BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL BRIEF OF ENVIRONMENTAL LAW AND POLICY CENTER

Respectfully submitted,
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TABLE OF CONTENTS

Page

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I. INTRODUCTION

This case involves the Application of Duke Energy Ohio ("Duke" or "Company") for approval of an Electric Security Plan ("ESP").[1] The Environmental Law and Policy Center ("ELPC") weighs in only on the introduction of the proposed Price Stabilization Rider ("PSR"), which Duke claims "will mitigate some of the volatility in overall rates that customers pay for generation service,"[2] but in reality this transfers ownership of Ohio Valley Electric Corporation ("OVEC") coal plants to customers.

Duke is beholden to its shareholders and has an obligation to make itself as profitable as possible. The Commission should closely scrutinize the notion that the Company is offering this financial hedge primarily to help its customers. While the PSR will provide some hedging effect, it will mostly allow Duke to eliminate all financial risk to its shareholders for an investment that it apparently now thinks is no longer profitable. Duke's proposal to subject both shopping and non-shopping customers to this hedge

[1] Pursuant to R.C. 4928.141(A), 4928.143, and Ohio Adm. Code 4901:1-35
[2] Application at 13.

violates Ohio law and policy by forcing customers to own a generation asset that they, as represented by the Ohio Consumer Counsel, the Industrial End Users, ELPC, and many other groups, do not have an interest in owning.

Duke has offered only conclusory testimony that this transfer will benefit consumers, let alone that it is the best option available to customers for hedging electricity prices, especially in the light of forthcoming environmental regulations that will likely make coal generation significantly less valuable. Even if the Commission determines that the PSR would serve as some kind of beneficial hedge, Duke has not undertaken any kind of competitive process to demonstrate that the PSR is the best hedge available to shopping and non-shopping customers. Nor has the Company explained why the existing hedging mechanisms present in other Standard Service Offers are inferior. Duke's proposed PSR violates Ohio law and policy and fails to provide the stability that Duke claims. In reality, it turns its customers into owners of fifty year-old generation for the next thirty-six years. The Commission should reject Duke's PSR proposal.

II. LAW

Under Ohio law, the charges Duke can assess to its customers under an ESP are limited to those listed in R.C. 4928.143(B)(2). As explained below, Duke has failed to demonstrate that the PSR fits into one of the (B)(2) categories. Specifically, Duke's reliance on section (B)(2)(d) is suspect because that section only allows charges that relate to the procuring generation for customers. The provision does not allow Duke to impose charges on all customers simply to provide a financial hedge that does not ensure the actual delivery of generation to customers.

If Duke cannot meet the only (B)(2) provision it identifies as applicable to the

PSR, the Commission cannot approve the PSR. The Supreme Court of Ohio held that "if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[3]

In addition to a lack of legal foundation for the PSR, Duke's proposal also violates Ohio law that strongly favors market-based competition in the provision of electric service:

> It is the policy of this state to do the following throughout this state: […] (H) 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.[4]

The Commission should not allow Duke to prop up a potentially uncompetitive OVEC by passing on losses to customers.

III. ARGUMENT

Company witness Wathen states that with the PSR, Duke is "offering the economic value of its share of the capacity and energy from OVEC to its retail customers for the duration of Duke Energy Ohio's entitlement."[5] Duke customers, then, will own "either the gain or loss on the sale of [the OVEC] generation."[6] Mr. Wathen argues that this offer "is simply a financial arrangement intended to act as a hedge against price volatility that exists in the PJM Interconnection, L.L.C., (PJM) power markets."[7] In reality, what Duke is proposing is to transfer its 9 percent ownership of the 2.4 GW

[3] In re Columbus S. Power Co., 128 Ohio St. 3d 512, 520 (Ohio 2011).
[4] R.C. 4928.02(H).
[5] Company Exhibit 6 at 11.
[6] Id. at 13.
[7] Id. at 12.

OVEC coal-fired power plants to customers for the life of Duke's OVEC entitlement, which ends in 2040.[8]

Duke proposes to "sell one hundred percent of its share of OVEC's energy and capacity into the wholesale market."[9] Duke will then use the revenue from these sales to pay for its share of OVEC's operating costs. The difference between the revenue from the PJM markets and Duke's costs will flow through to Duke's customers under the PSR.[10] This means that if the revenue returned from Duke's investment of OVEC's resources in the wholesale market is less than Duke's share of the OVEC operating costs, those losses would also flow through to customers, who would be charged under the PSR to make Duke whole. If the returns from the market are greater than the costs, customers would receive those gains.

Duke argues that the PSR is a hedging mechanism against fluctuations cost of electricity in the wholesale market.[11] As proposed, however, the PSR is non-bypassable, meaning that all customers would have to pay it regardless of whether or not they want it or whether or not they have managed their volatility concerns through competitive retail electric service ("CRES") provider offers or another hedging mechanism.[12] As Retail Energy Supply Association witness Campbell explained, this means that "customers are held captive to a non-bypassable rider because the charges cannot be avoided by switching to a CRES provider."[13]

As outlined by Company witness Wathen, the PSR would extend beyond the

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[8] IEU Exhibit 5 at 1.
[9] Company Exhibit 6 at 11.
[10] Id. at 11-12.
[11] Id. at 13.
[12] Transcript at page 107, line 25 to page 108, line 4.
[13] RESA Exhibit 3 at 9.

three-year term of the ESP and continue indefinitely. Moreover, the PSR could include generation assets beyond the OVEC assets should Duke decide to include other power purchase agreements in the PSR at some future date.[14] Ostensibly offered to reduce "future market volatility,"[15] the rider would make Duke whole for any operational losses for OVEC during the term of the ESP and beyond. Thus, the rider would eliminate operational risk at the facility and effectively transfer ownership of the generation asset to Duke customers. The PSR effectively turns all of Duke's customers into coal plant owners and energy market speculators.

Duke proposes to use the PSR, which applies to both shopping and non-shopping customers, as a hedge. However, Duke has failed to demonstrate that this is the best hedge for its customers. Duke has not conducted any kind of competitive bidding process for the hedge and has not conducted any analysis for whether or not this is the best hedge available.

The PSR violates Ohio law, is counter of Ohio's policy of a competitive energy sector, fails to provide the stability that Duke claims, and is likely not the best hedge out available. The Commission should not allow Duke to use the PSR as a way of getting out of a bad business decision.

A. Duke Has Not Demonstrated That the Price Stabilization Rider Is the Best Way to Hedge Electric Prices for Its Customers

Not only is Duke "offering" to transfer its ownership in 2.4 GW of coal-fired generation to its customers in name of "hedging" the energy markets, the Company has not demonstrated that this transfer is even the best hedge available to customers. First, the

[14] Transcript at page 410, lines 10-16.
[15] Company Exhibit 6 at 13.

proposed hedge lacks all the hallmarks of an effective, traditional backstop against volatility. Witness Campbell for RESA states that the PSR provides little benefit to customers in exchange for raising prices.[16] Unlike most fixed-price contracts, which are guaranteed hedges–meaning that the contracting party promises a fixed price under most circumstances–the PSR includes no such guarantee for customers. Instead, it provides a hedge that is only as valuable as the return to customers from the market. It is subject to wild swings in the market, including the potential for substantial losses if the OVEC facilities underperform or are subject to severe regulatory restrictions over the next 35 years. Even Ohio Energy Group's witness Taylor, who supports the PSR, admits that the PSR is not as strong as other hedges, such as a hedge with "a clean, hard, call option."[17] So it is likely that there are better hedging alternatives out there that Duke has not explored.

The process to develop the PSR was not open and competitive, so there was no effort to find a better hedge for Duke's customers. As a result, Duke did not examine other potentially more beneficial and less costly hedging options. As discussed below, there are considerable risks posed to the OVEC facilities by pending greenhouse gas ("GHG") rules, so relying on them to provide a good hedge is highly suspect. There are better hedges available, and it is possible that Duke would have found them had it conducted a competitive process. Other assets, especially renewables and demand response, face considerably less risk from those rules, and may actually benefit in price performance from them. If Duke wants to provide a hedge for its customers, the Commission should require it to review those assets, as well as other strategies, before

[16] RESA Exhibit 3 at 13.
[17] Transcript at page 2017, lines 2-8.

placing a huge bet on OVEC coal plants on behalf of customers. Duke has failed to review these other options, and as a result customers will be forced to face massive uncertainty if the Commission accepts the PSR proposal.

Even if the Commission does not think that it is appropriate to require Duke to conduct a competitive process to find a hedge for customers, there is strong evidence in the record that volatility is already effectively managed through other means. Staff witness Choueiki testified that consumers in Ohio are already sufficiently protected from volatility risks by the SSO auction process. Mr. Choueiki disputes the very idea that there is a volatility problem, explaining that the Commission's SSO auction process appropriately hedges for volatility via the "staggering"[18] and "laddering"[19] approach.

It is clear then that Duke has made no effort to find the best hedging mechanism for its customers. Instead it looks much more like a direct benefit to the Company's shareholders, who are able to jettison what Duke clearly believes is a bad investment in an aging coal-fired power plant asset.

B. The Price Stabilization Rider Will Not Provide the Stability That Duke Claims

Even assuming that there is a need for a hedge against volatility to protect customers, the OVEC plants are poorly suited to that purpose. First, Duke has not provided any evidence that the PSR will actually stabilize prices. Second, proposed GHG rules, scheduled to be finalized in June 2015, and other federal environmental regulations directed at coal plants create significant potential impact on the future of OVEC operations and render the PSR a significant gamble for customers.

[18] Administering procurement auctions twice a year. Staff Exhibit 1 at 13, FN 19.
[19] Providing multiple products that are 12 months, 24 months, 36 months, etc. Id. at 13, FN 20.

Duke has not met its burden to show that the PSR will actually stabilize prices. Rather than put factual evidence into the record, Duke witnesses argued that the PSR will stabilize prices simply because it is a hedge. Mr. Wathen stated, "Our proposal is that the value of that is a hedge because of the countercyclicality of that process. So whether it's a dollar or a million dollars, it has value as a hedge."[20] In other words, according to Duke, the fact that customers might be on the hook for millions of dollars is irrelevant. Customers cannot expect the PSR to stabilize prices if the Company cannot even identify the magnitude of the risk to the customers. With a nameplate capacity of only 2.4 GW in a market with nearly 200 GW of installed capacity,[21] the stabilizing effect of the PSR is minimal. Duke has not put forward any evidence to suggest that the hedge provided by the PSR will offset the risk to customers of significantly higher prices, and as explained above, the Company has made no effort to offer a competitive process to find the best hedging mechanism. With impending but uncertain environmental regulations, the OVEC facilities are at much higher risk than Duke admits.

For example, the forthcoming GHG rules could undermine any ability for the aging OVEC coal plants to serve as a stable volatility hedge in the manner proposed by Duke. Accordingly, the uncertainty associated with these rules makes the OVEC generation facilities dangerous and risky for customers.

First, the GHG rules might mean early retirement for some of the OVEC units between now and June 2040. Duke admits that the GHG rules would likely decrease the output from coal-fired power plants and could cause units such as the OVEC units to

[20] Transcript at page 668, line 25 to page 669, lines 1-4.
[21] IEU Exhibit 3 at 345.

retire earlier than expected.[22] It would make far more sense to hedge with generation that faced little or no GHG rule exposure.

Second, even if the OVEC units remain open through 2040, Duke customers might be forced to pay for efficiency improvements at the OVEC coal plants in order to comply with GHG rules. In its June 2014 proposed rule, the Environmental Protection Agency ("EPA") based its emission reductions targets on four general building blocks that states could use: 1) increased efficiency of existing generation, 2) increased dispatching of existing lower-carbon generation, 3) increased reliance on renewable energy, and 4) demand-side energy efficiency.[23] EPA has estimated that the costs of efficiency upgrades to existing coal plants will be $100 per kW.[24] If the PSR is approved these costs would be passed through to customers unless fully offset by the revenue returned from the wholesale market. While Duke insists that there is no evidence that the GHG rules will cause the OVEC facilities to close in the next several years, as noted above, Duke's commitment to OVEC lasts until June, 2040.

While Duke insists that it expects the OVEC facilities to remain operating for the life of the proposed ESP, it intends the PSR to last indefinitely. With an OVEC obligation that runs until June 1, 2040, customers would be on the hook for OVEC upgrades and retirements for decades to come. Duke witnesses provided no evidence of what customers can expect to pay as de facto owners of OVEC in the coming decades.

The proposed rider exposes customers to tremendous uncertainty and risk associated with GHG rules. Such risk will be compounded if Duke is allowed to expand

[22] Transcript at page 720, lines 3-8.
[23] 79 Fed. Reg. 34,830 (June 18, 2014).
[24] Id. at 34,861.

the PSR by adding other legacy coal generation to the rider. The costs of OVEC and any other coal assets Duke may roll into the rider are too uncertain to act as effective hedges for customers beyond the terms of this ESP.

C. The Price Stabilization Rider Violates Ohio Law

Not only is the PSR an unjustified hedge that creates the bad precedent of forcing customers to become generation owners and energy market speculators, the proposal also violates Ohio law in two ways. First, it fails to comply with the charges allowed through an ESP under R.C.4928.143(B)(2). Second, it violates Ohio laws prohibiting anticompetitive subsidies.

1. The Price Stabilization Rider Is Not Permitted Under R.C. 4928.143(B)(2)

As discussed above, R.C. 4928.143(B)(2) limits the charges a utility can impose on its customers under an ESP. Therefore, Duke must identify a provision of R.C. 4928.143(B)(2) that allows it to subject its customers to the PSR before the Commission can approve the rider. Duke has not met its burden.

The only statutory authority for the PSR that Duke identifies in its application comes from R.C. 4928.143(B)(2)(d)[25] which states that an ESP can include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

This provision is designed to ensure that utilities can only put charges beyond the cost of generation into their ESPs if those charges will help bring stable generation to customers.

[25] Application at 12.

Nothing in this section allows Duke to include a charge to all customers, shopping and non-shopping, for a hedge on electricity prices. In other words, Duke cannot tack on additional charges to the cost of generation service unless those charges ensure that they will stabilize the delivery of power to customers. In its Application, Duke appears to base its authority for offering the PSR on the fact that R.C. 4928.143(B)(2)(d) allows for "[t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service [and] bypassability . . . as would have the effect of stabilizing or providing certainty regarding retail electric service."[26] ELPC does not dispute that the PSR is a charge, but that charge does not meet the other requirements of R.C. 4928.143(B)(2)(d) that Duke claims it does. Specifically, Duke appears to claim that the PSR relates to a "limitation of customer shopping" and/or to "bypassability." Further, Duke appears to believe that the charge will stabilize or provide certainty for "retail electric service." The PSR does not meet any of these legal requirements.

a. The Price Stabilization Rider does not limit customer shopping for retail electric generation service

Duke appears to claim that the PSR is related to a "limitation of customer shopping." Duke's principle witness on the PSR issue, Mr. Wathen, however, admits that the PSR does not relate to any limitation of customer shopping for retail electric generation service. Mr. Wathen testified:

> Q. And it's also your view that the PSR does not limit customer shopping; is that correct?
> A. That's correct.[27]

Therefore, Duke misplaces its reliance on R.C. 4928.143(B)(2)(d)'s allowance for

[26] Id. (quoting R.C. 4928.143(B)(2)(d)).
[27] Transcript at page 470, lines 3-5.

charges relating to limitations on customer shopping.

Furthermore, the Company intends the PSR to be "a long-term hedge (or insurance) against the volatility of future market prices,"[28] not a way to provide customers with generation. Mr. Wathen explained:

> [W]e don't generate power and we don't sell it to retailers or customers. So we have a financial contract we are trying to propose here, but I wouldn't characterize it as being in the generation business.[29]

In fact, Duke has been quite clear that "none of Duke Energy Ohio's share of OVEC's capacity and energy will be used to displace any SSO service and no physical capacity or energy from OVEC will be delivered to any retail customer".[30] Duke has gone out of its way to explain that the PSR will NOT limit customer shopping. The Company can't have it both ways.

b. The Price Stabilization Rider does not relate to bypassability

Duke also appears to believe that the PSR relates to "bypassability." In order to meet the bypassability component of R.C. 4928.143(B)(2)(d), Duke must show that some provision of utility service is bypassed by the PSR. Duke has made no such showing in this case.

At best, it appears that Duke believes that the PSR "relates" to bypassability because it is non-bypassable. The Supreme Court of Ohio has held that "[i]t is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result."[31] All riders are either bypassable or non-bypassable, so arguing that a non-bypassable rider relates to bypassability renders the bypassability portion of R.C.

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[28] Company Exhibit 6 at 13.
[29] Transcript at page 429, lines 24-25 to page 430, lines 1-3.
[30] Company Exhibit 6 at 12.
[31] Mishr v. Poland Bd. of Zoning Appeals, 76 Ohio St. 3d 238, 240 (1996).

4928.143(B)(2)(d) meaningless; under Duke's theory all riders would be allowable under R.C. 4928.143(B)(2)(d).

c. The Price Stabilization Rider has no relation to retail electric service

ELPC maintains that the PSR is not the best way to stabilize electricity prices for customers, and that factual issue is addressed above. However, even if the Commission finds that the PSR is a worthwhile hedge, the PSR is still well outside what is allowed under R.C. 4928.143(B)(2)(d). First, Duke no longer has an obligation to provide retail electric service for shopping customers. Second, the PSR does not relate to "retail electric service" because it does not provide generation to customers. ELPC maintains that the PSR is not the best way to stabilize electricity prices for customers, and that factual issue is addressed below. However, even if the Commission finds that the PSR is a worthwhile hedge, the rider does not relate to "retail electric service," and therefore is not allowed under R.C. 4928.143(B)(2)(d). Duke must show not that the PSR will stabilize prices, but that it will stabilize "retail electric service," which in this case means that it must help ensure the stable delivery of power to customers.

"Retail electric service" does not refer to prices, but rather, as defined by R.C. 4928.01(A)(27), it refers to "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." By the Companies' own admission, the PSR is a "financial hedge," not a way for customers to procure power.[32] The Application clearly states:

> So as to ensure a fully competitive auction for the SSO supply, Duke Energy Ohio proposes that the energy, capacity, and ancillary services to which it is currently entitled from its contractual rights in OVEC **not be used for such supply**

[32] Company Exhibit 6 at 12.

obligations."[33]

Further, as noted above, Duke's own witnesses emphatically stated throughout this case, "[W]e don't generate power and we don't sell it to retailers or customers."[34] Therefore, because Duke has no intention of using its OVEC entitlement to actually supply power to its customers, the PSR does not relate to "retail electric service" and cannot be approved pursuant to R.C. 4928.143(B)(2)(d).

2. The Price Stabilization Rider Violates Ohio Law Prohibiting Anticompetitive Subsidization of Generation

Ohio has been moving to a competitive electricity market for over a decade. As Staff witness Choueiki explained, "All distribution customers in the Duke Energy Ohio and FirstEnergy service areas are currently purchasing electricity at competitive rates."[35] R.C. 4928.02(H) prohibits "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, or vice versa." With the PSR, Duke is requesting that the Commission approve a rate that would prevent Duke from suffering any losses from the operation of the OVEC facilities. In other words, if the OVEC facilities were to become uneconomic for any reason (e.g., subject to environmental costs from the forthcoming Environmental Protection Agency carbon rules), Duke's customers would compensate Duke for any losses. Using a nonbypassable rider to insulate a monopoly distribution company from the potential downside of its investment in a generation facility is exactly the kind of "anticompetitive subsidy" the law precludes.

If, for example, the costs of operating the OVEC facilities outstrip the gains from

[33] Application at 13 (emphasis added).
[34] Transcript at page 429, lines 24-25 to page 430, lines 1-3.
[35] Staff Exhibit 1 at 9.

the wholesale markets, Duke and any other utilities with nonbypassable riders similar to the PSR would have no incentive to shut down the facilities despite their being uneconomic. This is especially important in this case because, as Mr. Wathen explained, if the OVEC facilities close entirely, Duke is on the hook for retirement costs because the PSR would no longer be in effect.

> Q. And if they decommission the plant, then Duke becomes responsible for 9 percent of the costs of doing that, including the environmental cleanup?
> A. That's correct, but there would be no power flowing through there, so the PSR wouldn't be applicable anymore.
> [. . .]
> Q. So long as Duke is taking power under one of those [11 OVEC] units, it would have potential environmental decommissioning liability for the other 10 units?
> A. We typically don't decommission one unit out of a station, but your scenario hypothetically works.
> [. . .]
> Q. And the rider PSR would pass that all onto the customers.
> A. That's the way it's proposed here.[36]

This ability to pass on the costs of an uneconomic facility to customers directly contradicts the mandate of R.C. 4928.38, which states, "the utility shall be fully on its own in the competitive market." The Commission should not allow Duke to pass its potentially bad generation investment onto its customers.

Even if the Commission determines that putting the gains and losses of the OVEC entitlement onto Duke's non-shopping customers is consistent with Ohio's policy promoting competition, the non-bypassable nature of the PSR is anticompetitive. Under the PSR, shopping customers must pay this generation-related charge even though they do not take any generation from Duke. As Mr. Campbell explained:

> [G]eneration-related, non-bypassable surcharges can thwart competition and eliminate any economic advantage from shopping. Rider PSR will prohibit customers

[36] Transcript at page 679, lines 8-13; page 680, lines 6-12, 24-25; page 681, line 1.

> from being able to choose the lowest cost source of generation service and could mean higher costs for electricity customers and businesses that provide jobs in Ohio.[37]

If the customers cannot ensure that shopping for lower-priced CRES providers will actually lower their electricity costs, then there is little reason to shop and little reason for CRES providers to try to compete with Duke. This is antithetical to the purpose of Ohio's competition laws and is reason enough for the Commission to prohibit Duke from implementing the PSR.

IV. CONCLUSION

The Commission should reject Duke's proposed PSR because it attempts to transfer ownership of aging generation assets to customers. Duke fails to justify this bad policy on any grounds, including the allegation that it serves as a hedge to customers for energy prices. The Company did not conduct any analysis of whether this is the best hedge available, and ignores evidence that existing stability mechanisms in the SSO process are sufficient. In addition, the PSR is inconsistent with Ohio law. Duke has made an "offer" to transfer ownership of OVEC to its customers, and ELPC, and other representatives of Ohio customers directly affected, reject that offer. The Commission should reject Duke's proposal for the PSR.

[37] RESA Exhibit 3 at page 11.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Brief of the Environmental Law and Policy Center* has been served electronically upon those persons listed below this 15th day of December, 2014.

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