⁸ Staff Ex. 4 (Hecker Direct at 7).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 7-8.

¹⁵³ *Id.* at 8.

¹⁵⁴ *Id.*

other companies under the Company's DSR creates the potential for double recovery of revenues.¹⁵⁵ According to the Company's response to Staff's Data Request No. 13, the requesting company usually pays directly for travel costs and supplies.¹⁵⁶ The assisting utility will invoice the host company for its labor cost incurred and other various costs if the host utility does not pay it directly. Those charges that are reimbursed by the host utility are recorded by the Company to the following FERC accounts: 920 (Administrative and General Salaries) for labor, 921 (Office Supplies and Expenses) for non-labor costs, 926 (Employee Pensions and Benefits), and 408.1 (Taxes other than Income Taxes) for payroll taxes.¹⁵⁷ At the end of the accounting period, the costs are transferred from the expense accounts to Account 143 (Other Accounts Receivable), until the bill is paid by the other company.¹⁵⁸ When the reimbursement for the expenses is received, it is recognized as revenue and matched for accounting purposes against the expenses described above.¹⁵⁹

When the Company sends employees to assist other utility companies in their service territories for storm restoration, Staff believes that the amount of payment received from other utilities for labor (the straight-time portion of the first 40 hours)

¹⁵⁵ Staff Ex. 4 (Hecker Direct at 8).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 8-9.

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Id.*

performed by the Company's employees in those companies' service territories should be an offset to the Company's storm damage recovery.¹⁶⁰ When base rates are calculated, the first 40 hours of each employee's weekly labor are determined to be part of the revenue requirement used to calculate the rates.¹⁶¹ Therefore customers are paying for these employees' labor through base rates.¹⁶² However, when that employee is working on mutual assistance for another utility, the ratepayer is not receiving the benefit of the labor for which has been paid.¹⁶³ While the Company is being reimbursed by the requesting company for mutual-assistance labor, which is considered revenue for accounting purposes, the Company is also receiving revenue from customers for this labor from base rates, which results in double-recovery.¹⁶⁴ In comparison of the response to Staff data requests, which showed a list of employees who were sent to work in Super Storm Sandy recovery efforts, and the employee labor data used as part of the calculation of base rates in the Company's last base rate case (Case No. 12-1682-EL-AIR), Staff discovered that of the 38 Company employees sent to assist for repairs from Super Storm Sandy in 2012, all of them were also included in the labor calculation for the revenue

¹⁶⁰ Staff Ex. 4 (Hecker Direct at 9).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 9-10.

requirement for the Company's base rates.¹⁶⁵ Since these employees are part of the base rate calculation and the revenue from mutual assistance, double-recovery occurred.¹⁶⁶

Regarding the offset that occurs through the DSR, Staff recommends that the amount up to the first 40 hours of labor at straight-time rates for each employee performing mutual assistance should be deducted from the deferral and recovery request.¹⁶⁷ The premium portion of these first 40 hours plus the entire amount of any additional hours would not be included in this deduction.^{168, 169} The amount of the deferral should be the net amount of the Company's expenses (over the \$4.4 million threshold) and the amounts received from the other companies for its mutual assistance labor.¹⁷⁰ The \$5 million mentioned above as the threshold for recovery or carry-over would apply to the net of the expenses and revenue.¹⁷¹ The Company would seek recovery after the end of the year when the difference (positive or negative) between

¹⁶⁵ Staff Ex. 4 (Hecker Direct at 10).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ For example, if the Company incurred \$10 million in major storm repair expenses in a year, and during the same year sends a crew of four linemen to repair for hurricane damage along the Atlantic coast for one week, the straight time rate of the first 40 hours of each person (160 hours total) times their base rate (and loadings) would be subtracted from the \$10 million. The 160 hours of pay was part of the base rate calculation. Otherwise, double-recovery would occur when the Company is reimbursed by the other utility.

¹⁷⁰ Staff Ex. 4 (Hecker Direct at 11).

¹⁷¹ *Id.*

Ohio major storm expenses (over the \$4.4 million threshold) and the mutual assistance revenues exceeds \$5 million.¹⁷²

Any associated carrying charges on the mutual-assistance revenues would be calculated beginning at the end of the year on the net amount of expenses and the amount of revenue.¹⁷³ In other words, if expenses exceed revenues, it would incur positive carrying charges; if, in the unlikely event that the mutual assistance revenues exceed the Company's own major storm repair costs, negative carrying charges would occur.¹⁷⁴ If carrying charges were to be calculated on the monthly balance starting at the beginning of the year, then they should be calculated based on a \$4.4 million liability at the beginning of the year.^{175, 176} Since the Company is not proposing this, it is best to begin to calculate carrying charges at the end of the year when the balance of the deferred amount is known.¹⁷⁷

¹⁷² Staff Ex. 4 (Hecker Direct at 11).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ In other words, if the threshold is the \$4.4 million in base rates, and if no dollars were spent to repair for major storms during the year, the Company would incur a \$4.4 million liability. If carrying charges are calculated based on expenses at the end of the month they were incurred throughout the year, if no expenses are incurred, then a carrying charge should be calculated on the \$4.4 million liability. Therefore, Staff believes it is more appropriate to calculate the carrying charges at the end of the year when the balance is known.

¹⁷⁷ Staff Ex. 4 (Hecker Direct at 11-12).

The Company suggests, in a response to a data request, that the amount billed should be the total recovery amount divided by rate classes (Residential, Secondary Distribution, etc.) and then divided by the number of customer bills within the class for a monthly charge per customer.¹⁷⁸ Staff agrees with this process.¹⁷⁹

Finally, Staff has determined that one of the answers given during an exchange about catch-up work did not accurately capture its policy position. Catch-up work denotes non-storm-related work that remains outstanding because of time spent performing storm-related work. During re-cross, in response to a Company question, Staff witness Hecker explained that it would be appropriate for Company employees to code catch-up work with the storm code.¹⁸⁰ This was, however, a misstatement of Staff's position. Staff believes that only costs for work that are directly attributable to repairs for storm damage should be included in the rider. That is, only this work should be coded with the particular storm (job) code. While Staff acknowledges that it is unusual to clarify its position on brief, it believes that as a policy advisor to the Commission, it has a duty to accurately inform the Commission of its recommendations.

¹⁷⁸ Staff Ex. 4 (Hecker Direct at 12).

¹⁷⁹ *Id.*

¹⁸⁰ Tr. Vol. XIV at 3897-3898.

B. Modification of Current Riders

1. The Retail Capacity Rider (“Rider RC”) and The Retail Energy Rider (“Rider RE”)

As discussed in the direct testimony of Staff witness Turkenton, Staff foresees potential rate impacts that certain customers may experience as a result of the Company’s modification to the rate design for Riders RE and RC.¹⁸¹ Based on the typical bills provided in Duke’s application,¹⁸² the proposed rate design changes for Riders RE and RC may result in increases to certain customers that could exceed 12%.¹⁸³ While Staff does not oppose the rate design changes in concept, the Staff is concerned with the potential for significant rate impacts for certain customers.¹⁸⁴ The Company is proposing to reduce the differences between stepped rates for certain rate schedules to better reflect rates that are being offered in the competitive retail market.¹⁸⁵ As a result of the Company’s proposal, however, customers on three rate schedules – Option Residential Heating (“ORH”), the Common Use Residential (“CUR”), and the small commercial rate (“DM”) – could experience large increases.¹⁸⁶

¹⁸¹ Staff Ex. 2 (Turkenton Direct at 6).

¹⁸² Duke Ex. 18 (Ziolkowski Direct at JEZ-3).

¹⁸³ Staff Ex. 2 (Turkenton Direct at 6).

¹⁸⁴ *Id.*

¹⁸⁵ Duke Ex. 18 (Ziolkowski Direct at 9).

¹⁸⁶ Staff Ex. 2 (Turkenton Direct at 6).

The residential impacts are a result of reducing the difference between the first block rates and the tail block rates of the winter months that exist in current rate structure.¹⁸⁷ The impacts to the DM schedule are a result of reducing the difference between the first block rate and the tail block rates during the winter and summer months that exists in current rates.¹⁸⁸ To help mitigate the large increases for certain customers under these schedules, Staff recommends that the Company reduce the difference in rate blocks at a slower pace than is being proposed by the Company.¹⁸⁹ For example, the Company's proposed design could be phased in evenly over two years.¹⁹⁰

While the typical bills (JEZ-3) only show that certain customers under schedules ORH, CUR and DM may be subject to increases over 12%, the Staff recommends that the company provide similar treatment (i.e. phase-in of proposed rate design changes) to any other customer class that may also receive substantial impacts as a result of the RE/RC rate design changes, but for whatever reason are not depicted in the typical bills provided.¹⁹¹

¹⁸⁷ Staff Ex. 2 (Turkenton Direct at 6).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 7.

C. Additional Issues Regarding Duke’s Application

1. Competitive Bid Process Proposal

As a general matter, Staff witness Strom believes the Company’s competitive bidding proposals are appropriate and consistent with what the Company and other EDUs have used in the past.¹⁹² However, Staff submits that the Company’s proposal to include an ESP termination provision in its Master Standard Service Offer Supply Agreement (“MSA”)¹⁹³ will introduce unnecessary risk and uncertainty into the SSO supply procurement process, perhaps leading to chilled participation levels and less than robust winning bid prices in the auctions.¹⁹⁴ Additionally, if the Company implements this provision, the entirety of its SSO supply would terminate as of May 31, 2017, which could introduce rate volatility associated with 100% replacement of the SSO supply by subjecting it to prevailing market prices.¹⁹⁵ Staff recommends that the ESP termination provision be removed from the MSA.

Staff further suggests that the Commission reject the Company’s proposal to retain the unilateral authority to terminate the ESP.¹⁹⁶ But if the Commission permits the Company to keep this provision of the ESP, the Commission should require that any later

¹⁹² Staff Ex. 3 (Strom Direct at 3).

¹⁹³ Attachment F to the application at page 13 of 97, section 2.4 “Termination of ESP”

¹⁹⁴ Staff Ex. 3 (Strom Direct at 3-4).

¹⁹⁵ *Id.* at 4.

¹⁹⁶ *Id.*

ESP include the same competitive bidding process for procurement of the Company's SSO supply, and require the auction blending process to continue unabated.¹⁹⁷

To curb the potential harms arising from 100% termination of the SSO supply and any resultant rate volatility, Staff suggests that the auction laddering and blending process continue past the end date of the proposed ESP period.¹⁹⁸ This would allow transition from the proposed ESP to the next ESP without the rate volatility impact arising from a sudden end, followed by a re-start, of the auction laddering and blending process.¹⁹⁹ Exhibit RWS-1 attached to Strom's testimony illustrates a possible method by which this would work.²⁰⁰

In pre-filed testimony, Company Witness Lee made a reference that the Commission selected the winning bidder(s) from the SSO auctions.²⁰¹ Staff submits that this is a mischaracterization of the Commission's role. The standard practice for these auctions has been for the auction manager to select the winning bidder(s), subject to the Commission's subsequent approval or rejection.²⁰² Later, through a data request, the Company clarified Lee's statement to cohere with Staff's understanding of the

¹⁹⁷ Staff Ex. 3 (Strom Direct at 5).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 6.

Commission's role in the competitive bidding process.²⁰³ Given the information submitted in the data request, there is no longer a disagreement between the Company and Staff on this issue.

In the most recent DP&L ESP case, the Commission noted its authority to modify and alter the load cap or any other feature of the CBP for future auctions as the Commission deems necessary based upon its continuing review of the CBP, including its review of the reports on the auction provided to the Commission by the independent auction manager, the Commission's consultant, the Company, and Staff.²⁰⁴ Staff believes that it is necessary for the Commission to retain such ongoing authority in order to be able to respond to any unforeseen conditions that may otherwise detrimentally impact the auction process. The Commission should retain the option of modification of the CBP process during the ESP period in this case as the Commission deems necessary.²⁰⁵

To help assure awareness about impending CBPs to all potential auction participants, Staff recommends that the Company or Auction manager place at least one advertisement in an appropriate publication for each auction.²⁰⁶

²⁰³ Duke Ex. 38 (Staff-DR-17-001, Supplemental).

²⁰⁴ Staff Ex. 3 (Strom Direct at 6).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Finally, Staff suggests a revision to the proposed communication protocols that discuss the way the post-auction Commission consultant reports are to be handled.²⁰⁷ In the Company's application, at page 6 of attachment E that pertains to communication protocols for the Company's CBP, the Company writes that the auction manager "shall" review the consultant's post-auction report and the Company "shall" also receive a copy of the report.²⁰⁸ Staff recommends changing "shall" to "may" in both instances.²⁰⁹ In practice, the scenario outlined by the Company has not taken place and Staff does not foresee a reason why it should.²¹⁰ However, by using "may" instead of "shall," it allows for the possibility, but would not require that the consultant could show the auction report to the auction manager or Company in order to confirm information used in the report.²¹¹

2. Duke's Reliability Expectations

R.C. 4928.143(B)(2)(h) requires the Commission to examine the reliability of a utility's distribution system to ensure the customers' and utility's reliability expectations are aligned before it approves an electric utility's distribution infrastructure or modernization incentive as part of its ESP. Staff has conducted an examination of Duke's reliability performance as well as customer involvement in the establishment of Duke's

²⁰⁷ Tr. Vol. XIII at 3807-3808.

²⁰⁸ *Id.* at 3808.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

reliability standards, and has filed the results in this proceeding. O.A.C. 4901:1-10-10(B)(2) requires each electric utility in the state to file with the Commission an application to establish company-specific minimum reliability performance standards. As part of that application, electric utilities are to include supporting justification for the proposed methodology and each resulting performance standard.²¹² The performance standards should reflect historical system performance, system design, technological advancements, service area geography, customer perception surveys, and other relevant factors.²¹³ Staff's review mainly involves two steps. The first step is to work with the company and other interested parties in establishing Commission-approved reliability standards that incorporate a consideration of historical performance, customer survey results, and input from customer groups.²¹⁴ Once the performance standards are set, the second step is to monitor the utility's performance against its reliability standards to ensure that the standards are met.²¹⁵ If the electric utility meets its standards, Staff considers the utility's reliability expectations to be in alignment with those of its customers.²¹⁶ This methodology is appropriate because the establishment of standards

²¹² Staff Ex. 7 (Baker Direct at 3).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

includes a consideration of reliability survey results and participation of consumer groups.²¹⁷

Duke met both of its reliability performance standards during each of the years 2011, 2012, and 2013.²¹⁸ On September 17, 2014, the Commission adopted new reliability standards for Duke in Case No. 13-1539-EL-ESS.²¹⁹ In that case, Duke filed both its reliability-standards application as well as its latest reliability survey results on June 28, 2013.²²⁰ As a result, Duke's reliability survey results were available for consideration by Staff and interested parties as part of the standard setting process.²²¹ In the Duke's most recent standard-setting proceeding, the OCC intervened in the case, filed comments (and reply comments) on Duke's proposed new standards, and also participated in negotiations with Staff and the Company.²²²

Staff believes that Duke's reliability expectations are in alignment with those of its customers based on the following three reasons: first, Duke has met its reliability performance standards during each of the past three years; second, Duke's latest reliability survey results were available for consideration in the Company's most recent

²¹⁷ Staff Ex. 7 (Baker Direct at 3-4).

²¹⁸ *Id.* at 4.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

reliability standards case; and third, the fact that OCC participated in that case.²²³ Staff therefore recommends the Commission find that Duke’s reliability expectations are aligned with those of its customers.²²⁴

3. The Load Factor Adjustment Rider (“LFA”)

The company is proposing to eliminate the LFA rider effective June 1, 2015 subject only to a true-up.²²⁵ Once the rider is trued up, the Company proposes to eliminate the tariff schedule.²²⁶ Staff does not recommend the immediate elimination of the LFA Rider.²²⁷ While Staff does agree that the LFA Rider should be eliminated, Staff believes that the initial rate increase to certain customers would be too high and thus the rider should be phased out over the period of the ESP.²²⁸

Staff estimated the rate impacts to the customers as shown in the chart below.²²⁹ The chart is an estimate of total bill impacts.²³⁰

²²³ Staff Ex. 7 (Baker Direct at 5).

²²⁴ *Id.*

²²⁵ Duke Ex. 18 (Ziolkowski Direct at 6-7).

²²⁶ *Id.*

²²⁷ Staff Ex. 5 (Donlon Direct at 2-3).

²²⁸ *Id.* at 3.

²²⁹ *Id.*

²³⁰ *Id.*

Estimated Impacts of Eliminating LFA Rider

Schedule	Total # of Customers	Approximate # of Customers over 50% LF	% of Total	Est. % Impact on Non-Shop Customers with 83% LF
DS	18,703	3,711	20%	12%
DP	273	183	67%	11%
TS	34	21	62%	15%

Generally customers above 50% LFA currently benefit from rider

Staff's suggested solution to mitigate the rate impact to customers is that the LFA Rider should be phased out over the term of the ESP.²³¹ Staff suggests that the LFA rider is reduced by 33% in year one and two and 34% in year three, with a true up to follow for any remaining balance.²³² Once the rider has been trued up, the Company can eliminate the tariff schedule.²³³ This will reduce the initial rate impact of those customers receiving a credit for the LFA Rider, while still reducing the cost of those customers that are paying into the LFA Rider.²³⁴

²³¹ Staff Ex. 5 (Donlon Direct at 3).

²³² *Id.*

²³³ *Id.* at 3-4.

²³⁴ *Id.*

4. ESP Versus MRO Test

Duke has proposed an ESP to fulfill its obligation to provide a SSO under R.C. 4928.141. The Company submits that its proposed ESP will have the effect of stabilizing and providing certainty regarding retail electric service and is more favorable than the expected results that would otherwise apply under R.C. 4928.142.²³⁵

While a number of intervenors offered arguments on whether the Company's proposed ESP satisfied this statutory test, the Staff did not do so. Staff does have an opinion on the issue. Specifically, Staff witness Turkenton testified that when all provisions of the ESP application are considered, she believed that the ESP, with Staff's recommended modifications, was more favorable in the aggregate than an MRO application would be.²³⁶ She based her opinion on the fact that generation rates for the SSO are based on market-based auction prices, and as a result, there would be no difference between market-based generation rates under a MRO or ESP filing.²³⁷ She also considered qualitative benefits that result from the ESP application, including a new Rider DCI which provides an economical and efficient process enabling the Company to make investments in its distribution system, improving both the safety and reliability of the distribution system.²³⁸

²³⁵ Duke Ex. 6 (Wathen Direct at 24).

²³⁶ Staff Ex. 2 (Turkenton Direct at 3).

²³⁷ *Id.*

²³⁸ *Id.* at 3-4.

Staff's opinion was based on approval of the ESP not as proposed by the Company, but as modified by the Staff.²³⁹ Staff did not perform an analysis as to whether the ESP as proposed by the Company, without Staff's modifications, would pass the ESP v. MRO test,²⁴⁰ and offers no opinion on that question. If the Commission approves the PSR, the Staff would need to perform the test again to see if it fails or passes.²⁴¹

²³⁹ Staff Ex. 2 (Turkenton Direct at 3).

²⁴⁰ Tr. Vol. XIII at 3795.

²⁴¹ *Id.* at 3794-3796.

CONCLUSION

Staff recommends that the Commission approve Duke's application, with the above modifications. Staff believes these modifications will result in an ESP that will benefit all parties involved.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following Parties of Record, this 15th day of December, 2014.

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