

**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) Case No. 14-841-EL-SSO
Section 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) Case No. 14-842-EL-ATA
Duke Energy Ohio for Authority to)
Amend its Certified Supplier Tariff,)
P.U.C.O. No. 20.)

CONSTELLATION NEWENERGY, INC

AND

EXELON GENERATION COMPANY, LLC

INITIAL BRIEF

December 15, 2014

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I. Introduction

On May 29, 2014, Duke Energy Ohio, Inc. (“Duke” or “Company”) filed an application to establish a new electric security plan (“ESP III”), which would commence June 1, 2015, and end May 31, 2017 or 2018, at the election of Duke.¹

A. Description of Exelon Generation and Constellation NewEnergy

Exelon Generation Company, LLC (“Exelon Generation”) and Constellation NewEnergy, Inc. (“Constellation”) are full parties of record. Both have actively participated in the matter at bar, as well as in Duke’s previous Electric Security Plan proceedings² and Duke’s Market-Rate Offer case.³ Constellation provides competitive retail electric service (“CRES”) to approximately 150,000 business and 1,000,000 residential customers in open-market states, including Ohio.⁴ Constellation’s predecessor was certificated by the Public Utilities Commission of Ohio (“Commission”) to provide CRES in Ohio in 2000, making it one of Ohio’s oldest CRES suppliers.⁵ Today, Constellation actively provides CRES to retail customers in Ohio, including customers in Duke’s service area where it has offers posted on the Commission’s Apples-to-Apples chart.

Exelon Generation is one of the largest competitive power generator in the United States, dispatching roughly 35,000 megawatts (“MWs”) of generation from a diverse portfolio of

¹ Duke Ex. 1 at 1.

² Duke’s prior ESP proceeding was *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 Nos. 11-3549-EL-SSO et al., Opinion and Order (November 22, 2011). Before that, Duke’s other ESP proceeding was *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO et al., Opinion and Order (December 17, 2008) and Entry on Rehearing (February 11, 2009).

³ Duke’s market-rate offer proceeding was *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order (February 23, 2011) and Entry on Rehearing (May 4, 2011).

⁴ RESA Ex. 3 at 3.

⁵ *In the Matter of the Application of AES NewEnergy, Inc., for a Certificate of Public Convenience and Necessity*, Case No. 00-1717-EL-CRS. Constellation’s parent acquired AES NewEnergy, Inc., in 2002, and its name was changed to Constellation NewEnergy, Inc. *Id.*

generation plants and utilizing nuclear, fossil, hydroelectric, solar, landfill gas and wind technologies. Exelon Generation's generation fleet is one of the nation's cleanest and lowest-cost. Exelon Generation is an active supply bidder in the wholesale standard service offer ("SSO") auctions conducted by the Commission and has sold power to Duke (and other EDUs) pursuant to the SSO auctions.

B. Exelon Positions

Constellation and Exelon Generation (jointly "Exelon") jointly present this Initial Brief. Exelon agrees with certain provisions in Duke's proposed ESP III, namely, continuing the competitive bid process for SSO procurement, continuing the direct billing of non-market-based charges, and most of the proposed Master Standard Service Offer Supply Agreement ("MSA").

There are, however, three amendments to the ESP III application which Exelon believes must be implemented in order meet the criteria of the State Energy Policy⁶ and to be in the public interest. Those three amendments are to:

- Reject Duke's proposed Price Stabilization Rider ;
- Reject the unilateral option of Duke to terminate the ESP III after two years; and
- Implement the six corrections to the MSA presented by Exelon witness Campbell.

During the course of the proceeding the Commission Staff suggested changes to the current competitive bid auction process. In this Initial Brief, Exelon will discuss those Staff proposals.

II. Price Stabilization Rider ("Rider PSR")

A. Proposed Rider PSR is Contrary to Both State and Federal Law

Duke was able to reach an uncontested settlement for its ESP II. In sharp contrast, Duke's ESP III application was opposed by in part by some 17 intervenors and the Commission Staff. The three weeks of trial were devoted almost exclusively to the very changes that Duke

⁶ Section 4928.02, Revised Code.

proposed to make to the uncontested ESP II plan. Most of the three-week hearing focused on the newly proposed Rider PSR. Save for Duke, no party to this proceeding supports Rider PSR as filed, and as discussed later, only one party finds merit at all with the rider.

Currently, Duke sells all of the capacity and energy from its entitlement to the generation of the Ohio Valley Electric Corporation (“OVEC”) into the PJM markets.⁷ Last year, it was a money-losing proposition, as the payments that Duke had to make to OVEC for two Eisenhower-era coal plants (Kyger Creek Plant and Clifty Creek Plant) exceeded the revenue Duke received from the sale of OVEC capacity and energy.⁸ Under the proposed Rider PSR, if the OVEC costs for producing the power from the Kyger Creek generation plant in Ohio and the Clifty Creek power plant in Indiana exceed the net revenue from the sale of power into the PJM markets, then all Duke ratepayers will be obligated to pay Duke the difference via the new Rider PSR.⁹ Rider PSR insulates Duke from any commercial loss on its OVEC investment; the risk of the future profitability of the two 60-year old¹⁰ power plants via Rider PSR is transferred to the ratepayers.¹¹

Although Duke did not present as part of its application any data to show the impact of Rider PSR, Duke has emphasized that Rider PSR will eventually turn positive and result in a credit to customers.¹² Yet, Duke did not even do a study in developing its Rider PSR proposal, but instead has relied on projections developed post-application in June/July 2014, which are based significantly from data provided by OVEC.¹³ The PSR study however showed losses

⁷ Tr. Vol. II at 430.

⁸ Tr. Vol. III at 624.

⁹ Duke Ex. 1 at 13; Duke Ex. 6 at 16; Tr. Vol. II at 462.

¹⁰ Both plants began operating in 1955. IEU Ex. 6 at 1.

¹¹ RESA Ex. 3 at 11. Accord, Staff Ex. 1 at 11; OCC Ex. 43 at 13-14; Kroger Ex. 1 at 6; Sierra Club Ex. 4 at 5; and IGS Ex. 12 at 6.

¹² Tr. Vol. III at 667-672; Tr. Vol. I at 256-257; OCC Exs. 4 and 4A.

¹³ Tr. Vol. III at 652-653 and 665-666; Tr. Vol. IX at 2455, 2466-2467; OCC Exs. 4 and 4A.

through the term of the ESP III,¹⁴ which is the scope of this hearing. Duke has asked that the Rider PSR run conterminous with the obligation of Duke to pay for OVEC capacity and energy.¹⁵ That obligation was entered into voluntarily by Duke and does not expire until 2040.¹⁶ Further, Duke has asked that Rider PSR be made non-bypassable for the whole 25-year period.¹⁷

In sum, the first question that the Commission should answer is who is the primary beneficiary of Rider PSR. When one considers that the term of Rider PSR is conterminous with the term Duke's exposure to OVEC, the more certain projections of near-term losses for the retail customers versus the speculative projections of future profits; and the loss of certainty that retail customers with fixed prices enjoy, the primary beneficiary is clearly Duke. Duke has assured revenue stability for power plants that will be 85 years old by the time the customer obligation expires.

1. Proposed Rider PSR violates Ohio Law

Rider PSR is at odds with the express language of Section 4928.17, Revised Code, which requires the monopoly wire service providers to have a corporate separation plan approved and supervised by the Commission. The corporate separation plan must contain the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

¹⁴ Tr. Vol. 1 at 258-259; Tr. Vol. 11 at 409; OCC Exs. 4 and 4A.

¹⁵ Duke Ex. 1 at 13.

¹⁶ IEU Ex. 5; IEU Ex. 6 at 1; IEU Ex. 7 at 1.

¹⁷ Duke Ex. 1 at 13.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service....

As to shopping customers (who are Duke's distribution service only customers), Rider PSR requires shopping customers to potentially pay both for the power they use to their CRES supplier, and if Duke loses money on its Kyger Creek and Clifty Creek power, pay for the power from those two power plants. Rider PSR violates Section 4928.02(H), Revised Code. Rider PSR is characterized as a non-bypassable distribution charge as it will apply to all distribution customers.¹⁸ The projections for the ESP period though show that Rider PSR will collect distribution monies from retail customers to pay for generation losses.¹⁹ State Energy Policy provision H prohibits the subsidization of generation assets by distribution charges, and vice versa.

Regardless of whether Duke's OVEC power sales revenues exceed OVEC's costs, Rider PSR would still create a subsidy for Duke. Duke ratepayers are guaranteeing that the OVEC generation earns a profit by covering any difference in the revenues from the sale of the power and cost of generation. This profit guarantee will occur because the costs charged by OVEC to Duke, which will be covered by ratepayers under Rider PSR, include a return on OVEC's investment.²⁰ This provides a guarantee to Duke against any market / price risk associated with the OVEC generation.²¹ This "insurance policy" for Duke, in and of itself, is a benefit and thus a subsidy. Thus, once again the Rider PSR distribution fee would be subsidizing Duke's generation assets.

¹⁸ In contrast, Duke argues that Rider PSR will not be a generation rider, a distribution rider or a transmission rider; rather it will be an "other" rider. Tr. Vol. II at 416.

¹⁹ OCC Exs. 4 and 4A.

²⁰ IEU Ex. 5 at 10; Tr. III at 652.

²¹ Tr. Vol. II at 519.

Exelon, as a competitor of OVEC, is not the only party to recognize the harm that Rider PSR presents to the competitive market. As pointed out by Staff witness Dr. Choueiki, Rider PSR skews the way the OVEC generation will be used in the market:

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 MWs [footnote omitted] 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.²²

Further, because Duke will be guaranteed full cost recovery and will carry no market risk associated with the OVEC generation, there will be no incentive for Duke to manage costs and operate the plants efficiently and in the most cost-effective manner, eliminating one of the many benefits to Ohio electricity customers that competition brings to the marketplace.

2. Proposed Rider PSR will not be permissible under Federal Law

In both New Jersey and Maryland, federal district courts have taken up a similar issue concerning whether a state commission can order retail ratepayers to pay the difference between the PJM-established capacity costs and the higher cost of capacity for a new in-state generation facility. See, *PPL Energy Plus v. Nazgrin*, Case No. 13-2419, slip op. (4th Cir. June 2, 2014) and *PPL Energy Plus v. Hanna*, Civ. Action No. 11-745, 2013 WL 5603896 (Oct. 11, 2013), aff'd, *PPL Energy Plus v. Soloman*, 766 F.3d 241; 2014 U.S. App. LEXIS 17557; 44 ELR 20207 (Sept. 11, 2014). In *PPL Energy Plus v. Nazgrin*, the Maryland Public Service Commission ordered local electric utilities to enter into 20-year contracts with a generation plant owner, and ordered them to pay the difference between the generator’s sale of power in the PJM wholesale

²² Staff Ex. 1 (Choueiki Direct) at 16-17.

market and the contract price. The difference was to be passed on to Maryland ratepayers. The federal court concluded that the Maryland Public Service Commission decision fixed a value for the generator's wholesale capacity and energy, and was not within the state commission's authority (it was with the exclusive jurisdiction of the Federal Energy Regulatory Commission). *Id.* Similarly, in *PPL Energy Plus v. Hanna*, the New Jersey legislature passed legislation allowing the New Jersey Board of Public Utilities to order the electric utilities to enter into contracts with a generation plant owner to pay the difference between the new generators' sale of power in the wholesale market and the contract price. The federal court declared the New Jersey statute null and void because it was preempted by federal law. *Id.*

Both PPL Energy Plus cases are factually very similar to Duke's Rider PSR. In all three cases, the financial risk of the wholesale generator was being transferred to state retail customers via an order of the state commission. In fact, the major difference between the PPL Energy Plus cases and the Duke Rider PSR is that, in Maryland and New Jersey, the state sought to build a new, incremental power plant to improve reliability for retail customers. Similar to the situation in PPL Energy Plus, because Duke will be receiving a full hedge and guaranteed cost return on the OVEC power, it has no incentive other than to offer this generation into the market as a "price taker." The Rider PSR arrangement, therefore, creates a circumstance that intrudes on the regulation of the wholesale market by the Federal Energy Regulatory Commission.

B. Rider PSR's Purpose is to Provide a Guaranteed Return to Duke, Not Price Stability to Duke's Ratepayers

Duke presents just a single purported reason for Rider PSR – stabilizing retail customer prices.²³ The current competitive market in Ohio offers retail customers much cheaper and more effective ways to stabilize the price of generation and protect themselves from changing market

²³ Duke Ex. 1 (Application) at 13. Duke also states (a) Rider PSR will not interfere with CRES providers' ability to compete for customers and (b) OVEC is a reliable source of generation, but neither is a reason for Rider PSR.

prices. The most common and effective tool to hedge against variable-price risk is the fixed-price contract offered by CRES providers. If a customer signs a supply contract at a fixed price, they can budget their power costs based on that contract. For example, a residential customer can sign up for Constellation's current offer of 6.39¢ per kilowatt-hour ("kWh") for 36 months²⁴ and know their power cost will be 6.39¢ per kWh. Fixed prices are by definition stable prices. A larger more sophisticated customer also has the ability to purchase a financial hedging instrument to guard against price risk.²⁵

In addition, it should be noted that shopping customers have affirmatively decided that they do *not* want their power supplied by Duke. No matter what form it takes – direct provision of power or a financial arrangement – Rider PSR is ultimately a payment by retail customers to Duke which alters the price of generation – a competitive electricity service. Permitting Duke to amend the actual price of generation is directly at odds with the "Choice" program and possibly impairs existing CRES contracts.

Moreover, Exelon does not believe that Rider PSR can be called a true price-stabilizing instrument, for it lacks a "strike price." Unlike a fixed-price supply contract, or a more sophisticated financial hedging instrument, there is no fixed price per kilowatt-hour ("kWh") that Rider PSR assures.²⁶ Rider PSR just shifts the difference between what Duke gets for selling its OVEC output and what it pays its affiliate OVEC for that power. In other words, customers will have no better idea as to what power will cost them in the future under proposed Rider PSR and,

²⁴ RESA Ex. 3 at 13.

²⁵ Exelon realizes that many customers may not be sophisticated to buy a future, option or other financial instrument. However, the number of such customers does not lessen the point that Rider PSR has no price-stabilizing effect for the customer.

²⁶ As proposed, Rider PSR will be adjusted quarterly, up or down, depending on the difference between (a) actual revenues received from the same of the power into the PJM market and actual expenses charged by OVEC, and (b) projected revenues and expenses from the prior quarter. Duke Ex. 6 at 16.

for those on competitive fixed-price contracts, Rider PSR introduces volatility that does not currently exist.

In sharp contrast, Duke is getting a guaranteed fixed rate-of-return, and is fully hedged from all market risk. Under the Rider PSR proposal, the cost of this hedge will be funded by Duke electricity customers. Rather than providing the stability of a fixed-price or a ceiling, ratepayers will simply have gains or losses as if they owned the two OVEC plants. Rider PSR is like a speculative financial swap from the perspective of the Duke ratepayer. Duke is proposing to swap its upside potential in the OVEC plants with the ratepayers, in exchange for a guarantee from the ratepayers of its cost-plus-return on its investment. Is that a good deal for customers? There is no way to know for certain until the ESP III period is over and we can compare the actual costs, which amounts to putting ratepayers in the position of being a risk-taking speculator. Rider PSR essentially exposes ratepayers to the variability of the electricity market. Duke's own projection says that Rider PSR will not be a good deal for customers throughout the entire ESP III term.²⁷ And beyond the ESP term, ratepayers bear all of the risk while Duke bears none. It cannot and should not be the policy goal of the Commission to put Duke ratepayers into this position.

Although Rider PSR was analogized to insurance during the hearing,²⁸ this is not an apt analogy to apply to ratepayers, as it is Duke, not ratepayers, that will be receiving the "insurance" of full cost recovery for the OVEC generation, shielding Duke from market risk. For example, the market price of power could spike and OVEC generation (rather than being counter cyclical) could spike with it. In that situation, the costs that would go up as the market price spikes would be coupled with Rider PSR charge. One realistic scenario that could produce

²⁷ OCC Exs. 4 and 4A.

²⁸ Tr. Vol. I at 88, 100; Tr. Vol. II at 466, 520; Tr. Vol. III at 653, 656, 722-724.

exactly such a result would be when the Environmental Protection Agency carbon rules are applied, the rules drive up all power prices, but electric supplies generated from coal plants are affected more than gas, nuclear or alternative generation sources. This example also highlights that the net revenue projections for the OVEC power plants are heavily influenced by the assumptions that go into the models, yet future costs and revenues will always be unknown. The bottom line is that there is a substantial risk that the OVEC plants, in the fully competitive market wholesale electric market, may not be profitable, and that the real purpose of Rider PSR is to shift that financial risk from the Duke shareholder to the Duke ratepayers.

C. The Record, Including Duke’s Own Projection, Reflects the Uncertainty and Speculative Nature of Rider PSR

The historical data in the record as to the actual costs to Duke from OVEC is as follows between 2009 and 2013:²⁹

Year	Charge per MWh
2009	\$46.18
2010	\$49.48
2011	\$55.15
2012	\$70.92
2013	\$70.61

If capacity prices increase in the future, OVEC’s generation will not necessarily turn a profit when sold into the PJM market because its profitability is also tied to natural gas prices and market demand. In addition, Rider PSR’s counter-cycle contribution to stabilizing prices is not guaranteed during the ESP III period and is not linked to any particular price.

Duke’s own projection for Rider PSR³⁰ demonstrates that retail rates will not stabilize as the rider will rise during the ESP III term:³¹

²⁹ IEU Exs. 8-13.

³⁰ The PSR projection covers only the years 2015 through 2024 and is presented on a full-calendar-year basis. Tr. Vol. IX at 2462. The PSR projection is not the entire period in which Duke seeks to have Rider PSR be in effect.

³¹ OMA Ex. 5, at 5 8 (which are OCC-INT-16-413 Attachment (b), pages 2-5).

ESP Year	Impact of Rider PSR
1 (June 1, 2015 – May 31, 2016)	(\$ 4,445,000)
2 (June 1, 2016 – May 31, 2017)	(\$ 9,243,000)
3 (June 1, 2017 – May 31, 2018)	(\$ 6,953,000)
TOTAL	(\$20,641,000)

Note: Dollar figures in parentheses are charges to ratepayers.

The Commission does not need to spend a great deal of time with the projection to answer the basic question – will Rider PSR as proposed stabilize retail customer rates? The answer is clear that Rider PSR cannot and will not stabilize retail customer rates. Simply put, the rider will cause rates to change repeatedly. Also, the scope of the Rider PSR as presented, which just applies the OVEC generation as a theoretical counter-weight to market prices, lacks the volume to have a meaningful stabilizing impact on customer rates. The MWhs represented by OVEC units are only roughly 7% of the generation used by Duke.³² Furthermore, it will be only a portion of the price which customers pay for service.³³ In sum, even in the years beyond the ESP when Duke presupposes Rider PSR will be positive, the stabilizing effect on customers would be negligible.

As a result, Rider PSR does not does not comport with the ESP statute – Section 4928.143, Revised Code. An ESP may include terms, conditions or charges that has the effect of stabilizing or providing certainty regarding retail electric service per Section 4928.143(B)(2)(d), Revised Code. Duke proposes Rider PSR as a ESP term that has the effect of stabilizing retail electric service.³⁴ However, for all the stated reasons, Rider PSR does not actually have the stated effect.

In January, 2012, the Commission noted that electric generation is a competitive service, and before costs associated with an electric generation facility could be collected, the utility must

³²Tr. Vol. II at 461-462.

³³Tr. Vol. III at 669-670.

³⁴Duke Ex. 1 (Application) at 13; Duke Ex. 6 at 12.

prove that the charge it seeks is authorized by the ESP statutes.³⁵ In *Sporn*, AEP Ohio attempted to collect closing costs for the Sporn unit owned by AEP Ohio, claiming the Sporn unit was eligible for compensation under Section 4928.143(B)(2)(c), Revised Code. The Commission disagreed, finding that subsection (B)(2)(c) has conditions that the Sporn Unit had not met, such as the date of service.³⁶ The Commission correctly found that it only could authorize payments via an ESP statute if all the requirements in Section 4928.143, Revised Code, were met.

The *Sporn* holding applies to payments for the OVEC generation units too -- customers can only be charged for costs associated with the two OVEC generating plants if such costs are authorized under the ESP statute, Section 4928.143, Revised Code. Rider PSR would, in fact, charge retail customers for the difference between the cost of OVEC power and market revenues from the sale of OVEC power. Once again, the Commission can only authorize Rider PSR if all the ESP statutory requirements are met. As noted above, though, Section 4928.143(B)(2)(d), Revised Code, was not met because Rider PSR does not have the effect of stabilizing retail electric service.

The goal of rate stability is a worthwhile one. Fortunately, in the ESP III period which is the subject of the hearing, Ohio's competitive marketplace offers effective and less expensive ways for retail customers to stabilize their rates and protect themselves from electric price spikes. Retail customers, during the ESP III period, can buy long-term fixed-rate contracts. As Exelon witness Mr. Campbell testified the Commission's Apples-to-Apples chart shows three-year fixed-price offers for residential customers in the Duke's service area.³⁷

³⁵ *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, Entry (January 11, 2012).

³⁶ *Id.* at 18.

³⁷ RESA Ex. 3 at 13.

D. Allowing Duke to Add Additional Arrangements to Rider PSR must be Rejected as Unlawful

Duke is reserving the “right” to include additional arrangements into Rider PSR in the future. For years, the Commission has dutifully been carrying out the electric restructuring in Senate Bill 3 and Senate Bill 221. All of the former legacy generation units from the three FirstEnergy utilities and all the legacy generation units from Duke and Ohio Power have been transferred from the regulated utility to unregulated affiliated or third-party companies, save for the OVEC generation. Further, The Dayton Power and Light Company is under a Commission order to divest by January 1, 2016.³⁸ Just at the time when the State Energy Policy of separating the competitive from the non-competitive service is nearing completion and ratepayers will no longer underwrite the costs of competitive generation, proposed Rider PSR reverses years of effort. If Duke signs additional purchase power agreements with its generation affiliate, the ratepayers, who have already paid millions of dollars in transition monies to shift the financial risk of those old units to the stockholders, will be at risk again for legacy generation plants. Once again, these guarantees are for plants that lost money last year in the same type of transaction which Rider PSR proposes for the next quarter century.

III. Unilateral Right to Terminate the ESP III Early

A. No Statutory Authority

Duke’s reservation of the unilateral “right” to terminate the ESP III at the end of the second year lacks statutory authority. Section 4928.143, Revised Code, allows the utility to decide (when the Commission modifies and approves a proposed ESP) whether to accept the

³⁸ *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 12-426-EL-SSO et al., Opinion and Order (September 4, 2013), Entry Nunc Pro Tunc (September 6, 2013); Entry on Rehearing (March 19, 2014), Entry on Rehearing (June 4, 2014).

ESP or withdraw it, thereby terminating it. There is no authority for a termination two years into a three-year term when the utility no longer likes the rates that were set.

B. No Criteria Has Been Established

Duke's reservation is unsubstantiated. There has been no clarification, examples or objective criteria provided. Exelon/RESA witness Campbell testified that there is no objective criterion by which Duke might avail itself of the provision, or by which the Commission would evaluate whether Duke's election of the early termination provision is proper.³⁹

C. Uncertainty will be Created

Duke's reservation creates significant uncertainty for the competitive market. Giving Duke discretion to decide on a moment's notice to end the ESP a year earlier than scheduled creates tremendous uncertainty within the market, adds risk (and cost), all of which could chill competition. As Mr. Campbell noted, CRES providers may be reluctant to offer contracts beyond the termination date and may build the risk into the price.⁴⁰

D. Proposed Timeframe is Problematic

If this reservation is accepted by the Commission and exercised, it is questionable whether the Commission would be able to enter a final order in time (in advance of June 1, 2017) after Duke's notice of termination. This will add even more uncertainty.

Exelon strongly opposes this option by Duke to terminate the ESP III a year early.

IV. Master Standard Service Supply Agreement Changes

Exelon has participated as a bidder in almost every ESP competitive supply offering by an Ohio utility, including Duke's most recent descending-clock auction.⁴¹ Exelon has been a winning bidder on a number of occasions as well. Thus, Exelon has extensive experience in the

³⁹ RESA Ex. 3 at 19.

⁴⁰ RESA Ex. 3 at 19-20.

⁴¹ Exelon Ex. 1 at 2.

bidding process and in supplying generation for the SSO under a MSA. Duke's proposed MSA largely mirrors what has been used in prior Duke SSO auctions and largely strikes the appropriate balance between the various interests. Based on its experience and vast knowledge, Exelon takes issue with just a handful of provisions in Duke's proposed MSA. Each will be addressed in turn.

A. Sixth Recital Paragraph's Reference to PJM Responsibilities

The sixth recital paragraph states as follows:⁴²

WHEREAS, each SSO supplier will satisfy its Capacity obligations under the PJM Agreements associated with its respective SSO Supplier Responsibility Share in accordance with the PJM agreements, including, without limitation, through participation in the base residual auction and incremental auctions administered by PJM; and

Exelon recommends that the phrase, "including, without limitation, through participation in the base residual auction and incremental auctions administered by PJM" be deleted. SSO suppliers will be charged by PJM for capacity as necessary to meet their SSO Supplier Responsibility Share. Participation in the capacity auctions administered by PJM, or lack thereof, will have no direct impact on their obligations under the MSA.⁴³ As a result, this language is unnecessary.

B. Three Definitions

The definition of "ESP" should be corrected to reflect the fact that the beginning of the ESP period is June 1, 2015, not July 1, 2015. A definition should be added for percentage of income payment plan ("PIPP") customers. In the most recent Duke auction, PIPP customers were specifically excluded from the definition of "SSO Customers." However, in the ESP III, Duke proposes to include the PIPP load in the auctions. Exelon commends Duke for that

⁴² Exelon Ex. 1 (Campbell's Exelon Direct) at Attachment 1, page 4.

⁴³ Exelon Ex. 1 (Campbell's Exelon Direct) at 3.

change. In order to ensure clarity for bidders that may be familiar with Duke's most recent auction, Exelon recommends that "PIPP Customers" be defined as "customers that take service under Duke Energy Ohio's percentage of income payment plan" and that they also are referenced in the "SSO Customers" definition so that "SSO Customers" specifically include "PIPP Customers."

C. Unilateral Early Termination of ESP III

Section 2.4 of the MSA refers to Duke's proposed unilateral "right" to an early termination of the ESP III. For all the reasons set forth above in Section III of this Initial Brief, Section 2.4 of the MSA should be deleted. A unilateral right to terminate the ESP III early is illegal, unwise and unjustified. It should be removed from the MSA as well. Staff likewise took issue with this section of the MSA and also is recommending that it be removed from the MSA.⁴⁴

D. Non-Market-Based Transmission Charges

"Generation Deactivation" and "Emergency Load Response" should be added back to the list in Section 3.2(d)(i) of charges for which Duke will retain responsibility, as they are an unhedgeable risk to SSO Suppliers and therefore most properly should reside with the utility.⁴⁵ Moreover, striking those two costs in Section 3.2(d)(i) creates inconsistency with Attachment F of the MSA where they are listed.⁴⁶

E. Declaration of Authority

Paragraph 3.9 addresses Declaration of Authority. It states:

As designated or otherwise required by Duke Energy Ohio, Duke Energy Ohio and each SSO Supplier shall execute a Declaration of Authority, a representative form of which is attached hereto as Attachment G. Duke Energy Ohio shall have the right to modify at any time the Attachment A – Addendum to the Declaration of Authority. In the event Duke Energy Ohio exercises such right to modify the

⁴⁴ Staff Ex. 3 (Strom Direct) at 3-4.

⁴⁵ Exelon Ex. 1 (Campbell Exelon Direct) at 4.

⁴⁶ Exelon Ex. 1 (Campbell Exelon Direct) at Attachment 1, page 87 and 88.

Attachment A – Addendum, each SSO Supplier shall execute an amendment to the Declaration of Authority or a new Declaration of Authority within fifteen (15) Business Days as required by Duke Energy Ohio.

Section 3.9 of the MSA should be modified so that only the initial sentence remains. Exelon would be amenable to changes to the Declaration Authority “consistent with the terms of the Agreement,” but Duke should not be permitted to revise the Declaration of Authority unilaterally unless a change to the Declaration of Authority is necessary to maintain consistency between the Declaration of Authority and the Parties’ obligations under the terms of the Agreement. As a result, Section 3.9 as proposed is unfair and should be modified as described above.

F. PJM Billing; Third Party Billing

Section 6.2(c) states as follows:

Duke Energy Ohio shall have no obligation to authorize or initiate a billing adjustment or resettlement under PJM rules, regulations, or agreements for any SSO Supplier. However, in the event Duke Energy Ohio authorizes or initiates any such billing adjustment or resettlement, each SSO Supplier hereby consents to such billing adjustment or resettlement.

Duke acknowledged that the effect of this language is to mandate consent to any billing adjustment or resettlement that Duke authorizes or initiates, and that the language does not authorize the opposite.⁴⁷ Certainly this language is one-side and unfair. As such, Section 6.2(c) should be deleted. To the extent that a billing adjustment or resettlement is warranted, PJM is in the best position to perform any such recalculation.

G. Seasonal Billing Factors

Currently, the values in MSA Attachment B “Seasonal Billing Factor” are missing. Exelon expects that those values would be populated and provided to prospective bidders sufficiently in advance of the deadline for bid submissions.

⁴⁷ Tr. Vol. IV at 1067-1069.

V. Staff's Competitive Bidding Process Proposals

Staff witness Strom recommended four changes/clarifications to the competitive bidding process ("CBP") in Duke's proposed ESP III. Exelon will address each. First, Mr. Strom suggested continuing the auction laddering and blending process past the end date of the proposed ESP III term to allow transition from this currently proposed ESP III to the next ESP without the rate volatility impact that could be associated with a sudden end, followed by a re-start, of the auction laddering and blending process.⁴⁸ Exelon agrees that this suggestion could allow for better transitions between ESPs, but the suggestion does not allow the opportunity for modifications or adjustments based on experiences or issues that arise. Mr. Strom's suggestion simply envisions that the ESP III auction laddering and blending process continue indefinitely. Exelon believes that a more appropriate middle ground can be developed and suggested in the future.

Second, Mr. Strom stated that, while Duke has indicated that the Commission selects the winning bidder(s),⁴⁹ it is more appropriate to state that the auction manager selects the winning bidder(s), subject to the approval or rejection of the auction results by the Commission.⁵⁰ Exelon concurs that Mr. Strom's clarification accurately reflects the manner in which the Commission has proceeded in the past and does not oppose that continuing through the ESP III.

Third, Mr. Strom suggested a process to modify features of the CBP, if necessary, during the term of the ESP III.⁵¹ The Commission, in its decision in *DP&L, supra*, retained the right 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

⁴⁸ Staff Ex. 3 (Strom Direct) at 5.

⁴⁹ Duke Ex. 3 (Lee Direct) at 7.

⁵⁰ Staff Ex. 3 (Strom Direct) at 5.

⁵¹ Staff Ex. 3 (Strom Direct) at 6.

of the reports on the auction provided to the Commission by the independent auction manager, the Commission's consultant, the Company, and Staff. Mr. Strom stated that Duke's CBP should similarly include the potential for modification during the ESP III period as the Commission deems necessary.⁵² Exelon accepted that modification in the DP&L case and likewise is agreeable to such an addition to the CBP in this case.

Fourth, Mr. Strom stated that it is not clear whether the auctions to be conducted under the CBP will be advertised, and recommended that the Commission require that the Company or Auction Manager place at least one advertisement in an appropriate publication for each auction, in order to help assure that potential new participants may become aware of the auction process.⁵³ Exelon concurs with this suggestion so long as a well-circulated publication is utilized. Such advertising will promote the auction and provide a greater opportunity for participation by diverse bidders.

VI. Conclusion

For the foregoing reasons, the Commission should modify Duke's proposed ESP III in the following respects:

- Reject the proposed Rider PSR in totality;
- Reject Duke's proposed unilateral "right" to terminate the ESP III early, at the end of the second year;
- Accept and incorporate Exelon's proposed changes to the proposed MSA--otherwise, the MSA will not benefit the competitiveness of the SSO auctions and may very well harm the auctions; and
- Accept three of Staff witness Strom's four suggested modifications to the CBP, as outlined above.

⁵² *Id.* at 6.

⁵³ *Id.* at 6.

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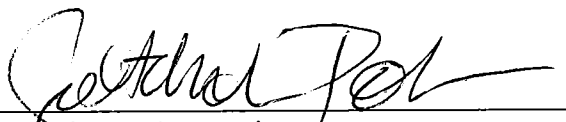
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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 15th day of December 2014 upon all persons/entities listed below:


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