**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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*****PUBLIC VERSION*****

# INITIAL POST-HEARING BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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## I. INTRODUCTION

These cases are about a regulatory plan that, if approved, will cost 615,700 electric consumers in the Cincinnati area millions of dollars above the market price of electricity. The plan should be denied by the Public Utilities Commission of Ohio ("PUCO").

This case includes the industry's latest idea for revenue enhancement at customer expense, the power purchase agreement (the utility's so-called "price stabilization rider"). This rider is not deserving of a place on the already overladen bills of electric customers. Fortunately for Ohioans, the PUCO Staff opposes Duke's proposal. The PUCO Staff has brought critical thinking and clarity to this issue by testifying that

Duke's proposal, like AEP's before it, would "force...distribution customers... to subsidize ...generation assets." And the Staff testified that "a more effective approach for mitigating price volatility, *and that does not violate any state policies*, is via the staggering and laddering approach that the Commission has adopted in administering all past SSO procurement auctions."[1] The PUCO Staff is right. Duke's PSR for charging customers should be denied in the interest of the customers who have to pay Duke's bills.

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential electric utility customers of Duke Energy Ohio ("Duke" or "Utility"), submits this Initial Post-Hearing Brief. The Brief contains our recommendations to protect customers and their electric bills from hundreds of millions of dollars in rate increases.

R.C. 4928.02 lists 14 objectives for the electric policy of the state and its people. The Public Utilities Commission of Ohio ("PUCO") must apply these policies in judging whether Duke's proposal for an electric security plan ("ESP") should be implemented for the next three years.

The PUCO's consideration of the plan turns on whether, under R.C. 4928.143(C)(1) , it is "more favorable in the aggregate" for customers as compared to the expected results of a Market Rate Offer ("MRO"). But Duke's proposal is not more favorable in the aggregate than a market plan for customers. Duke seeks government (PUCO) re-regulation to protect itself from the market. Fifteen years ago, the General Assembly adopted market pricing of electricity to protect consumers.

Moreover, the regulatory concept of the electric security plan has outlived any usefulness it may have had under the 2008 law. The PUCO should now turn to the market

[1] PUCO Staff Ex. 1 at 11, 12-13 (Choueiki) (emphasis in original).

rate offer for setting the standard service offer based on competitive auctions (without the vestigial and costly regulatory devices of the electric security plan).

With regard to Duke's re-regulatory initiative, the PSR rider, Duke seeks to charge customers the difference between the market value of its interest in Ohio Valley Electric Corporation ("OVEC") and its percentage share of OVEC costs. The Ohio electric utilities are excessive in their use of riders and other vestiges of government regulation to continually ratchet up the cost of electricity for Ohioans. These Ohioans are the consumers trying to make ends meet and the businesses that are trying to compete in the local to global markets. For the sake of customers, the utilities' rider madness has to end. And again for the sake of customers, utility acceptance of the state's reliance on competitive markets has to begin.

The PUCO should protect Ohioans by modifying the Utility's proposed ESP to produce a reasonably priced SSO, in keeping with R.C. 4928.02(A). A modified approach would mean that, among other things, the PUCO should eliminate a number of Duke's proposed "single issue" distribution charges. Charges the PUCO should eliminate include charges for the Distribution Capital Investment Rider ("DCI") and Distribution Storm Rider ("DSR").[2] Claims for distribution expenses to be collected from customers should instead, if needed, be presented in a rate case proceeding (under R.C. 4909.18), where the proposed costs can be reviewed for prudence as part of a whole along with other revenue, expense, and rate base items.

The PUCO should also not require Duke's SSO customers to pay for the bad debts of customers of competitive suppliers. Instead, the PUCO should order the Utility

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[2] See OCC Ex. 45 at 3, 17, 25 (Mierzwa Direct).

to charge competitive suppliers for the bad debts of their customers by taking a percentage off the amount Duke reimburses competitive suppliers as their billing agent in order to cover their customers' bad debts.

The Utility's request to charge customers for what are excessive financing costs related to an overstated return on equity (9.84%) for capital investment (under Rider DCI) should also be rejected by the PUCO.[3] And the Utility's proposal for conducting the Significantly Excessive Earnings Test ("SEET"), where only those profits over 15% would be returned to customers should be rejected too. This test (in the 2008 law) is supposed to protect customers, albeit it does so only minimally considering the law actually codified charging customers for *excessive* utility earnings (only protecting customers from "significantly" excessive earnings)..

In addition, the PUCO should decline to add an $11 million cost premium to what residential customers will pay Duke. These charges emanate from Duke's proposal to allocate SSO auction results between customer classes based on a five Coincident Peak ("5CP") allocator. OCC Witness Kahal testified that such an allocation method is unwarranted because residential class load is more stable than other customer classes, counterbalancing any additional capacity costs incurred SSO suppliers might incur because of the residential class's greater peaking requirements .[4]

The PUCO should protect Ohioans and their utility bills from Duke's proposals for excessive charges. On the following pages we explain the path for those consumer protections.

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[3] See OCC Ex. 32 at 10 (Kahal Direct).

[4] OCC Ex. 32 at 19-22 (Kahal Direct).

## II. STANDARD OF REVIEW

The standard of review for ESP cases is found in R.C. 4928.143(C)(1), which states in pertinent part:

> [T]he commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

## III. ARGUMENT

### A. Duke's proposal to make customers guarantee utility profits through re-regulation should be rejected in this state where Ohio law favors the competitive market.

#### 1. The PUCO cannot act upon Duke's proposal for a PSR because the PSR is preempted by federal law.

Duke's proposed Price Stabilization Rider ("PSR") must be rejected because the PUCO is preempted from approving it under the Federal Power Act ("FPA"). The recent Fourth Circuit Court of Appeals decision in *PPL Energy Plus, LLC v. Nazarian*[5] has confirmed this result. There, the Fourth Circuit upheld a District Court decision finding that Maryland's authorization for a new generator to recover the difference between PJM's RPM clearing price and the generator's revenue requirements was preempted

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[5] *PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467, 2014 U.S. App. LEXIS 10155 (4th Cir. June 2, 2014).

under the FPA.[6] The Fourth Circuit upheld the District Court's ruling that the Contract for Differences ("CfD") "payments had the effect of setting the ultimate price that CPV [Commercial Power Ventures Maryland, LLC] receives for its sales in the PJM auction, thus intruding on the Federal Energy Regulatory Commission's ("FERC") exclusive authority to set interstate wholesale rates."[7]

There is little difference between Duke's proposed PSR and Maryland's contract for differences payments to an electricity generator. The PSR would recover the difference between Duke's share of OVEC costs and the sale of its share of OVEC into the PJM market. By doing this, the PSR would be a contract price guarantee between affiliates that supersedes PJM's FERC-approved market rate process. As a result, it has the "potential to seriously distort the PJM auction's price signals."[8] The PSR would set the price received by Duke at a wholesale market and would violate the Supremacy Clause of the U.S. Constitution,[9] upon which FERC's preemptive authority is based.

Furthermore, as the Fourth Circuit's decision made clear, where a generator's costs are subsidized by a charge such as the Maryland contract, the generator will naturally have incentives to withhold energy or capacity from the market.[10] That will adversely affect the operation of the market.

Duke's proposed PSR should be rejected because the PUCO is preempted from approving it under the FPA.

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[6] *PPL Energy Plus, LLC v. Nazarian,* 753 F.3d 467, 2014 U.S. App. LEXIS 10155.

[7] *PPL Energy Plus, LLC v. Nazarian,* 753 F.3d 467, 474, 2014 U.S. App. LEXIS 10155 at *13.

[8] *PPL Energy Plus, LLC v. Nazarian,* 753 F.3d 467, 478, 2014 U.S. App. LEXIS 10155 at *26.

[9] U.S. Const. Art. VI provides "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

[10] *PPL Energy Plus, LLC v. Nazarian,* 753 F.3d 467, 478, 2014 U.S. App. LEXIS 10155 at *26.

### 2. There is no basis in Ohio law to charge customers for the PSR.

The PSR does not meet legal requirements for charging customers in an electric security plan under R.C. 4928.143. The Ohio Supreme Court has limited the provisions a utility may seek under an electric security plan ("ESP") to those provisions that are specified under R.C. 4928.143(B)(2).[11] In other words, if a provision does not fit within one of the categories listed following subsection (B)(2), it is not authorized by statute.

Duke has not, to date, come forward with its legal theory as to how the PSR fits within subsection (B)(2). It is expected, however, that Duke will argue that the OVEC transaction is a power purchase transaction under R.C. 4928.143(B)(2)(a), or alternatively that it falls in some manner under subsection (B)(2)(d). These issues are discussed below.

#### a. The PSR is contrary to the limitation of R.C. 4928.143(B)(2)(a) that does not allow automatic recovery for purchased power other than for the standard service offer.

R.C. 4928.143(B)(2)(a) allows a utility to include in its ESP a provision to collect prudently incurred costs of "purchased power supplied under the [standard service] offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate." But the OVEC transaction does not provide purchased power supplied to meet the requirements of the standard service offer ("SSO"). Duke witness Wathen specifically testified that "[t]he capacity and energy available from OVEC will not displace any of the capacity and energy procured for SSO service and will not displace any of capacity and energy provided by CRES providers."[12] He testified that the PSR is "simply a financial arrangement intended to act as a hedge against price volatility that

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[11] *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 520, 2011-Ohio-1788.

[12] Duke Ex. 6 at 12 (Wathen Direct).

exists in the PJM Interconnection, L.L.C., (PJM) power markets."[13] Furthermore, he stated that Duke "will collect no revenue from any retail customer for generation service except for generation service provided by SSO auction winners."[14]

Duke will not use its OVEC interest to serve SSO or shopping customers. Duke is instead selling it into the PJM wholesale market. Therefore, Duke's OVEC entitlement is not "power supplied under the [SSO] offer" and thus cannot be automatically collected from customers under R.C. 4928.143(B)(2)(a).

Consequently, the PSR is not authorized under R.C. 4928.143(B)(2)(a).

**b. The PSR is not a "term[], condition or charge" that qualifies as part of an Electric Security Plan under R.C. 4928.143(B)(2)(d) and does not meet the additional requirement of that section that it "would have the effect of stabilizing or providing certainty regarding retail electric service."**

The PSR also does not qualify as a lawful charge for customers to pay under any provision of R.C. 4928.143(B)(2)(d). The first six lines of Subsection (B)(2)(d) establish the parameters that must be met in order for a provision to be part of a utility's electric security plan under that subsection. R.C. 4928.143(B)(2)(d) reads as follows:

> (2) The plan may provide for or include, without limitation, any of the following:
>
> ***
>
> 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;

[13] Duke Ex. 6 at 12 (Wathen Direct).

[14] Duke Ex. 6 at 12 (Wathen Direct).

The statute quite clearly requires that the provision be a term, condition, or charge relate to all of these items. And if it is determined that the provision falls within one of these six categories, then the provision must also "have the effect of stabilizing or providing certainty regarding retail electric service."

Even if the OVEC transaction is considered a term, condition, or charge within one of the nine categories, it must also be shown that the provision stabilizes or provides certainty regarding retail electric service.

As discussed further below, the PSR is not a qualifying charge under R.C. 4928.143(B)(2)(d). And OCC witness Wilson testified that the OVEC transaction will not likely provide such stability or certainty.[15]

#### c. Duke's Price Stabilization Rider does not constitute a term, condition or charge under R.C. 4928.143(b)(2)(d) that would permit charging it to customers.

Duke's proposed PSR cannot be charged to customers under R.C. 4928.143(B)(2)(d) because it does not fit within one of the categories allowed to be charged to customers. Under R.C. 4928.143(2)(d), the PUCO may authorize, as part of an Electric Security Plan, certain "[t]erms, conditions, or charges" that "have the effect of stabilizing or providing certainty regarding retail electric service." Those items must relate to one of the following items: (1) limitations on customer shopping for retail electric generation service, (2) bypassability, (3) standby, (4) back-up, (5) supplemental power service, (6) default service, (7) carrying costs, (8) amortization periods, or (9) accounting or deferrals, including future recovery of such deferrals.

[15] OCC Ex. 43 at 28-31 (Wilson Direct).

Duke did not identify in its testimony in this proceeding the legal basis for the PSR other than it "would have the effect of providing stability and certainty in respect of retail electric service while supporting the Company's contractual interest in The Ohio Valley Electric Corporation (OVEC)."[16] OCC submits that the PSR does not qualify under any of the nine categories of terms, conditions or charges in R.C. 4928.143(B)(2)(d).

With respect to "bypassability," Duke has proposed the charge as non-bypassable. But while all utility charges are either bypassable or non-bypassable, the General Assembly certainly didn't intend every charge to qualify under this section. Given the absence of a definition of "bypassability," the PUCO should resolve against applying this language to the PSR because it would produce an absurd result inconsistent with R.C. 1.49(E).

The PSR also does not relate to "default service," which has, under R.C. 4928.14, been defined as the provision of retail electric generation service by the utility where the non-utility supplier (marketer) fails to provide retail electric generation service to customers. According to the statute, if a supplier fails to provide retail electric generation service to customers within the utility's service territory, the customers of the supplier "default" to the utility's standard service offer until they choose an alternative supplier.

The Supreme Court of Ohio has on a number of occasions addressed the default service requirements of R.C. 4928.14.[17] In these cases, the Court recognized that "default service" is related to a utility's provider of last resort ("POLR") obligations.

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[16] Duke Ex. 6 at 4 (Wathen Direct).

[17] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195; *In re Columbus S. Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655,

The PUCO has also determined that the default service requirements under R.C. 4928.14 relate to provider of last resort obligations. The PUCO made this finding just a few years ago in another electric security plan proceeding.[18] The law has not changed since the PUCO last applied the default service language to mean provider of last resort. Since the law is unchanged, the PUCO's application of the law should not have changed.

Duke's proposed PSR does not qualify for ratemaking treatment under R.C. 4928.143(B)(2)(d). Therefore, consistent with *In re: Columbus S. Power*, it cannot be authorized as part of charges to customers in the ESP in this proceeding.

**d. Duke's Price Stabilization Rider does not qualify for charging to customers because it would not have the effect of stabilizing or providing certainty regarding retail electric service as required by R.C. 4928.143(B)(2)(d).**

Duke's proposed PSR also cannot be charged to customers under R.C. 4928.143(B)(2)(d) because it has not been demonstrated to stabilize rates. Duke would have to show that, as compared to the rates SSO and shopping customers will pay, the PSR will produce greater stability to Duke customers' retail electric rates. But Duke has not made such a showing.

Instead, as discussed further below, Duke makes inappropriate comparisons between hourly market prices in PJM during the polar vortex and OVEC's fuel costs. But Duke's SSO customers do not pay hourly market prices in PJM. Rather, their rates are set based upon 1-year, 2-year and 3-year SSO auctions that provide stable rates to customers.

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¶¶22-30; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶18-26.

[18] *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011).

Duke has not shown that the PSR will result in rates that are more stable, either over the term of the ESP or over the longer-term proposed for the PSR.

**i. Duke witness Wathen inappropriately compared OVEC fuel costs to the volatility of PJM hourly market prices during the polar vortex in concluding that Rider PSR would enhance price stability. But SSO customers do not pay volatile PJM hourly market prices.**

Mr. Wathen testified in support of Duke's proposal to effectively place all of the risk of the OVEC entitlement on customers. Mr. Wathen claimed that "Duke Energy Ohio's costs for its share of OVEC are relatively stable as it is allocated a share of fixed costs, which are generally very stable, and variable costs, which are mostly fuel."[19] He claimed that the stability of OVEC's costs will "temper the volatility of prices customers will see for the generation rates, thereby having the effect of adding stability and certainty with regard to the overall price of retail electric service."[20]

The apparent basis for Mr. Wathen's claims is a comparison between OVEC fuel costs and market prices in PJM during the January 2014 "polar vortex" when spot prices during certain hours exceeded $1,000 per MWh.[21] Mr. Wathen claimed that "the polar vortex confirms that most of Duke Energy Ohio's customers are subject to varying degrees of volatility in the price of capacity and energy whether they take service under the SSO or from CRES providers."[22]

But the PSR "would not have this effect to any appreciable extent" as OCC witness Wilson testified. Under the ESP, SSO customers will be served through fairly

[19] Duke Ex. 6 at 14. (Wathen Direct).

[20] Duke Ex. 6 at 14 (Wathen Direct).

[21] Duke Ex. 6 at 14 (Wathen Direct).

[22] Duke Ex. 6 at 14 (Wathen Direct).

stable long-term "one- to three-year full requirements contracts resulting from competitive auctions."[23] In contrast, "the OVEC net cost will reflect potentially relatively volatile PJM market revenues, netted from relatively stable OVEC plant costs."[24] OVEC generation is generally offered into the PJM day-ahead market and "day-ahead market prices can reflect extreme weather, unexpected plant outages, and various other unanticipated circumstances."[25] This volatility will be reflected in the PSR charge, adding a "relatively volatile component to the SSO customers' rates that otherwise do not include any such volatile components."[26]

**ii. Duke performed no analysis to support its claims that the PSR rider will produce stable rates for customers. Such claims are inconsistent with the evidence.**

Mr. Wathen testified that it is the "the relative volatility of coal prices as compared to other fuel prices [that] will determine whether the PSR adds to or decreases volatility."[27] But even for this factor, Mr. Wathen performed no analysis of the relative volatility of coal costs as compared to other fuel costs.[28]

While the cost of coal may not be adversely affected by the implementation of new carbon emission regulations, the economics of coal-fired generating plants, their overall cost of operation, and their generation output could well be substantially affected by such requirements. But additional costs OVEC may incur which are associated with

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[23] OCC Ex. 43 at 28 (Wilson Direct).

[24] OCC Ex. 43 at 28 (Wilson Direct).

[25] OCC Ex. 43 at 29 (Wilson Direct).

[26] OCC Ex. 43 at 29 (Wilson Direct).

[27] Tr. II at 580 (Wathen ).

[28] Tr. II at 580-81 (Wathen).

carbon emission reduction requirements are not reflected in OVEC's budget.[29] The evidence also shows that OVEC, in seeking approval of the current Amended and Restated Inter-Company Power Agreement ("ICPA"), [30] projected a cost associated with carbon reductions of $23.33/MWh.[31] However, as noted above, no such cost is reflected in OVEC's budget. Thus, a potentially very significant cost – the cost to comply with carbon emission regulations -- could make coal plants very uneconomic compared to other generation. But that cost hasn't been accounted for in OVEC's budget.

**iii. Because there will be adjustments of OVEC costs for under- and over-collections, it is not reasonable to conclude that the PSR will provide stable rates for customers.**

Additionally, as Mr. Wilson points out, the PSR will be adjusted every quarter to adjust the charge for actual costs – either higher or lower in the previous quarter. This adjustment means that the PSR will not reflect the level of costs experienced in the market at the time they are incurred. Rather, the ongoing adjustment process means that actual costs incurred will always lag a quarter (plus a month) behind the quarter in which the OVEC costs was incurred.[32] Thus, "the changes in the relatively volatile quarterly PSR amounts are perhaps about as likely to move the same direction as the opposite

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[29] Tr. V at 1236-1237, 1268 (Brodt).

[30] The ICPA is the agreement between OVEC's Sponsoring Companies, including Duke and twelve other entities, and OVEC.

[31] Tr. V at 1374 (line 10 $84.23/MWh – line 8 $60.90/MWh) (Brodt); Duke Ex. 14 at 34 (FERC Re-filing of Amended and Restated Intercompany Power Agreement).

[32] OCC Ex. 43 at 29 (Wilson Direct).

direction to SSO rates."[33] As Mr. Wilson concludes "[i]t cannot be assumed, therefore, that the PSR will tend to hedge or stabilize SSO customers' rates."[34]

**iv. Duke failed to present any evidence that greater rate stability would result from the PSR. Indeed, the PSR may add to instability and the stability benefit to retail customers, if any, would likely be insignificant.**

Duke's proposal for charging its customers is contingent upon claims of price stability. But none of Duke's witnesses presented any examples of the claimed price stability effect or benefit of the PSR. Mr. Wathen presented no such analysis. Nor did Mr. Wathen examine the fluctuation of SSO rates, while guessing at a five to 10 percent fluctuation.[35] Nor did he examine the volatility that any customer experiences in rates.[36]

Indeed, Mr. Wathen testified that SSO service itself has not been volatile.[37] And he testified that he was not aware of any residential customers -- SSO or CRES -- that had actually experienced an increase in their rates for generation as a result of the polar vortex.[38] And, with respect to volatility caused by events such as the polar vortex, Mr. Wathen testified that SSO customers did not experience volatility in the rates they paid at the time related to those events.[39]

Mr. Wathen's position is also based on the assumption that the costs of OVEC, including fuel costs, do not change during the same period of time that market prices for

[33] OCC Ex. 43 at 29 (Wilson Direct).

[34] OCC Ex. 43 at 29 (Wilson Direct).

[35] Tr. II at 573-575 (Wathen).

[36] Tr. II at 573, 575 (Wathen).

[37] Tr. II at 572 (Wathen).

[38] Tr. II at 579 (Wathen).

[39] Tr. II at 575-576 (Wathen)

electricity change. But Mr. Wilson noted that "natural gas and coal price movements tend to be correlated due to inter-fuel competition, and energy prices tend to be correlated with fuel prices because they are set by marginal generation costs."[40] Thus, "OVEC's coal generation provides only a partial hedge of market electric energy costs."[41]

As Mr. Wilson emphasized, the OVEC entitlement only corresponds to about [redacted] percent of Duke's customers' total load and generation supply is approximately half of the customers' bill.[42] As a result, the price stability impact on the average customers' bill of Duke's alleged hedging through the PSR would be "very small." Mr. Wilson also pointed out that the results for customers purchasing their supply from competitive retail electric suppliers ("CRES") would depend upon the purchasing decisions those customers make.[43] It would also depend on the correspondence between OVEC net costs in one quarter with the customer's CRES supplier charges in the following quarter.[44] Customers who choose a long-term fixed price product from CRES suppliers would be unlikely to see any price stability benefits.

Thus, the PSR would not have the effect of stabilizing or providing certainty regarding retail electric service. And the PSR could produce greater instability than other tools that are currently available to stabilize rates. It thus fails to satisfy the requirements under R.C. 4928.143(B)(2)(d), and cannot be authorized by the PUCO as part of the Utility's ESP.

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[40] OCC Ex. 43 at 31 (Wilson Direct).

[41] OCC Ex. 43 at 31 (Wilson Direct).

[42] OCC Ex. 43 at 30 (Wilson Direct).

[43] OCC Ex. 43 at 30-31 (Wilson Direct).

[44] OCC Ex. 43 at 30-31 (Wilson Direct).

### 3. Duke's PSR would provide an unlawful subsidy to generation service in violation of R.C. 4928.02(H) and R.C. 4928.38 which required Duke to be "on its own" with respect to generation since 2005.

Duke asks the PUCO to require utility customers to guarantee Duke's profits on its interest in the OVEC generation stations. But R.C. 4928.02(H) prohibits certain subsidies. That law "[e]nsure[s] 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." Distribution service is a noncompetitive monopoly service. Retail generation service is defined as a competitive retail electric service by R.C. 4928.03. Duke's proposal is against this law that was designed to protect distribution customers from subsidizing competitive services.

The Supreme Court of Ohio cases of *Indus. Energy Users-Ohio v. Pub. Util. Comm.*,[45] and *Elyria Foundry Co. v. Pub. Util. Comm.*[46] support the principle articulated in R.C. 4928.02(H). While those cases predated other changes made in Senate Bill 221, R.C. 4928.02(H) was not changed. The holdings of those cases are thus, intact. In *Indus. Energy Users-Ohio*, the Supreme Court of Ohio reversed a PUCO finding authorizing the use of distribution revenues to subsidize the cost of a generation facility.[47] And in *Elyria Foundry,* fuel costs in a SSO were not permitted to be deferred for later recovery through a non-bypassable distribution charge, i.e. a charge applicable to all customers.[48]

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[45] 2008-Ohio-990, 117 Ohio St. 3d 486, 487-88, 885 N.E. 2d 195, 198. The Supreme Court's references in the case to R.C. 4928.02(G) are to the same language now in R.C. 4928.02(H) due to the 2008 addition, in Senate Bill 221, of R.C. 4928.02(F).

[46] 2007-Ohio-4164, 114 Ohio St. 3d 305, 315, 871 N.E. 2d 1176, 1188.

[47] 2008-Ohio-990, 117 Ohio St. 3d 486, 487-88, 885 N.E. 2d 195, 198.

[48] 2007-Ohio-4164, 114 Ohio St. 3d 305, 315, 871 N.E. 2d 1176, 1188.

Similarly, in the instant case, the price for the OVEC subsidy (or the credit), which varies based on market revenues and actual costs, are proposed to be flowed back to all customers through the PSR. But such a charge to customers would subsidize the utility's generation costs. The PSR would be a subsidy of the cost of the OVEC generation facilities by all captive monopoly distribution service customers. Indeed, both SSO and shopping customers would be subjected to the charge although **neither** is receiving the generation output from OVEC through Duke.

The PUCO's decision in the *Sporn Case*[49] also supports OCC's position that the PSR is not authorized by the law. In *Sporn*, the PUCO found "no statutory basis within Section 4928.143, Revised Code, or anywhere else in the Revised Code" for the recovery of plant closure costs. The PUCO's *Sporn* decision also found that collecting a generation-related cost such as a "plant closure cost" from all customers would violate R.C. 4928.02(H).

This rationale applies equally to the hedging costs that the PSR seeks to collect. Those OVEC hedging costs result from generation sold to PJM, but funded by all of Duke's captive distribution customers. The PUCO should find that Duke's PSR would be an unauthorized charge to customers violating R.C. 4928.143 and R.C. 4928.02(H).

Additionally, the PSR violates R.C. 4928.38. Under that law "the utility shall be fully on its own in the competitive market" at the end of the market development period. The market development period ended for Duke on December 31, 2005.[50] But Duke is

[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, Finding and Order at 19 (January 11, 2012).

[50] *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitively-Bid Service Rate Options Subsequence to Market Development Period, et al.*,

seeking a subsidy of generation assets in violation of the requirements of this law. Such a subsidy means Duke is not on its own in the competitive market.

Instead the PUCO would be prolonging Duke's transition to market perhaps indefinitely by offering it assistance in the competitive market. That means the PUCO would be prolonging customers' payment for Duke's transition. Duke's prolonged transition to competition, which began with the 1999 law, should have ended years ago under Ohio law. It must be at an end under R.C. 4928.38. The PUCO should deny Duke's proposal to charge customers for the PSR.

#### 4. Duke's proposed PSR conflicts with Ohio regulatory policy.

##### a. Duke is asking the government (PUCO) to guarantee a profit on the operation of a power plant (OVEC), at the expense of monopoly utility customers and despite the Ohio General Assembly's deregulation of electric generation service. The PUCO should give customers the protection of Ohio law by denying Duke's proposal.

The PUCO Staff testified on this issue. PUCO Staff witness, Dr. Choueiki, has considerable experience in this field. In his expert opinion, Duke's proposal is contrary to Ohio's move to a fully competitive retail electricity market.[51] Dr. Choueiki testified that the PSR "violates one of the state's policy goals as articulated in §4928.02(H), Revised

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Case No. 03-93-EL-ATA, Opinion and Order at 7, 34-35 (September 29, 2004); *In the Matter of the Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues,* Case No. 99-1658-EL-ETP, Opinion and Order at 6 (August 31, 2000).

[51] PUCO Staff Ex. 1 at 11 (Choueiki Direct).

Code."[52] And he said that the PUCO's objective is "going to the market, and we are getting the best competitive price, clearing price, for the SSO load."[53]

There is no basis in Ohio law for Duke's PSR. It violates state policy in R.C. 4928.02(H), which prohibits subsidies. It violates R.C. 4928.38 because it helps Duke when Duke is supposed to be on its own in the competitive market.

The PSR also violates Ohio regulatory policy. It guarantees profits for Duke's competitive generation service offering at the expense of its captive monopoly distribution customers. And Duke is also attempting to leave the door open for expanding Rider PSR "as a rider in which additional contractual arrangements could be included to increase the benefits available to customers."[54]

Under the PSR the government (PUCO) would guarantee a profit, to be paid by electric customers, on generation service that the legislature deregulated. In other words, the PSR is nothing more than a competitive service subsidy -- a subsidy that cannot be countenanced under Ohio law for a number of reasons.

The generation rates of utilities like Duke should no longer be subsidized by their monopoly customers, Instead, if electric utilities continue to provide retail electric generation services, they must compete with other generation market participants for profits. Competition must exist on equal footing. Giving subsidies to one or more market participants is contrary to how the market is intended to and must function.

Moreover, Duke Energy plans to sell all of its generation assets to Dynegy Resource I. As a result, as pointed out by Staff witness Choueiki, Duke will have no

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[52] PUCO Staff Ex. 1 at 11 (Choueiki Direct).

[53] Tr. Vol. XII at 3434-3435 (Choueiki).

[54] Duke Ex. 1 at 13 (Application).

additional generation to sell in the market and "expanding rider PSR is no longer an option for the Company."[55] Thus, even if PSR is allowed to any extent, it should be limited solely to Duke's proposal to retain the OVEC entitlement for such purpose.

The PUCO should reject the PSR.

**b. The proposal for the PSR is contrary to sound regulatory policy and would undermine market incentives to control OVEC's costs for customers.**

Duke's proposed PSR is also contrary to customer interests because it would undermine Duke's incentive to control costs related to OVEC. The retention of the OVEC assets is also contrary to the mandate provided in Senate Bill 3, in 1999, for utilities to separate their generation operations from their transmission and distribution operations and provide "competitive retail electric service . . . through a fully separated affiliate of the utility."[56]

The Ohio General Assembly mandated a transition to a competitive electric generation market. In doing so, as OCC witness Wilson testified, it recognized that "electric generation, like other commodities, is produced most efficiently when the associated costs, benefits, and risks are borne by the parties best able to manage them."[57] That means that "[w]hen competitive providers build, own and operate power plants, and bear the risks of their decisions to build, own and operate power plants, they have full incentive to make sound decisions and to operate efficiently."[58]

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[55] PUCO Staff Ex. 1 at 4-5 (Choueiki Direct), citing *Joint Application for Order Authorizing Acquisition and Disposition of Jurisdictional Facilities Under Section 203 of the Federal Power Act of Dynegy, Inc., et al.*, EC14-140 (filed September 11, 2014).

[56] R.C. 4928.17.

[57] OCC Ex. 43 at 35 (Wilson Direct).

[58] OCC Ex. 43 at 35 (Wilson Direct).

But Duke's proposal for a PSR would undermine these objectives. At the same time, the fact that OVEC's charges are not subject to PUCO regulation would mean that if the PSR were to be approved, customers would have little protection from escalating OVEC charges. Rather than having OVEC costs disciplined by the market or regulated by the PUCO, under the proposed PSR, the net OVEC costs (all costs net of energy and capacity revenues) each quarter would be passed through to customers in their rates the following quarter.[59]

Mr. Wilson testified that a cost tracker, such as the PSR, is not appropriate to collect the net costs of Duke's entitlement to OVEC output.[60] He testified that state regulatory commissions typically approve cost trackers "under extraordinary circumstances, for costs that are (1) largely outside the control of the utility, and (2) unpredictable and volatile."[61] Indeed, the PUCO has pointed to these factors in justification of riders in other cases.[62] Mr. Wilson also testified that the PUCO may "also consider whether the costs are substantial and recurring."[63] Mr. Wilson explained that regulators provide cost trackers only under such circumstances because the purpose is "primarily to protect a utility from potentially severe financial consequences that are not a result of utility performance."[64] Where costs are largely outside of a utility's control,

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[59] OCC Ex. 43 at 32 (Wilson Direct).

[60] OCC Ex. 43 at 34, 39 (Wilson Direct).

[61] OCC Ex. 43 at 32 (Wilson Direct).

[62] *See, e.g., In the Matter of the Joint Application of The East Ohio Gas Company, et al., for Approval of an Adjustment Mechanism to Recover Uncollectible Expenses,* Case No. 03-1127-GA-UNC. Finding and Order at 10-11 (Dec. 17, 2003).

[63] OCC Ex. 43 at 32-33 (Wilson Direct).

[64] OCC Ex. 43 at 33 (Wilson Direct).

"the need for and potential value of regulatory oversight is less."[65] But a cost tracker, such as the PSR, has "even weaker incentives for cost control than are provided by traditional regulation."[66]

Mr. Wilson testified that, except for fuel, the costs associated with *utility-owned* power plants are typically subject to traditional regulation.[67] This is because, "[t]he fixed costs, and variable operations and maintenance costs, are very much under the utility's control, and they are not unpredictable or volatile."[68] Traditional regulation of such costs "ensures the utility has some incentive to strive to minimize the costs" as opposed to a cost tracker which eliminates such incentives.[69] But Duke's proposal lacks the incentives of traditional regulation. And it lacks the discipline of the competitive market. The absence of the incentives of either traditional regulation or the discipline of the competitive market would leave customers unprotected from inefficient and unjustified costs associated with the OVEC facilities.[70]

As an example of the problematic incentives associated with the PSR Rider, Mr. Wilson pointed to "future programs to reduce OVEC fixed costs that would reduce the OVEC demand charges passed through the PSR."[71] Mr. Wilson testified:

> Under market arrangements, if OVEC were able to reduce these fixed costs, it would increase the profits to OVEC's owners, including Duke Ohio. Consequently, OVEC's owners would have incentives to pressure OVEC management to accomplish any such potential cost improvements.

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[65] OCC Ex. 43 at 33 (Wilson Direct).

[66] OCC Ex. 43 at 33 (Wilson Direct).

[67] OCC Ex. 43 at 34 (Wilson Direct).

[68] OCC Ex. 43 at 34 (Wilson Direct).

[69] OCC Ex. 43 at 34 (Wilson Direct).

[70] OCC Ex. 43 at 34-36 (Wilson Direct).

[71] OCC Ex. 43 at 36 (Wilson Direct).

By contrast, under the proposed PSR, OVEC's actual costs net of market revenues would be passed through to retail customers. OVEC's owners operating under such arrangements would, therefore, see no benefit from any such cost reductions, and would have little if any reason to encourage management to pursue them.[72]

Mr. Wilson also testified that the PSR proposal could create anti-competitive incentives. He was concerned that these incentives could lead to realizing less than the full value of the OVEC assets in the PJM markets in order to enhance its unregulated affiliate's sales to the PJM market, leading to higher net costs of the PSR to customers.[73] He explained how this could occur:

> The OVEC plants compete with Duke Ohio's affiliates' unregulated generation in the PJM markets. Under the PSR, Duke Ohio would not benefit from incremental OVEC sales and net revenues, as these would pass through to customers. However, incremental output from the OVEC plants will tend to reduce the energy prices available to the affiliated plants in the western PJM market area. Therefore, Duke Ohio would have some incentive to exercise its control and influence over OVEC, including both its rights to schedule output and also its influence over management and operations as an owner, in a manner that would benefit the affiliated unregulated generation.[74]

And the ability to operate OVEC efficiently may also be affected by the fact that it has multiple owners whose interests may differ. OCC witness Wilson testified that the fact that the Inter-Company Power Agreement determines how OVEC output is requested and shared and how costs not associated with output are allocated can affect decision-making.[75] Specifically, he testified, it can lead to "inefficient decision-making with

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[72] OCC Ex. 43 at 36 (Wilson Direct).

[73] OCC Ex. 43 at 37 (Wilson Direct).

[74] OCC Ex. 43 at 37 (Wilson Direct).

[75] OCC Ex. 43 at 37 (Wilson Direct).

regard to, among other actions, plant operations, maintenance, and investment."[76] He pointed in particular to the fact that some OVEC sponsors may dispatch their OVEC entitlement into the PJM markets when they are economic to dispatch.[77]

But other sponsors' decisions to dispatch may be based on "the availability of other resources in their portfolios and other considerations" not necessarily consistent with PJM market prices.[78] And decisions to dispatch that are not based on PJM market prices can lead to inefficient operations that increase the cost of OVEC power to all of the sponsors.[79] Inefficient dispatch can also raise prevailing market prices with a negative impact on all consumers in the PJM market place.[80]

Additionally, ownership by multiple parties and the sponsors' obligations under the ICPA could create "a barrier to difficult decisions, such as the retirement or repowering of generating units that are no longer economic."[81] Under Duke's PSR proposal, customers would be taking the risk that these decisions would be made efficiently and, if they were not, would be on the hook for the inefficient costs of operation.[82]

Consequently, Mr. Wilson recommended that Duke's PSR proposal should be rejected because "it would shift Duke Ohio's share of the additional costs and risks

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[76] OCC Ex. 43 at 37 (Wilson Direct).

[77] OCC Ex. 43 at 38 (Wilson Direct).

[78] OCC Ex. 43 at 38 (Wilson Direct).

[79] OCC Ex. 43 at 38 (Wilson Direct).

[80] OCC Ex. 43 at 38 (Wilson Direct).

[81] OCC Ex. 43 at 38 (Wilson Direct).

[82] OCC Ex. 43 at 38-39 (Wilson Direct).

resulting from these inefficiencies to Duke Ohio customers."[83] The PSR would be harmful to customers and should be rejected.

**c. The PSR is a bad deal for customers because PUCO oversight of Duke's costs would be extremely limited.**

The PSR is a bad deal for customers. It is a bad deal because Duke would have carte blanche authority to pass on costs to customers without any prudence review by the PUCO or FERC. This is because wholesale contracts, such as the ICPA between OVEC and its Sponsoring Companies, are regulated by FERC and not the PUCO. In this regard, the *Mobile-Sierra* doctrine requires FERC to presume that a rate set by "a freely negotiated wholesale-energy contract" meets the statutory just and reasonable requirement.[84] The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.[85]

Thus, the PUCO's ability to challenge the costs charged under the ICPA -- let alone conduct its own prudence review -- would be extremely limited. With such limited ability to review the prudence of OVEC charges, under the PSR, Duke could easily pass on increasing costs incurred by OVEC to Duke's customers with no questions asked. The PUCO should reject this absurd notion and protect customers by requiring Duke's OVEC entitlement to be excluded from any retail rate impact.

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[83] OCC Ex. 43 at 39 (Wilson Direct).

[84] *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 530 (2008).

[85] *Id.*

### 5. Duke failed to meet essential filing and notice requirements to customers by not projecting the rate impact associated with its proposed Price Stabilization Rider or noticing customers about that impact.

Duke did not provide an estimate in its filing or its Direct Testimony of the net cost of the PSR Rider to customers. Rather, Duke assumed a zero net cost or benefit to customers from the PSR Rider. But Ohio Admin. Code 4901:1-13-03(C)(3) requires utilities filing electric security plans to provide "[p]rojected rate impacts by customer class/rate schedules for the duration of the ESP." And Ohio Admin. Code 4901:1-35-04(B) requires projected rate impacts to be specifically disclosed to customers.

Duke's disregard of these filing and notice requirements with respect to significant aspects of its proposed electric security plan is reason in itself to reject the PSR. Indeed, OCC and other parties filed a Motion to Reject Duke's filing because of these, and other shortcomings, on July 9, 2014. However, this Motion was denied by the Attorney Examiner's Entry of August 5, 2014. Notwithstanding that ruling, the PUCO should hold Duke, as well as all electric utilities, to established filing and notice requirements designed to ensure adequate support for utilities' claims and proper notice to customers. Consistent with past PUCO decisions,[86] the PUCO should reject Duke's PSR because Duke failed to provide "good cause" for waiving the requirements for this information. As the PUCO concluded when it initially established the ESP filing requirements, without such information, "the Commission, and the public, [would be]

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[86] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 398 *11-13, Entry of April 25, 2012 at 6*; In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan; In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority*, Case No. 11-346-EL-SSO et al., 2012 Ohio PUC LEXIS 403 *4-5, Entry of April 25, 2012.

flying blind in this regard, and [it] could jeopardize the sense of fairness and legitimacy of the process."

Moreover, the PUCO has specifically found that customers cannot make an informed decision as to whether to object to an application that is insufficient and seemingly contains contradictory statements.[87] The PUCO should reject Duke's PSR for failing to meet essential filing and notice requirements.

**6. By Duke's own calculations, the PSR would have a net cost to customers of $22 million over the term of the ESP-- and it could be significantly greater as shown by OCC witness Wilson. Duke's PSR would be costly for customers and should be rejected.**

Duke produced no estimates of the impact of the PSR on its customer rates, in its application or testimony, and assumed that any impact would be $0.[88] As Duke witness Mullins' testified, Duke's "forecast assumed that margins on Duke Energy Ohio's contractual entitlement in OVEC were $0 for the term of the proposed ESP."[89] Duke witness Wathen provided responses to discovery indicating that Duke had not "prepared any financial modeling or forecasts of the expected rate impacts of the proposed Price Stabilization Rider for the term of the proposed electric security plan" or "for the remaining term of Duke's contract with Ohio Valley Electric Corporation."[90]

R.C. 4928.143(C)(1) squarely places the burden of proof on electric utilities in ESP proceedings to show that the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. By failing to present any

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[87] *See e.g. Committee Against MRT v. Pub. Util. Comm.*, 52 Ohio St. 2d 231, 371 N.E.2d 547 (1977); *Ohio Assn. of Realtors v. Pub. Util. Comm.*, 60 Ohio St. 2d 172, 398 N.E.2d 784 (1979).

[88] OCC Ex. 43 at 6 (Wilson Direct).

[89] Tr. II at 351-352 (Mullins); OCC Ex. 43, Att. JFW-2 1 (OVEC IKEC Attendance).

[90] OCC Ex. 43, Att. JFW-2 at 2-4 (Duke Responses to IEU-INT-01-001, IEU-INT-01-002, and OCC-POD-03-020).

evidence in its case in chief regarding the projected rate impact of Rider PSR, Duke failed to carry its burden of proof.

The measurement of quantitative rate impacts of an ESP as compared to an MRO is critical to the utility's ability to meet its burden of proof. With respect to any rate proposal such as the PSR, Duke must reasonably assess the rate impact of such charge. Duke failed to carry its burden of proof in this respect. As a result, the PUCO should reject the proposed ESP because Duke failed to meet its burden to quantify an essential part of its proposal and one that significantly affects the results of the ESP v. MRO test.

**a. Duke's OVEC Analysis is based on Duke's Commercial Business Model ("CBM") and OVEC's budget projections, neither of which have been demonstrated by Duke to be reliable inputs.**

In response to discovery requests, Duke, for the first time, prepared and presented an "analysis" of the net cost of its OVEC entitlement for the period 2015-2024.[91] This was provided as an attachment to the response to OEG-DR-01-001. This attachment provided a forecast prepared by Duke witness Bryan Dougherty[92] of the costs and revenues associated with its interest in OVEC (the OVEC analysis).[93] OEG-POD-01-003 subsequently provided workpapers for OEG-DR-01-001.[94] Other discovery responses equate the OVEC analysis with the estimated cost of the PSR over the ESP period.[95]

[91] Tr. IX at 2455 (Dougherty). Mr. Dougherty testified that he had not been consulted regarding the development of the Price Stabilization Rider. Tr. IX at 2456 (Dougherty). He only prepared his analysis of the OVEC net cost in July 2014 in response to a request associated with OEG-DR-01-001. Tr. IX at 2455-2456 (Dougherty). At the time prepared his OVEC net cost analysis, Mr. Dougherty did not know that it was being requested in connection with Duke's proposed Rider PSR. Tr. IX at 2458 (Dougherty).

[92] Mr. Dougherty is Financial Forecasting Manager for Duke's Midwest Commercial Generation. Tr. IX at 2442-2443 (Dougherty).

[93] OCC Ex. 43, Att. JFW-3 at 1-4 and OCC Ex. 6/6A (OVEC Attendance).

[94] OCC Ex. 4 and OCC Ex. 4A (IGS POD 01-003).

[95] OCC Ex. 43 at 16, Att. JFW-2 at 5-6 (Kroger-INT-01-001 and OCC-POD-09-068).

Although Mr. Dougherty's OVEC Analysis calculated a net cost of Duke's OVEC entitlement and Mr. Dougherty was presented as the sponsoring witness, Mr. Dougherty's analysis was based almost entirely on the work of others.[96] Mr. Dougherty testified that the only number he independently developed in OCC Exhibit 4 was the PJM capacity price utilized in the analysis for the period June 2018 through December 2018.[97] Mr. Dougherty testified that the remainder of his OVEC Analysis is simply a compilation of data produced by other Duke Energy personnel and OVEC's December 11, 2013 budget ("Billable Cost Summary").

Mr. Dougherty testified that he is not involved in the OVEC budgeting process and did not provide any numbers to OVEC for their budget forecast.[98] And, with respect to the other information shown on OCC Exhibit 4/4A, he did not develop those numbers. He specifically testified that, at the time he prepared OCC Exhibit 4, he was unfamiliar with the derivation of the Unforced Capacity ("UCAP") number.[99] Mr. Dougherty further testified that generation volumes, generation revenues, and generating unit costs are all outputs of Duke's Commercial Business Model developed by other personnel based on forward market curves and a price forecast for the period developed by an outside consulting firm, Energy Ventures Analysis.[100]

Thus, even the OVEC Analysis that Duke produced in discovery could not properly be supported by the witness who sponsored the discovery response. And Duke

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[96] Tr. IX at 2467-2468 (Dougherty).

[97] Tr. IX at 2467-2468 (Dougherty).

[98] Tr. IX at 2458 (Dougherty).

[99] Tr. IX at 2459 (Dougherty).

[100] Tr. IX at 2459-2460, 2463-2466 (Dougherty). Dr. Zhang, the architect of the Commercial Business Model, testified that Mr. Dougherty would have used the model output but could not personally run the CBM. Tr. X at 2923 (Zhang).

presented no evidence of its own to support that analysis. As a result, intervenors were left to question still other witnesses regarding the inputs and assumptions underlying the OVEC Analysis to assess the potential impact of proposed Rate PSR on customers. And, as that examination demonstrated, the inputs and assumptions underlying Duke's Commercial Business Model and OVEC's budget, especially for the period beyond the "observable market" (2018), are unsound and speculative and should not be relied upon by the PUCO.

As Dr. Zhang testified, there are technical and market inputs in Duke's commercial business model. Dr. Zhang testified that technical inputs include "all the operational parameters and downtime and uptime, all the forced outages, all those things."[101] It would also include weather simulation.[102] Market inputs would include forecasts of energy prices, fuel prices, variable O&M.[103] In particular, the Commercial Business Model utilizes both forward market curves (through 2018) and fundamental price forecasts (2019 and thereafter) as essential inputs.[104] Dr. Zhang testified that Duke's fundamental curves are developed by an outside "consulting firm who has a very complicated equilibrium economic model."[105] But he also testified that he is not the "person to ask" regarding the fundamental curves because he is not involved in the development of the fundamental forecast.[106]

[101] Tr. X at 2926 (Zhang).

[102] Tr. X at 2928 (Zhang).

[103] Tr. X at 2927 (Zhang).

[104] Tr. X at 2929 (Zhang).

[105] Tr. X at 2930 (Zhang).

[106] Tr. X at 2930-2931 (Zhang).

In terms of the accuracy of the model for forecasting outcomes, Dr. Zhang testified that he has not studied its accuracy and, therefore, does not know its accuracy.[107] In fact, he testified that as a general rule, the model is not used to forecast outcomes.[108] Nonetheless, he testified that the production run utilized by Mr. Dougherty to make the OVEC Analysis is a "reasonable assessment on expected basis how this can be" for a "given set of inputs."[109] In other words, the model is only as good as the correspondence between the inputs utilized and the actual events that occur. And because he does not develop some of the most important inputs in terms of pricing, fuel costs, or demand cost information supplied by OVEC, Dr. Zhang is not able to support the outcome of the model except in a theoretical sense.

The idea that Duke's model will be revenue neutral over the longer term is based on the outcomes of Duke's OVEC Analysis beyond 2018. The analysis beyond 2018 reflects a dramatic change in cash flow after the year 2018. Specifically, the $8.4 million in OVEC net losses in 2018 turn into a $1.9 million OVEC net gain in 2019 and increase from there. That dramatic change in cash flow is driven by changes in certain inputs that Duke claimed and the Attorney Examiners have treated as confidential. Primary among those changed inputs is the shift from forward curves (in the observable market) to Duke's consultant's EVA fundamental curves.[110] These input changes drive a dramatic change in forecasted outputs of the models. Foremost among these changes is the difference between the changes in energy and capacity revenues and the change in energy

[107] Tr. X at 2933-2934 (Zhang).

[108] Tr. X at 2934 (Zhang).

[109] Tr. X at 2935, 2955 (Zhang).

[110] Tr. IX at 2461, 2512-2513 (Dougherty).

costs. Energy revenues nearly [redacted] from 2018 to 2021 and capacity revenues [redacted] percent but energy costs [redacted] percent due to Duke's consultant EVA's forecast of assumed [redacted] costs as shown on OCC-INT-16-420 and OCC-INT-16-421.[111]

Mr. Wilson also testified that the OVEC analysis assumes "OVEC generation will [redacted] over [redacted] percent from 2018 to 2019," as shown on OCC Exhibit 4/4A. Mr. Wilson testified that this change in OVEC generation "presumably reflects the assumed [redacted] in [redacted]."[112] But, he testified, this outcome "seems highly speculative and doubtful" because "due to the assumed [redacted] in [redacted], the OVEC plants' margin on energy sales [redacted]."[113]

OCC witness Wilson testified that "[t]hese assumptions are highly speculative, to say the least. Forward [energy] prices for the western PJM region reflect no such tendency toward [redacted] in the out years."[114] In reaching this conclusion, Mr. Wilson accessed AD Hub forward prices as of September 15, 2014 published by CME Group.[115] For capacity prices, Mr. Wilson testified that "PJM has seen new gas-fired generation enter the market with capacity prices in the $120/MW-day range" but the OVEC Analysis assumes capacity prices close to $[redacted]/MW-day.[116]

Duke did not support or defend the dramatic change in cash flow of the OVEC units from 2018 to 2019 and beyond. And the primary input driving the increase in cash

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[111] OCC Ex. 43/43A at 18 & Att. JFW-3 at 36-41 (Wilson Direct).

[112] OCC Ex. 43/43A at 20 (Wilson Direct).

[113] OCC Ex. 43/43A at 20 (Wilson Direct).

[114] OCC Ex. 43/43A at 19 (Wilson Direct).

[115] OCC Ex. 43/43A at 19, n. 15 (Wilson Direct).

[116] OCC Ex. 43/43A at 20 (Wilson Direct).

flows is the differential between the [redacted] in energy prices and the [redacted] in energy costs, primarily attributable to Duke's projection of non-coal costs at the OVEC plants.[117] The projection of non-coal costs shows for both OVEC plants, $CO_2$ costs [redacted] in all years through [redacted] up to $[redacted]/MWh in [redacted] and [redacted] in the following years.[118] This constitutes the vast majority of energy cost changes assumed in the OVEC Analysis. Without support for these price changes, Duke's analysis cannot form a reasonable basis for the PUCO's decision.

**b. As OCC witness Wilson has shown, the PSR would be risky and costly to customers.**

**i. Duke's own calculation of a $22 million cost of the PSR over the ESP term is a good enough reason to reject it.**

Duke's proposed PSR will likely produce significant additional costs, and therefore, harm customers over the ESP period. Mr. Wilson testified that, based on Duke's OVEC analysis produced in discovery, "the cumulative net cost to customers of Duke Ohio's OVEC entitlement over the ESP Period would be $22 million."[119] At the same time, Mr. Wilson testified that the results of Duke's OVEC analysis are "highly uncertain" and "at least some of the assumptions are out of date."[120] Mr. Wilson testified that Duke's OVEC analysis "relies upon multiple, uncertain assumptions, including energy and capacity market prices, fuel prices, environmental and other regulations, the resource's fixed costs, and the resource's operation and generation."[121]

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[117] OCC Ex. 43/43A, Att. JFW-3, p. 38 of 54 (Response to OCC-INT-16-420, at 3)

[118] OCC Ex. 43/43A, Att. JFW-3, p. 38 of 54 (Response to OCC-INT-16-420 at 3)

[119] OCC Ex. 43 at 7, 17 (Wilson Direct).

[120] OCC Ex. 43 at 9 (Wilson Direct).

[121] OCC Ex. 43 at 8-9 (Wilson Direct).

Furthermore, OCC and other parties' ability to evaluate Duke's projections were impeded "because Duke Ohio has not provided some of the key inputs or results from its OVEC analysis (such as energy price assumptions, or hourly generation)."[122] Mr. Wilson concluded:

> Duke Ohio's OVEC analysis represents an unreliable estimate of the potential future net costs to customers of the OVEC entitlement through the proposed PSR, due to the highly uncertain and speculative nature of the assumptions used in the analysis, and also apparent shortcomings or simplifications that were adopted in performing the analysis. The net cost to customers of the proposed PSR, especially over the longer term, could be much greater (or much less) than suggested by Duke Ohio's OVEC analysis.[123]

As OCC Exhibit 4/4A shows and Mr. Wilson testified, based on Duke's own estimate, the PSR will likely have a significant cost to customers over the term of the ESP. And the cost could be considerably greater because, as OCC witness Wilson testified, important assumptions made in Duke's analysis are plainly unreasonable.[124]

The significant cost to customers that will likely be incurred because of Duke's proposal should be sufficient to reject Duke's costly proposal. The PSR should also be rejected for other reasons. Indeed, the primary benefit that Duke attributes to the proposal -- price stability, is so insignificant as a hedge for customers based on Duke's own calculations, as to make the entire proposal meaningless.

**The only party that would truly benefit from the PSR Rider is Duke.** The PSR would secure Duke's investment and return on capital in OVEC, and would protect the Utility from the risk of the market. Instead customers would bear the risk that OVEC would significantly under-perform relative to the market. As such customers would be

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[122] OCC Ex. 43 at 9 (Wilson Direct).

[123] OCC Ex. 43 at 9-10 (Wilson Direct).

[124] OCC Ex. 43 at 8-10.

required to become involuntary investors in the OVEC transaction. This is not good policy and it is contrary to the legislative mandate that utilities are to be on their own in the competitive market.[125]

In Ohio, prices are supposed to be determined based on market factors as the legislature mandated. But Duke seeks regulation in a competitive market. Duke wants a PUCO mandate that customers would continue to fund the Utility's generation investment, and provide the Utility with a guaranteed profit on and of its interest in OVEC. And this customer funding of OVEC relates to power that is not even being used to provide service to Duke's SSO customers.

**ii. Duke's OVEC Analysis makes highly speculative and unsupported assumptions regarding capacity prices, energy prices, and OVEC generation beginning in 2019.**

**(a) Duke, ignoring its burden of proof, left numerous holes in its assessment of the PSR cost to customers.**

Duke did not provide an estimate in its filing or its Direct Testimony of the net cost of the PSR to customers. Rather, as discussed above, Duke assumed a zero net cost or benefit to customers from the PSR.[126] Thus Duke failed to properly reflect the

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[125] See R.C. 4928.38, requiring that after the market development period is over, the utility is to no longer receive transition revenues and "shall be fully on its own in the competitive market." Duke's market development period ended on December 31, 2005. See *In the Matter of the Application of Columbus Southern Power of Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC. Opinion and Order at 5, 14 (January 26, 2005).

[126] Tr. II at 351-352 (Mullins); OCC Ex. 43, Att. JFW-2, p. 1 (Wilson Direct).

projected rate impact of the PSR over the term of the ESP, and thus violated the filing and notice requirements of the law.[127]

Duke's subsequently provided OVEC analysis projected a net cost of $22 million to customers over the term of the ESP.[128] Duke's net cost analysis was shown in response to OEG-DR-01-001. It was placed in the record first in OCC Exhibit 4/4A. That exhibit shows Duke's $22 million net cost estimate of the PSR Rider over the term of the ESP (June 2015 – May 2018).

Because Duke disregarded the requirement to provide the projected rate impact of its ESP proposal as part of its filing, other parties were left to assess the rate impact of Duke's proposal based on the indicated discovery response.

In the absence of any projected rate impact provided in Duke's testimony in this proceeding, the intervenor witnesses in this proceeding assessing the cost of the PSR looked to OEG-DR-01-001 as the most relevant reference point. The reason for this is apparent. It was the only calculation done for the ESP period. It was apparent that it was intended to show the net cost over the ESP period from Duke's standpoint -- a $22 million net cost. And, from this starting point, OCC witness Wilson proceeded to evaluate the reasonableness of this estimate.

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[127] Ohio Admin. Code 4901:1-13-03(C)(3) (requires the utility to provide "[p]rojected rate impacts by customer class/rate schedules for the duration of the ESP"); Ohio Admin. Code 4901:1-35-04(B) (notice provision requires disclosure of "projected rate impacts").

[128] OCC Ex. 4 at Attachment 1 (IGS POD 01-003).

**(b) Duke's OVEC Analysis relies upon multiple uncertain assumptions for the period through 2024, making it unreliable.**

OCC witness Wilson testified that the results of Duke's OVEC analysis, because it relies upon multiple, uncertain assumptions, "are necessarily highly uncertain."[129] OVEC's Chief Financial Officer, John Brodt, similarly testified that he would not consider OVEC's forecast of revenues and costs beyond five years to be "very reliable."[130]

**(c) Duke's OVEC Analysis is based on forward energy prices that are out of date and capacity prices have been entering the market in the $120/MW-day as compared to Duke's forecast close to $ [redacted]/MW-day.**

OCC witness Wilson also testified that the OVEC analysis is "based on forward prices that are out of date."[131] He testified that that the OVEC Analysis reflected [redacted] revenues in the months of [redacted] and [redacted] in the coming years but that, while these expectations were reflected in AD Hub forward prices last spring following the polar vortex weather event, more recent forward prices for coming winter months have [redacted].[132]

Duke's assumed capacity prices of close to $[redacted]/MW-day are also at variance with capacity prices for new gas-fired generation of $120/MW-day. The higher the capacity prices used in the model, the higher the revenues assumed to be produced under

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[129] OCC Ex. 43 at 8-9 (Wilson Direct).

[130] Tr. V at 1213 (Brodt).

[131] OCC Ex. 43/43A at 20 (Wilson Direct).

[132] OCC Ex. 43/43A at 20 (Wilson Direct).

the rider. Higher revenues would reduce the costs of the rider to customers. The PUCO should consider that the $22 million net cost to customers is potentially significantly understated.

**(d) Duke's assumption of [redacted] [redacted] in OVEC generation beginning around [redacted] is highly speculative.**

OCC witness Wilson also concluded that the OVEC Analysis's assumption of a [redacted] of over [redacted] percent in OVEC generation from [redacted] to [redacted] seems highly speculative and doubtful.[133] Duke offered no rebuttal to this evidence.

Although OVEC's Analysis's assumption presumably reflects the assumed "[redacted] in [redacted]," Mr. Wilson testified that the "OVEC plants' margin on energy sales [redacted]" because of the assumed "[redacted] [redacted]."[134] Without a [redacted] in margin on energy sales, the OVEC Analysis's assumption of a [redacted] in OVEC generation during this time frame makes no sense. And [redacted] in margin on energy sales means that [redacted] would be created, thus [redacted] the estimated cost of the rider to customers. The PUCO should question the reasonableness of this assumption when considering the estimated cost of the rider to customers.

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[133] OCC Ex. 43/43A at 20 (Wilson Direct).

[134] OCC Ex. 43/43A at 20 (Wilson Direct).

(e) **The OVEC Analysis inappropriately assumes that the two OVEC plants have the [redacted] generation cost per MWh and, as a result, [redacted] utilization rates despite the differences in heat rates and coal costs resulting in Clifty Creek's $[redacted]/MWh [redacted] generation cost over the ESP period.**

Another flaw in the OVEC Analysis, as OCC witness Wilson testified, is that despite documented differences in heat rates and coal costs, it assumes that [redacted] units of [redacted] plants have the [redacted] generation cost per MWh throughout the analysis.[135] Although projections of OVEC generation and market revenues were developed using Dr. Zhang's "sophisticated Monte Carlo hourly dispatch model," OCC witness Wilson pointed out that "the fact that the generation costs per MWh [redacted] the two plants (located in two different states), or [redacted] the [redacted] of the year, or between [redacted] and [redacted], suggests that the OVEC Analysis may have relied upon a greatly simplified version of the this model.[136]

Again, Duke failed to present any rebuttal testimony in response to Mr. Wilson regarding the simplified production model that apparently underlies the OVEC Analysis. This is another reason why the PUCO should find that Duke's OVEC Analysis is unreliable.

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[135] OCC Ex. 43/43A at 21 (Wilson Direct).

[136] OCC Ex. 43/43A at 22 (Wilson Direct).

### (f) Duke's OVEC Analysis appears to [redacted] the amount of OVEC unforced capacity ("UCAP") available to be sold into PJM's RPM capacity market.

OCC witness Wilson testified that, due to impacts of recent environmental upgrades, OVEC's unforced capacity, or UCAP, has [redacted] and Duke was able to offer only [redacted] MW into the most recent RPM auction.[137] Notwithstanding that [redacted], the OVEC Analysis uses [redacted] MW as Duke's share of OVEC's UCAP. Thus, the OVEC Analysis appears to [redacted] the capacity quantity available to be sold into the market. This will then understate the cost of the PSR rider to customers.

Duke failed to present any rebuttal testimony in response to Mr. Wilson regarding the impact of environmental upgrades on Duke's OVEC capacity.

### (g) Duke's assumptions regarding forced and maintenance outage rates are questionable.

The OVEC Analysis also assumed that the rates of forced and maintenance outages were the [redacted] of each year.[138] But Mr. Wilson testified that maintenance outages are typically scheduled during the off-peak spring and fall seasons, and forced outage rates also tend to vary by season.[139] Consequently, OVEC Analysis assumption regarding forced and maintenance outage rates is inappropriate and further undermines the validity of the analysis.

[137] OCC Ex. 43/43A at 23 (Wilson Direct).

[138] OCC Ex. 43/43A at 24 (Wilson Direct).

[139] OCC Ex. 43/43A at 24 (Wilson Direct).

#### (h) Conclusion

As OCC witness Wilson testified, Duke's OVEC analysis is "an unreliable estimate of the potential future net costs to customers of the OVEC entitlement through the proposed PSR, due to the uncertain and speculative nature of the assumptions used in the analysis, and also apparent shortcomings or simplifications that were adopted in performing the analysis."[140] Mr. Wilson's conclusions were not rebutted. The PUCO should accordingly accept Mr. Wilson's conclusions. It should therefore reject Duke's OVEC analysis. It should conclude that the cost of OVEC will likely be significantly greater than shown by the OVEC Analysis. Additionally, PSR cannot be justified if there is a cost and significant risk placed on customers, let alone a significant cost.

### c. If Duke Ohio's PSR proposal is adopted in any respect, it should be modified to establish a benchmark level of net cost, with a sharing mechanism between Duke and customers for net costs and benefits of the PSR.

The PSR is a bad idea and will likely be harmful to customers. But if the PUCO adopts the PSR in any form, it should only adopt it in a form that is cost-neutral for customers and will share the risks and benefits between Duke and its customers.[141] Mr. Wilson explained how this could work.[142] Under this alternative, a benchmark level of "OVEC net cost would be established."[143] This could be "based on a one-time forecast of expected OVEC value, or it could be determined based on a formula that takes into account actual market prices and perhaps other uncertainties over time."[144] Then,

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140 OCC Ex. 43/43A at 24 (Wilson Direct).

141 OCC Ex. 43 at 42 (Wilson Direct).

142 OCC Ex. 43 at 42 (Wilson Direct).

143 OCC Ex. 43 at 42 (Wilson Direct).

144 OCC Ex. 43 at 42 (Wilson Direct).

differences, if any, between actual OVEC net cost in a month and the benchmark would be shared between Duke and customers, based on a percentage sharing subject to a 50/50 split.[145]

The result, Mr. Wilson explained, would be a sharing of the risks and rewards of the PSR between Duke and customers.[146] This would mean first, that the PSR would be premised on a result that is expected to produce no harm to customers.[147] Second, with this alternative, "Duke would have more incentive to maximize revenues and minimize costs."[148] And, third, "the risk to customers would be 50 percent mitigated" compared to Duke's proposal.[149] Thus, many of the downsides associated with Duke's PSR Rider proposal would be addressed by a sharing of the risks and rewards of the proposal.

Duke's PSR should be rejected. However, if a PSR is adopted, the PUCO should implement a benchmark and sharing of the risks and rewards of OVEC net costs, as explained by OCC witness Wilson. Notwithstanding OCC's alternative recommendation here, OCC would emphasize that this would not make the PSR lawful, just less harmful and risky to customers.

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[145] OCC Ex. 43 at 42-43 (Wilson Direct).

[146] OCC Ex. 43 at 42-43 (Wilson Direct).

[147] OCC Ex. 43 at 43 (Wilson Direct).

[148] OCC Ex. 43 at 44 (Wilson Direct).

[149] OCC Ex. 43 at 44 (Wilson Direct).

### 7. Duke's harmful PSR should not be considered by the PUCO because Duke has not shown that its nine percent OVEC interest should be retained under the terms of the approved stipulation implementing the current ESP.

#### a. The law mandates Duke's divestment of its assets and Duke agreed to divest them in its last ESP.

Duke's proposed PSR would shift the net cost and risk associated with Duke's nine percent interest in the OVEC to customers. As discussed above, this is a bad deal for customers, in addition to being unlawful and contrary to state policy.

But the issue would likely not even exist if Duke had been able to transfer or sell its OVEC interest to an unregulated affiliate or third party. And such a transfer or sale of its OVEC interest was anticipated under Duke's last ESP Stipulation.

In that Stipulation, the parties agreed that Duke would transfer its generation assets by December 31, 2014.[150] The Stipulation also provided that for "contractual obligations arising before the signing of the Stipulation," such obligations would be permitted to remain with Duke but only "to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities" to Duke.[151]

Despite the language of the Stipulation, which covered all of Duke's generating assets and generation-related "contractual obligations," Duke asserts that it was not required to transfer its OVEC entitlement to an unregulated affiliate or third party. Duke witness Wathen testified that "directly owned generation was to be transferred by the end

[150] Case No. 11-3549, Stipulation at 25-26 (Oct. 24, 2011).

[151] Case No. 11-3549, Stipulation at 26-27(Oct. 24, 2011).

of 2014, but that this language did not address contractual entitlements [such as OVEC]."[152]

Duke claims that there is no nexus between the PSR and Duke's retention of its OVEC interest. But Duke is wrong. If Duke cannot justify retaining its OVEC interest, there would be no costs for Duke to collect through the PSR, and the PUCO would not even need to consider approving the PSR.

**b. Duke's claim that its OVEC interest was not required to be transferred is inconsistent with the plain language of the Stipulation.**

Mr. Wathen, who is not an attorney, testified that Duke was only required to transfer its "directly owned" generation assets.[153] He further testified that the Stipulation's allowance for pre-existing "contractual obligations" to remain with Duke under limited circumstances did not address Duke's contractual interest in OVEC.[154] Instead, Mr. Wathen contended that "OVEC's two generation assets are not directly owned by Duke Energy Ohio; consequently, the Utility has no obligation to transfer its equity interest in OVEC to an affiliate as part of the broader transfer of directly owned assets."[155]

Mr. Wathen's testimony makes little sense. The Stipulation addressed Duke's interests in generation assets, including contractual interests held by Duke. R.C. 4928.17(a)(1) requires Duke to provide competitive retail electric service "through a fully separated affiliate of the utility." The Stipulation provides some flexibility for pre-existing contractual obligations that could not be transferred under the term of the

[152] Duke Ex. 6 at 11 (Wathen Direct); see also Tr. II at 450 (Wathen).

[153] Duke Ex. 6 at 11 (Wathen Direct); see also Tr. II at 451 (Wathen).

[154] Tr. II at 558, 561-562 (Wathen).

[155] Duke Ex. 6 at 11 (Wathen Direct).

contract *or* if the transfer would result in "substantially increased liabilities" to Duke. However, R.C. 4928.17(a)(1) does not exclude any assets or contracts used to meet the demands of competitive retail electric service. Competitive retail electric service, per R.C. 4928.03 includes "retail electric generation."

Mr. Wathen made several other arguments to justify not transferring or selling its OVEC interest. First, Mr. Wathen sought to distinguish Duke's nine percent ownership interest in OVEC and its contractual entitlement to nine percent of OVEC's output from its "contractual obligations" under the Amended and Restated Inter-Company Power Agreement ("ICPA"). But that agreement defines both the terms of Duke's rights (its ownership interest and entitlement) as well as its obligations (cost responsibility; management role).[156] Article 4 of the ICPA specifies, among other things, Duke's right to take nine percent of "all Available Power and Available Energy."[157] Article 5 specifies Duke's payment obligations. Other sections of the agreement govern operation of OVEC, including the role of the Operating Committee.[158] Mr. Wathen's suggestion that the ICPA does not incorporate both rights and obligations associated with OVEC is simply wrong.

Second, Mr. Wathen claimed that the Stipulation's provision for "contractual obligations" was intended to address "coal contracts, rent contracts, etc."[159] But no such limiting language appears anywhere in the Stipulation. Nor could Mr. Wathen fairly

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[156] The introductory paragraph of the agreement states that the agreement amends and restates in their entirety "the terms and conditions governing the rights of the Sponsoring Companies to receive Available Power from the Project Generating Stations and the obligations of the Sponsoring Companies to pay therefor." Thus, the agreement addresses both rights and obligations.

[157] IEU Ex. 5 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[158] IEU Ex. 5 at 17, Section 9.05 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[159] Tr. II at 560 (Wathen).

explain the basis for his claim.[160] Again, Mr. Wathen's testimony is inconsistent with the plain language of the Stipulation.

And both Mr. Wathen and Mr. Whitlock agreed that OVEC does constitute a "contractual obligation" of Duke.[161] Since the agreement was signed on September 10, 2010, it was a pre-existing obligation at the time of Duke's ESP Stipulation. Duke's contention that its OVEC interest was not required to be transferred is baseless.
The Stipulation provided that Duke's wholly owned generating assets as well as contractually-owned interests would be transferred to the extent they could be transferred, with specified exceptions. The transfer of OVEC assets was not a specified exception. Therefore, the PUCO should reject Duke's claims that it is not required by R.C. 4928.17 or the Stipulation to divest itself of its OVEC interest to the extent the ICPA allows and to the extent its liabilities would not be substantially increased by such transfer.

#### c. Duke produced no evidence -- and made no argument -- that substantially increased liabilities would result from a transfer of Duke's interest in OVEC.

The Stipulation permitted Duke to retain its interest in OVEC rather than transfer it to an unregulated affiliate if the terms of the contract prevented transfer or such transfer would result in substantially increased liabilities to Duke.[162] But Duke produced no evidence in this proceeding that transfer of its OVEC interest would substantially increase its liabilities. Indeed, Duke's representative on the OVEC Board of Directors, Mr. Whitlock, testified that he was not aware of whether Duke had made such a

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[160] Tr. II at 563-64 (Wathen).

[161] Tr. II at 561 (Wathen).

[162] Case No. 11-3549, Stipulation at 26-27.

determination.[163] Thus, Duke has failed to show that it was required to retain its OVEC interest for this reason.

**d. Duke has not demonstrated that it made a good faith effort to transfer its OVEC interest to an unregulated affiliate The PUCO should not consider Duke's proposal to retain its OVEC interest.**

**i. Duke did not demonstrate that it attempted to transfer its OVEC interest to a Permitted Assignee under Section 9.182 of the ICPA.**

The Stipulation permitted Duke to retain its interest in OVEC rather than transfer it to an unregulated affiliate if the terms of the OVEC contract prevented its interest from being transferred. But Duke did not produce evidence that it could not have transferred its interest in OVEC. Neither Mr. Wathen nor any other Duke witness testified in Duke's direct case that Duke was prevented by the terms of the ICPA from transferring its interest in OVEC to an unregulated affiliate or third party.

And the evidence presented by intervenors shows that Duke did not make a good faith effort to transfer its interest in OVEC to an unregulated affiliate or third party under the terms of the ICPA. The evidence shows that Duke received authorization from FERC to transfer its interest to an affiliate or third party under the terms of the ICPA.[164] Nonetheless, Duke did not take the most basic actions to carry through with such a transaction. As a result of Duke's inaction, it forced the issue to be considered by the PUCO.

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[163] Tr. X at 2760 (Whitlock).

[164] Tr. X at 2731; *Re Cinergy Corp., et al.*, FERC Docket No. EC12-90-000, Order Authorizing Disposition of Jurisdictional Facilities (September 5, 2012).

The ICPA[165] provides for three routes to transfer a Sponsoring Companies' OVEC interest to an affiliate or third party. Section 9.182 provides the simplest means of doing so. It allows the transfer to a Permitted Assignee "upon thirty (30) days' notice to the Corporation and each Sponsoring Company, without any further action by the Corporation or the other Sponsoring Companies."[166] Other than notice and qualification of a "Permitted Assignee," the only requirement is that the assignment agreement executed be "in form and substance acceptable to the Corporation in its reasonable discretion."[167] OVEC's CFO, John Brodt, testified that there is a standard assignment agreement that is used by OVEC for this purpose.[168]

Duke failed to present evidence that it could not have transferred its interest to a Permitted Assignee under Section 9.182 of the agreement. A Permitted Assignee is defined in the agreement in one of two possible ways.[169] First, a Permitted Assignee may be simply a "Sponsoring Company or its Affiliate" with a specified Standard and Poor's ("S&P") and Moody's credit rating for long-term debt. The S&P minimum credit rating is BBB-. The Moody's minimum credit rating is Baa3.[170]

[165] IEU Ex. 5 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[166] IEU Ex. 5 at 20-21 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[167] IEU Ex. 5 at 21 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement). A parenthetical to this requirement provides "(including, without limitation; the agreement by the Sponsoring Company assigning such rights, title and interests in, and obligations under, this Agreement to reimburse the Corporation and the other Sponsoring Companies for, any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment).

[168] Tr. V. at 1210.

[169] IEU Ex. 5 at 4 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[170] IEU Ex. 5 at 4 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

Second, if "a Sponsoring Company or its Affiliate" does not meet the S&P and Moody's bond rating criteria, a Sponsoring Company or its Affiliate with lower than the specified credit ratings may otherwise qualify as a Permitted Assignee. Specifically, if the assigning entity "agrees in writing (in form and substance satisfactory to Corporation) to remain obligated to satisfy all of the obligations," then it may qualify.[171] In other words, the transferring entity (or its Affiliate -- presumably with qualifying credit ratings) may provide a guarantee of the obligations of the Permitted Assignee.

A proviso applies to the definition of Permitted Assignee: If OVEC's counsel makes a reasonable determination that this assignment could cause a default of a security or agreement, then OVEC's counsel may disqualify an assignment.[172] In other words, OVEC's counsel may "reasonably determine" that the proposed assignee does not qualify notwithstanding that the proposed assignee otherwise qualifies.

Duke presented no evidence in this case that it attempted to transfer its OVEC interest to a "Permitted Assignee." Duke witness Whitlock testified that he believed that Duke Energy Corporation, Duke's parent company, and other Duke Energy Ohio unregulated affiliates held the required credit ratings for such transfer of the OVEC interest.[173] Thus, Duke could have transferred its OVEC interest to an affiliate with a sufficient credit rating. Or Duke could have transferred its OVEC interest to another affiliate without an appropriate credit rating but providing a guarantee of "all of the obligations related to the assigned rights, title and interests to the extent such obligations

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[171] IEU Ex. 5 at 4 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[172] IEU Ex. 5 at 4 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[173] Tr. X at 2736-2737 (Whitlock).

are not satisfied by assignee of such rights, title and interests."[174] Duke did not demonstrate that it did either.

Indeed, Mr. Whitlock, a Duke officer and its Board representative at OVEC, testified that he did not know whether an effort was made by Duke Energy Ohio to transfer its OVEC interest to an entity that would have met the qualifications of a Permitted Assignee.[175] Nor did Duke present an opinion from OVEC's counsel that a proposed Permitted Assignee did not qualify. Thus, Duke failed to show that it made good faith efforts to transfer its OVEC interest under the assignment process specified in Section 9.182 of the ICPA.

**ii. Duke failed to demonstrate that it took reasonable efforts to transfer its OVEC interest by obtaining the written consent of OVEC's Sponsoring Companies.**

Duke could have also transferred its interest with the "written consent" of all of the other OVEC Sponsoring Companies.[176] But Duke failed to demonstrate that it made a good faith effort to obtain the written consent of all of the other Sponsoring Companies.

The evidence shows that [redacted] requested the consent of the other Sponsoring Companies to transfer its OVEC interest.[177] [redacted] proposed to transfer its OVEC interest to a newly created unregulated affiliate that had no credit rating. But Duke also provided a guarantee from [redacted] with a limited liability provision. The proposed guarantee was opposed, however, by [redacted] and

[174] IEU Ex. 5 at 20-21 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[175] Tr. X at 2737-2738.

[176] Section 9.181 ICPA, IEU Ex. 5 at 20 (Ohio Valley Electric Corporation Amended and Restated Inter-Company Power Agreement).

[177] OCC Ex. 17/17A (OVEC E-mail); OCC Ex. 15/15A (Guaranty Agreement).

[redacted][178] These entities advised [redacted] that the proposed guarantee was unacceptable, primarily because of the limitation on liability, and they proposed changes to the proposed guarantee that were unacceptable to [redacted].[179] [redacted] did not produce any evidence that the concerns regarding the limitation of liability provision expressed by [redacted] and [redacted] were unreasonable.

Rather, OVEC's Chief Financial Officer, Mr. Brodt, testified that [redacted] and [redacted] advocated that the same creditworthiness requirements applied to them when they acquired their interests from [redacted] should be applied to other parties acquiring these interests.[180] [redacted] also failed to provide any evidence, other than limited e-mail communications, that it attempted to resolve the concerns of [redacted] and [redacted][181] What is clear is that [redacted] and [redacted] concerns were not resolved and that a vote was conducted as to the adequacy of the proposed guarantee with [redacted] and [redacted] opposing the guarantee.[182]

This was the premise for another Ohio utility -- AEP Ohio's -- proposal to retain its OVEC interest.[183] AEP Ohio advised it was unable to obtain unanimous consent to transfer its interest. And, like Duke, AEP then sought the preferential treatment of its OVEC interest in the form of a Power Purchase Agreement Rider.[184] Only a limited

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[178] OCC Ex. 13/13A (OVEC E-mail).

[179] OCC Ex. 11/11A; OCC Ex. 13/13A (OVEC E-mail).

[180] Tr. V at 1388-1389 (Brodt).

[181] OCC Ex. 11/11A (OVEC E-mail), 12/12A (OVEC E-mail), and 13/13A (OVCE E-mail).

[182] Tr. V at 1394-1396 (Brodt).

[183] *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Application to Amend at 2 (Oct. 4, 2013).

[184] Tr. V at 1394-1395 (Brodt).

number of votes, however, were submitted.[185] According to the request for consent, however, the failure to vote would be interpreted as a denial of consent to the transfer. However, there is no evidence that parties other than [redacted] and [redacted] opposed [redacted] proposed guarantee.

**iii. Duke failed to demonstrate that it could not have sold/transferred its OVEC interest to a third party under Section 9.183 of the ICPA because it did not actively solicit such a sale.**

Section 9.183 of the ICPA also allows a Sponsoring Company to assign its interest to an unaffiliated third party, following a right of first refusal given to the other Sponsoring Companies on at least 30 days' notice. The third party must, among other things, meet the same creditworthiness requirements as that of the Permitted Assignee.

But Duke provided no evidence that it made a good faith effort to assign its OVEC interest under Section 9.183 of the ICPA. Duke did not solicit any requests for proposals to sell its OVEC interest although Mr. Whitlock asserted that Duke offered its OVEC interest in response to a third party's purchase power solicitation.[186] Mr. Whitlock wasn't able to testify as to the reasons that Duke's proposal was not selected.

Duke failed to show that it made good faith efforts to assign its OVEC interest to a third party under Section 9.183. It did not solicit a third party purchaser or reach an agreement with a third party purchaser. Mr. Whitlock's testimony that Duke offered its OVEC interest in response to a solicitation to acquire power lacks any weight in the absence of any details or demonstrated interest by such potential purchaser.

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[185] OCC Ex. 20/20A (OVEC E-mail) and OCC Ex. 27/27A (Sponsoring Company Acknowledgement).

[186] Tr. X at 2739-2744.

### iv. Duke failed to demonstrate any continuing effort to transfer its OVEC interest.

It is now over a year since Duke's [redacted]. But Duke has not taken any further steps to transfer its OVEC interest. Duke did not present any evidence that it would be futile to pursue any means of seeking to transfer its OVEC interest. Its failure to act suggests that it believes it has no further obligation. This is contrary to the PUCO's holding -- that AEP Ohio will only be permitted to retain its OVEC interest until "the OVEC contractual entitlements can be transferred to AEP Genco or otherwise divested, or until otherwise ordered by the Commission."[187]

Notably, a significant portion of the ownership interest in OVEC is in Ohio electric utilities. Ohio electric utilities or their affiliates control more than two-thirds of the ownership interests and voting power at OVEC -- 67.22 percent.[188] Buckeye Power Generating, LLC, with an 18 percent ownership interest in OVEC,[189] is owned by a cooperative that serves customers almost entirely in Ohio. Thus, the power generated by OVEC is used to serve the interests of Ohio-based entities or affiliated companies. In this light, the PUCO should question the commitment of these companies, including Duke, in carrying through with the PUCO's direction that Ohio electric utilities divest their generation assets.

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[187] *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order at 9 (December 4, 2013).

[188] IEU Ex. 7 at 1 (OVEC 2013 Annual Report).

[189] IEU Ex. 7 at 1 (2013 OVEC Annual Report).

The PUCO should reject Duke's proposed PSR because of its failure to demonstrate good faith efforts to pursue a transfer. Further, in light of its failure to [redacted] to pursue consent of OVEC Sponsoring Companies to a transfer, the PUCO should direct Duke to take [redacted] measure to obtain the consent of the other Sponsoring Companies, including the unlimited guarantee of its parent corporation. Finally to the extent that the PUCO determines to approve the PSR in any form, the continuation of any specialized rate treatment for Duke's OVEC costs should be contingent on ongoing demonstration of Duke's reasonable efforts to achieve separation of the OVEC ownership interest.

### B. Duke's proposed ESP, when properly considered under an analysis of quantitative factors, fails the ESP v. MRO Test and thus would fail to protect Duke's customers.

The PUCO's pronouncements in the *FirstEnergy MRO,* the *FirstEnergy ESP* cases, [1] and AEP Ohio's first ESP Case ("*ESP I*") embrace this approach. In November 2008, the PUCO, in analyzing FirstEnergy's application for a standard service offer through an MRO, emphasized the need to examine FirstEnergy's application in light of R.C. 4928.02:

> Chapter 4928 of the Revised Code provides a roadmap of regulation in which specific provisions were put forth to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing the Companies' application for an MRO, the commission is aware of the challenges facing Ohioans and the electric power industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by Amended Substitute Senate Bill No. 221 (SB 221), effective July 31, 2008.

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> In determining whether an MRO meets the requirements of Section 4828.142(A) and (B), Revised Code the Commission must read those provisions together with the policies of this state as set forth in Section 4928.02, Revised Code. Accordingly, the policy provisions of Section 4928.02, Revised Code, will guide the Commission in its implementation of the statutory requirements of Section 4928.142(A) and (B), Revised Code.[1]

Moreover, despite arguments that R.C. 4928.02 is merely a redundant standard once the requirements of the "more favorable in the aggregate" standard have been met, the PUCO determined otherwise, stating:

> The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to 'ensure the policy specified in section 4928.02 of the Revised Code is effectuated.'[1]

The PUCO also dismissed arguments that R.C. 4928.02 does not impose any obligations or duties upon utilities.[1] The PUCO ruling relied upon the Ohio Supreme Court ruling in *Elyria Foundry v. Pub. Util. Comm.*[1] There the Court held that the PUCO may not approve a rate plan that violates the policy provisions of R.C. 4928.02. Accordingly, the PUCO held that an electric utility should be deemed to have met the "more favorable in the aggregate" standard "only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in section 4928.02, Revised Code."[1]

Less than a month later, the PUCO cemented its interpretation that each provision of the SSO application must be examined in light of the policy objectives of R.C. 4928.02 in FirstEnergy's ESP application. The PUCO said that "Chapter 4928 of the Revised

Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges."[1] Rather than ignoring the state policies enumerated in R.C. 4928.02, in the *FirstEnergy ESP* case, the PUCO embraced the policies in order to give meaning to R.C. 4928.143:

> The Commission believes that the state policy codified by the General Assembly in Chapter 4928, Revised Code, sets forth important objectives which the Commission must keep in mind when considering all cases filed pursuant to that chapter of the code. Therefore, in determining whether the ESP meets the requirements of Section 4928.143, Revised Code, the Commission takes into consideration the policy provisions of Section 4928.02, Revised Code, and we use these policies as a guide in our implementation of Section 4928.143, Revised Code.[1]

In the *FirstEnergy ESP* case, assertions were made that R.C. 4928.02 does not impose requirements on an ESP and the ESP should not be rejected or modified if it fails to satisfy the policies of the state.[1] Nonetheless, the PUCO appropriately dismissed such arguments.

Indeed the PUCO remained true to its words as can be seen throughout the *FirstEnergy ESP Order*. For instance, the PUCO recognized the need to ensure reasonably priced retail electric service under R.C. 4928.02(A). In this regard, the PUCO reduced the base generation rates of FirstEnergy -- "mindful of the significant economic difficulties facing residents in Ohio at this time."[1] The PUCO also eliminated other provisions in FirstEnergy's ESP plan that would have significantly increased costs to customers. For example, the deferred generation cost rider was eliminated, saving customers approximately $500 million in carrying costs.[1] There the PUCO concluded that this savings will help promote the competitiveness of Ohio in the global economy, a state policy enumerated in R.C. 4928.02(N).[1]

The PUCO should take a similar approach that considers each aspect of Duke's ESP in light of whether it furthers the policy objectives of R.C. 4928.02, including ensuring "reasonably priced retail electric service." Specifically, under a thorough analysis of R.C. 4928.02, and for other legal and policy reasons, the proposed Price Stabilization Rider ("PSR") should be rejected.

The PUCO has authority to modify utilities' proposed ESP under R.C. 4928.143. Indeed the PUCO has expressly ruled that its authority to modify a utility's ESP is not dependent upon its finding that the ESP is not more favorable than the expected results of an MRO.[1] Rather the PUCO aptly described its statutory authority as including the authority to make modifications to the ESP that are supported by the record in the case.[1] And in this case, modifications are recommended to transform the ESP into a rate plan that serves the public interest and promotes the policies of the state.

R.C. 4928.02 lists 14 objectives for the electric policy of the state and its people. The Public Utilities Commission of Ohio ("PUCO") must apply these policies in judging whether Duke's proposal for an electric security plan ("ESP") should be implemented for the next three years.

The PUCO's consideration of the plan turns on whether, under R.C. 4928.143(C)(1) , it is "more favorable in the aggregate" for customers as compared to the expected results of a Market Rate Offer ("MRO"). But Duke's proposal is not more favorable in the aggregate than a market plan for customers. Duke seeks government

(PUCO) re-regulation to protect itself from the market. Fifteen years ago, the General Assembly adopted market pricing of electricity to protect consumers.

OCC urges the PUCO to modify Duke's proposed Plan. The Plan is not more favorable in the aggregate than a MRO. It fails the General Assembly's test for evaluating utilities' electric security plans.. Duke's proposed PSR, for re-regulation, would be at least a $22 million net cost to customers under the security plan. And the cost of the PSR to customers, by Duke's calculations, may be significantly understated given the numerous uncertain and speculative assumptions used by the Utility.[190]

Duke proposes to obtain its electric generation supply under its ESP through a competitive bid process, the same as if it were to offer the SSO under an MRO. Accordingly, for purposes of R.C. 4928.143(B)(1), the price for generation supply under either an ESP or MRO would be identical.[191] Duke claims (albeit mistakenly[192]) that no other costs would be incurred or avoided in implementing the proposed ESP, and admits that the "ESP and MRO are necessarily equal quantitatively."[193] Thus, the proposed ESP cannot be deemed "more favorable" than an MRO under the strictly quantitative analysis required by *Columbus Southern II*[194], and Duke's application must be denied.

Moreover, although Duke's application and supporting testimony projected the cost of its proposed PSR to customers to be zero,[195] Duke's own estimates of the PSR's

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[190] OCC Ex. 43 at 24 (Wilson Direct).

[191] Duke Ex. 6 at 24-25 (Wathen Direct); OCC Ex. 48 at 4, 9 (Hixon Direct); Tr. XIII at 3750-3752 (Turkenton).

[192] If the proposed Price Stability Rider ("PSR") is approved, customers would pay $22 million more in costs during the term of the ESP than under an MRO. OCC Ex. 48 at 4 (Hixon Direct).

[193] Duke Ex. 6 at 26 (Wathen Direct).

[194] *In Re Application of Columbus Southern Power Company et al.*, 128 Ohio St.3d 512,519, 520 (2011).

[195] OCC Ex. 43 at 6 (Wilson Direct); OCC Ex. 48 at 8 (Hixon Direct).

costs and revenues dispute those projections. Duke's data obtained through discovery shows that Duke actually estimates that the PSR, if approved as a part of the ESP, would impose a cumulative net cost on Ohio consumers of approximately $22 million over the ESP's term.[196] Duke admits the PSR would not be available under an MRO.[197] Thus, considering the additional costs the PSR would impose, the ESP would be less favorable for customers than an MRO by approximately $22 million -- considerably less favorable than Duke is willing to admit. It must be denied.

### 1. Even if the PUCO Were to Consider Alleged Qualitative Benefits for Customers, Duke's Proposed ESP Still Would Fail the ESP v. MRO Test.

If the PUCO determines to (unlawfully) consider qualitative benefits as a part of the ESP v. MRO test, Duke asks the PUCO to find that: (1) the PSR provides customers with price stability and certainty; (2) the DCI Rider enables a timely investment in the Utility's distribution system, and (3) qualitative benefits are provided by competitive enhancements over the current ESP.[198] The PUCO must reject each of Duke's claims.

#### a. The PSR does not provide rate stability and certainty for customers.

Under *Columbus Southern II*, if qualitative benefits could be considered as a part of the ESP v. MRO test, they must be permitted in an ESP by one of the categories listed in R.C. 4928.143(B)(2). Although Duke witness Wathen claims three benefits associated with the PSR (price stability and certainty, competitive neutrality, and having "steel in the ground"), only the claim of price stability and certainty could conceivably, if proven,

[196] Id.; OCC Ex. 43 at 7 (Wilson Direct).

[197] Duke Ex. 6 at 8 (Wathen Direct); OCC Ex. 48 at 8 (Hixon Direct).

[198] May 29, 2014 Application at 15; Duke Ex. 6 at 26-27 (Wathen Direct).

meet the criteria of R.C. 4928.143(B)(2), specifically R.C. 4928.143(B)(2)(d).[199] It does not.

Mr. Wathen testified that the PSR would act as a long-term hedge against the volatility of future market prices. He explains that Duke will sell its contractual entitlement to OVEC's energy and capacity into PJM markets and will record either a gain or loss on the sale. The gains or losses will be assigned to retail customers on a non-bypassable basis through quarterly filings with the PUCO. He reasons that, at times of low market prices, customers may be charged for the difference between market and OVEC prices. But when market prices are high, customers could receive the profits from the sale of OVEC generation.[200]

As a threshold matter, Duke performed no analysis or provided any documents to support that its customers presently are subject to price volatility. Duke performed no analysis of the potential impact of the PSR on the stability of customers' rates, and the Utility performed no analysis that the PSR would provide customer with value as a hedge. Accordingly, Duke has failed in the burden imposed upon it by R.C. 4928.143(C)(1).[201]

OCC witness Wilson refuted Mr. Wathen's premise that SSO customers would be subject to substantial price volatility during the ESP's term. Mr. Wilson noted that SSO customers would be served under stable, staggered one- to three-year contracts

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[199] R.C. 4928.143(B)(2)(d) provides that an ESP may 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;

[200] Duke Ex. 6 at 13-14 (Wathen Direct).

[201] OCC Ex. 43 at 27-28 (Wilson Direct).

established through periodic auctions, and that the staggered rates tend to be stable over time.[202] On the other hand, the OVEC net cost would reflect potentially volatile PJM market revenues, because the PJM day-ahead market can reflect extreme weather, unexpected plant outages, and other unanticipated circumstances. These factors would more than offset relatively stable OVEC plant costs. Thus, the PSR would add a relatively volatile component to SSO customers' rates that otherwise do not have such volatile components.[203]

Furthermore, OCC witness Wilson demonstrated that, because the proposed PSR would be updated quarterly, the net OVEC cost incurred in one quarter could appear on a CRES customer's bill the next quarter. Noting the volatility of quarterly PSR amounts (for example, due to weather changes) and SSO customers yearly rate changes from the auctions, OCC witness Wilson testified that is likely that the quarterly PSR amounts could move in the same direction as market rates, and move four times per year. Thus, contrary to Mr. Wathen's assumptions, Mr. Wilson concluded that there is no assurance that the PSR would move in the same, or opposite, direction as the market and, further, that it cannot be assumed that the PSR will tend to hedge or stabilize customers' rates.[204]

Even assuming, arguendo, that Mr. Wathen is correct in his assumption that the PSR will move in the opposite direction of the market (and thus stabilize prices); Mr. Wilson shows that the impact on customers' bills will be very small. To put the issue in perspective, Duke Ohio's OVEC entitlement is less than [redacted] GWh over the next four years, compared to total end use consumption by Duke Ohio customers of 24.6 million

[202] OCC Ex. 43 at 12, 28 (Wilson Direct).

[203] Id. at 28-29 (Wilson Direct).

[204] Id. (Wilson Direct).

MWh per year. This entitlement corresponds to only about [redacted] percent of each customer's total load. Additionally, generation supply is only about half of the customer's bill. Regardless of how the PSR amounts move over time relative to the rest of the customer's bill, the effect on the bill is very small.[205]

In addition, OCC witness Wilson explained that customers taking service from CRES suppliers could choose offerings that hedge prices and provide greater stability. As with SSO customers, the proposed PSR charged to shopping customers would be lagged at least one quarter, and corresponds to only about [redacted] percent of Duke load. To the extent the PSR would provide shopping customers that choose a hedged product some price stability despite the lag, the impact would be very small.[206]

Based upon his analysis, OCC witness Wilson concluded that it is doubtful that the PSR would act as a hedge of volatile market prices or contribute to price stability due to the quarterly time lag. Moreover, if the PSR could function to a degree as a hedge, its impact on total bills customers pay would be insignificant.[207]

**b. The Distribution Capital Investment Rider is not a benefit of the ESP for customers because it is available under an MRO.**

In his direct testimony, Duke witness Wathen testified that Rider DCI offers "an opportunity to improve the safety and reliability of the [distribution] system in an economical and efficient manner.[208]" As such, Duke offers Rider DCI as a provision regarding single-issue ratemaking or other incentive ratemaking under R.C. 4928.143(B)(2)(h). Duke witness Wathen reasons that it is a qualitative benefit of the

[205] Id. at 30 (Wilson Direct).

[206] Id. at 12, 30-31 (Wilson Direct).

[207] Id. at 13 (Wilson Direct).

[208] Duke Ex. 6 at 27 (Wathen Direct).

ESP because it is not available under an MRO. However, his assertion is contradicted by Duke's own application and the testimony of Staff witness Turkenton.

Duke's application clearly provides that "Rider DCI and Rider DSR are also available should the Company provide an SSO in the form of an MRO and, as such, they have no impact on the qualitative comparison***.[209]"

Moreover, on cross-examination Staff witness Turkenton corroborated that a rider to recover capital investment costs would be available under an MRO through a base rate proceeding as well as an ESP proceeding.[210] However, she considers approving the DCI Rider in this ESP proceeding to be a qualitative benefit over its approval in a subsequent base rate proceeding, because it would avoid the time and expense of the latter.[211]

Nevertheless, she also recognized that if a rider to recover the same capital investments were approved in a prior base rate proceeding, Duke could be receiving the revenues from that base rate rider currently to timely improve the safety and reliability of its distribution network, just as it seeks in this proceeding. [212] The point is that Staff is creating a perceived benefit from Duke's choice of forums. Duke has the choice to seek approval of a distribution capital investment rider when a base rate is pending (including its most recent base rate proceeding decided in 2013),[213] or to choose to seek approval in a pending ESP case. The exercise of its choice of forums cannot be considered a qualitative benefit.

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[209] Duke Ex. 1 at 15 (Application).

[210] Tr. XIII at 3762 (Turkenton).

[211] Tr. XIII at 3772 (Turkenton).

[212] Tr. XIII at 3773-3774 (Turkenton).

[213] Tr. XIII at 3771-3773.

OCC witness Hixon cautions that the PUCO also should consider the significant cost of Rider DCI -- approximately $272 million over three calendar years.[214] She and Staff witness Turkenton agree, due to regulatory lag, that Duke would recover its costs from customers sooner under a rider than it would under a traditional base distribution case.[215] Although neither attempted to quantify additional revenues Duke would receive under the ESP as opposed through a rate proceeding under an MRO,[216] the PUCO should consider those costs in determining whether the ESP is more favorable.

### 2. Duke's proposal to enhance the competitive retail market is not sanctioned by R.C. 4928.143(B)(2) and cannot be included as a benefit of the ESP for customers.

Duke claims that various provisions of its ESP are designed to enhance the competitive retail market place. The provisions include: changes to rate design for Rider RC, changes to rate design for Rider RE, discontinuance of Rider LFA, discontinuing interruptible credits through Rider DR-ECF, changes to Rider NM, and discontinuance of Percentage of Income Payment Plan ("PIPP") discount.[217] These provisions are predominantly rate design matters, and do not fall within any of the nine categories listed in R.C. 4928.143(B)(2). Therefore, they may not be included in this ESP.[218]

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[214] OCC Ex. 48 at 11 (Hixon Direct).

[215] Id. at 11-12 (Hixon Direct); Tr. XIII at 3774 (Turkenton).

[216] Id.

[217] Duke Ex. 6 at 26-27 (Wathen Direct); OCC Ex. 48 at 14-15 (Hixon Direct).

[218] *In Re Application of Columbus Southern Power Company et al.*, 128 Ohio St.3d 512,519, 520 (2011).

### a. The benefits Duke claims are not benefits compared to an MRO but benefits compared to the current ESP.

Duke claims that these market enhancement provisions should be included in the ESP because it considers the changes to the current rate design (Riders RC and RE) and the elimination of current ESP provisions (Riders LFA, DR-ECF, NM and PIPP) to be benefits over the **current** ESP.[219] In doing so, Duke misstates the statutory test, which requires a comparison of the provisions of the proposed ESP as filed to the expected results of an MRO. Staff agrees that the test does not provide for the comparison of the proposed ESP to the current ESP it will replace.[220] Significantly, collection of interruptible credits under Rider DR-ECF[221] and the PIPP rider[222] were due to expire at the conclusion of the current ESP.[223] Simply put, if a benefit exists to not including these riders in the proposed ESP, the same benefit exists in the riders not being available under an MRO.[224]

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[219] Duke Ex. 6 at 16-24, Section III "Changes from the Current ESP" (Wathen Direct).

[220] Tr. XIII at 3759 (Turkenton).

[221] It should also be noted that while Duke now claims elimination of this demand response program as a benefit, the establishment of the same program was a considered a benefit in Duke's current ESP. (Case No. 10-2586-EL-SSO, Duke witness Jansen Supplemental Testimony at 11); OCC Ex. 48 at 17 (Hixon Direct).

[222] Actually, in evaluating Duke's current ESP, the five percent off discount for PIPP customers was considered an "undeniable" quantifiable benefit. In Case No. 11-3549-EL-SSO, Duke witness Wathen (Supplemental Testimony at 31) stated "the estimated benefits of the ESP also includes the savings projected for PIPP customers" and Duke witness Janson (Supplemental Testimony at 11) stated "the ESP also provides an undeniable benefit to our customers enrolled in PIPP by affording them a confirmed discount." OCC Ex. 48 at 18 (Hixon Direct).

[223] OCC Ex. 48 at 17, 18 (Hixon Direct).

[224] Id.

**b. Because Riders RC, RE, LFA and NM are also available under an MRO, they cannot be considered benefits of an ESP for Customers.**

OCC witness Hixon testified that changes to the rate designs as proposed in Riders RC, RE and LFA are also available in an MRO. R.C. 4928.142 requires an MRO applicant to file a proposed rate design and the PUCO's rules require it to provide proposed SSO generation rates derived from the competitive bidding process ("CBP"). Specifically, the rules require the applicant to file (1) a proposed retail rate design, (2) an indication of how bid prices were used for deriving rates, and (3) a description of the rate structure chosen by the utility with the method used to convert bides prices to retail rates.[225] Indeed, Duke filed a proposed retail rate design when it filed an application for an MRO in 2010.[226]

Moreover, the Staff agrees that an MRO applicant must provide a proposed rate design to the PUCO, that the PUCO has the discretion to approve the design submitted, and that the EDU may submit subsequent MRO applicants and change its current rate design. Thus, the changes to SSO generation-related rates proposed in this ESP for Riders RC, RE and LFA[227] are equally available in an MRO. Because they are available in an MRO, the changes cannot be considered a qualitative benefit reserved only for the ESP.

Finally, the language revisions proposed for Rider NM are also available under an MRO through an application to amend a tariff.

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[225] Ohio Adm. Code 4901:1-35-03(B)(2)(a), (B)(2)(c), and (B)(2)(i).

[226] *In re Duke Energy Ohio*, Case No. 10-2586-EL-SSO, Opinion and Order at 52-56 (February 23, 2011).

[227] It should also be noted that while Duke now claims elimination of Rider LFA as benefit, the establishment of the same rider was a considered a benefit in Duke's current ESP. (Case No. 10-2586-EL-SSO, Duke witness Janson Supplemental Testimony at 11); OCC Ex. 48 at 16 (Hixon Direct).

Therefore, under the applicable standard Duke has not proven that (1) the aggregate of the price determined under R.C. 4928.143(B)(1) and the costs of the nine items determined under R.C. 4928.143(B)(2) is more favorable (quantitatively or qualitatively) than (2) the price and costs resulting from a CBP conducted pursuant to R.C. 4928.142, and as such should be rejected.

#### c. The ESP plan as proposed will not ensure that Duke's customers receive reasonably priced retail electric service.

The PUCO should protect Ohioans by modifying the Utility's proposed ESP to produce a reasonably priced SSO, in keeping with R.C. 4928.02(A). A modified approach would mean that, among other things, the PUCO should eliminate a number of Duke's proposed "single issue" distribution charges. Charges the PUCO should eliminate include charges for the Distribution Capital Investment Rider ("DCI") and Distribution Storm Rider ("DSR").[228] Claims for distribution expenses collected from customers, under these riders, should instead be presented in a rate case proceeding (under R.C. 4909.18), where the proposed costs can be reviewed for prudence along with other revenue, expense, and rate base items. This regulatory cost of service shell game, via the addition of riders, must come to an end.

The PUCO should also not require customers to subsidize CRES supplier bad debt expense. Instead the PUCO should order the Utility to implement a discount for receivable payments that fully covers CRES Suppliers' actual bad debt expense Utility customers should not have to pay CRES Suppliers' bad debt expenses.

[228] See OCC Ex. 45 at 3 (Mierzwa Direct).

The Utility's request to charge customers for what are excessive financing costs related to an overstated return on equity (9.84 percent) for capital investment (under Rider DCI) should also be rejected by the PUCO.[229] And the Utility's proposal for conducting the Significantly Excessive Earnings Test ("SEET"), where profits over 15 percent would be returned to customers (as recommended by Ms. Laub), should be rejected too. This test (in the 2008 law) is supposed to protect customers, albeit only minimally, from paying for too much utility profit. But Duke's proposal to retain earnings of up to 15 percent will minimize the return of funds to customers. It allows the utility to retain too much customer-funded profit

In addition, the PUCO should decline to add an $11 million cost premium to what residential customers will pay Duke. These charges emanate from Duke's proposal to allocate SSO auction results between customer classes based on a five Coincident Peak ("5CP") allocator. OCC witness Kahal testified that such an allocation method is unwarranted because the residential class load is stable thus reducing migration risk.[230]

The PUCO should also reject the Utility's proposed allocation of its new distribution riders. Instead the riders should be collected (if allowed and not rejected) from cost causers as recommended by OCC witness Yankel, thereby reducing the impact on Duke's residential customers.

As noted by OCC witness Williams, it is the policy of the State under R.C. 4928.02(A) to:

> Ensure the availability to consumers of adequate, reliable, safe efficient, nondiscriminatory, and **reasonably priced retail electric service**. (Emphasis added).

[229] See OCC Ex. 32 at 9-10 (Kahal Direct).

[230] OCC Ex. 32 at 22-23 (Kahal Direct).

This policy provision is important to customers, because adequate, reliable, safe, efficient, and nondiscriminatory electric service has little value to customers if they cannot afford that service.[231] Unfortunately for its customers, Duke does not seem focused on fulfilling this policy requirement in its ESP. Rather, Duke is focused on the collection method that enables it to most immediately charge customers in order to minimize the Utility's business risk of under-collection or less timely collection. This focus is evident in the lopsided nature of the Distribution Capital Investment ("DCI") Rider proposal.

The DCI Rider will provide Duke with accelerated collection of the capital costs associated with the Utility's investment in distribution programs. Numerous witnesses, including Duke's, acknowledged this point.[232] Any benefits for customers are much more elusive because Duke claims that service reliability will improve, but refuses to provide customers with any assurances that the DCI Rider investment will actually produce measurable service reliability improvements.[233] In addition, while Duke acknowledges that there will be some O&M cost savings, it has not offered a method to accelerate the

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[231] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Opinion and Order at 17 (December 19, 2008) where the PUCO noted the significant economic difficulties facing residential customers; at 18 where the PUCO eliminated commitments for generation and environmental reclamation; and at 25 where the PUCO rejected the Deferred Generation Cost Rider due to its negative impact on Ohio's economy. See also *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Opinion and Order at 30 (March 18, 2009), where the PUCO eliminated the inclusion of automatic non-FAC portion of generation rates.

[232] For example see: Tr. XIII at 3772-3773 (Turkenton), Tr. II at 393 (Wathen), Tr. VI at 1551 (Ziolkowski).

[233] Tr. VIII at 2157.

credit of those cost savings to customers. Instead, Duke will retain those savings until the next distribution rate case.[234]

When evaluating the ESP Application, the PUCO must consider affordability. See R.C. 4928.02(A). This is especially germane to residential customers because residential customers are the most likely to experience difficulty in paying their bills. OCC witness Williams testified about the affordability of electric service for Duke's customers and how the various aspects of the ESP would impact customer affordability.. Mr. Williams also identified the policy guideline, R.C. 4928.02(L), which requires the State through the PUCO to protect at-risk populations, which by definition should include low income customers.

Mr. Williams testified on the impact of the current rates on at-risk or low-income customers in the Utility's service territories in 2013. He testified that approximately 124,860 customers or up to 20.2 percent of Duke's total customers are significantly and negatively impacted by the current rates.[235] Mr. Williams noted that approximately 88,199 or 14.3 percent of the Utility's customers were actually disconnected for non-payment in 2013.[236] Duke did not dispute the disconnection numbers.

The number of Duke's customers who were disconnected for non-payment increased by 19.1 percent since 2011.[237] What is especially alarming about this is that Duke's disconnection rate is the highest in the state -- more than double every other electric utility except DP&L.[238] This disconnection rate is especially alarming in light of

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[234] Tr. IX at 2388.

[235] OCC Ex. 35 at 11 (Williams Direct).

[236] OCC Ex. 35 at 11(Williams Direct).

[237] OCC Ex. 35 at 11 (Williams Direct).

[238] OCC Ex. 35 at 13 Williams Direct).

Duke witness Henning's claims about the Utility having the lowest rates in Ohio.[239] The point to be made is that Duke's residential customers have experienced difficulty paying their bills currently; therefore, the PUCO should be mindful that the additional costs from the proposed DCI Rider could present increasing hardships for at-risk customers as the rates charged to customers continue to increase.

In addition to these levels of disconnections, another approximately 28,468 or (4.6 percent) of Duke's customers participated in the Percentage of Income Payment Plan ("PIPP") Plus plan under the current rate structure in 2013.[240] This represents a 4.8 percent increase in PIPP enrollments since just 2011.[241] In order to participate on the PIPP Plus program, a customer must be certified as a low-income customer having an income at or below 150 percent of the federal poverty guidelines.[242] PIPP Plus customers participate in the PIPP Plus program not because they want to, but because they are having significant difficulties paying their bills under the current rate structure.

Moreover, while PIPP Plus customers pay a percentage of their income for electric service, they remain financially responsible for the entire bill. Therefore, even if their actual payment does not increase after the ESP rates goes into effect, the PIPP Plus customers' ultimate financial responsibility is made larger for identical consumption. For these at-risk customers, any ESP rate increase will exacerbate the hardship.

Finally, Mr. Williams also noted that another approximately 13,193 or (2.1 percent) of the Utility's customers' participate in some type of payment plan in order to

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239 Duke Ex. 2 at 13 (Henning Direct).

240 OCC Ex. 35 at 11 (Williams Direct).

241 OCC Ex. 35 at 11 (Williams Direct).

242 See Department of Development eligibility rules at Ohio Admin. Code 122.5-3-02(B)(1).

be able to afford their electric service and avoid disconnection in 2013.[243] These customers are also negatively impacted by the Utility's current rates, and are pursuing payment plans in an attempt to keep their electric service affordable and to avoid service disconnection.

The affordability of Duke's rates is further called into question by the fact that the Utility's customers have experienced increases in their electric charges at twice the inflation rate over the last 10 years. Mr. Williams testified that in July 2004 a residential customer bill based on 750 KWH was $60.71 compared to $93.82 for the same bill in July 2014.[244] This is an increase of $33.11 or 54.5 percent in just a 10 year period.[245] This contrasts with the cumulative rate of inflation of only 26.1 percent over the same 10 year period.[246] Moreover, there is no evidence in the record that any benefits available to help at-risk customers have increased at a level comparable to the actual increases that customers have had to endure.

Mr. Williams indicated that Duke failed to provide any analysis to evaluate the impact of the various proposals in the ESP application on customer affordability. Mr. Williams testified that the impact from the DCI Rider -- about $100 per residential customer per year by 2018,[247] would only exacerbate the current unaffordability of rates for all customers and especially at-risk customers.

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[243] OCC Ex. 35 at 9 (Williams Direct).

[244] OCC Ex. 35 at 9 (Williams Direct).

[245] OCC Ex. 35 at 9 (Williams Direct).

[246] OCC Ex. 35 at 9 (Williams Direct).

[247] OCC Ex. 35 at 15 (Williams Direct).

### C. Distribution Related Issues

#### 1. Duke failed to show why customers should pay more money (and pay faster) through a Distribution Capital Infrastructure Rider.

Duke noted that its request for the DCI Rider was pursuant to R.C. 4928.143(B)(2)(h).[248] The statute permits a utility to request an infrastructure modernization plan that includes recovery of costs, "including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization."[249] The statute provides the PUCO with the discretion to permit DCI-type Riders. In exercising this discretion the PUCO should look to the factors provided by Mr. Mierzwa. Duke made no showing that the costs associated with the DCI-related programs are substantial that they are unpredictable or beyond the Utility's control. Duke also made no showing that it would experience financial distress if it had to recover the DCI-related costs through distribution base rate cases instead of through a Rider. The PUCO is not required to permit such Riders. Under the law, the Utility bears the burden of proving the need for and the overall reasonableness of the requested DCI Rider. Here, Duke has failed to demonstrate the reasonableness of implementing the DCI Rider, because the Utility failed to address these factors.

As noted by OCC witness Jerome Mierzwa, as a general matter, riders provide a utility with automatic recovery of certain charges from customers.[250] This has the effect of reducing the utility's business risk of under-collection and also potentially providing

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[248] Duke Ex. 1 at 10 (Application).

[249] R.C. 4928.143(B)(2)(h).

[250] OCC Ex. 45 at 4 (Mierzwa Direct).

the utility a perverse incentive to make uneconomic choices.[251] Because of these concerns, Mr. Mierzwa recommended that the PUCO limit the use of riders to situations where the costs at issue are substantial, unpredictable and outside of the utility's control.[252] He also recommended that a utility be required to show that its financial integrity would be compromised if the utility did not collect the charges through a Rider, rather than through base rates, where the charges would face greater scrutiny.[253] These limitations are reasonable and appropriate and should be relied on by the PUCO in its evaluation of the DCI Rider.

As proposed by Duke the DCI Rider would charge customers $22 million in 2015, $41 million in 2016, $20 million in 2017 and $21 million for the five-month period January 1-May 31, 2017, for a total of $104 million.[254] This amount could be even greater because Duke did not propose hard caps on the annual spending for DCI Rider programs. Under the Utility's proposal, the DCI rider would represent a significant charge to customers estimated at almost $100 per year for residential customers by 2018.[255] It is not unreasonable for customers to expect some quantifiable benefit from such a significant charge. Yet Duke has failed to demonstrate any quantifiable benefit for customers from the proposed charge. Without a measurable benefit, the additional charge from the DCI Rider does not result in reasonably priced utility service for customers and the PUCO should reject the Rider.

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[251] OCC Ex. 45 at 4 (Mierzwa Direct).

[252] OCC Ex. 45 at 4 (Mierzwa Direct).

[253] OCC Ex. 45 at 4 (Mierzwa Direct).

[254] OCC Ex. 45 at 8 (Mierzwa Direct).

[255] OCC Ex. 35 at 15 (Williams Direct) citing Duke Ex. 21 at 15 (Arnold Direct).

### 2. Duke has achieved improved its service reliability for customers without having an accelerated collection of such costs from customers.

In support of the DCI Rider, Duke witness Arnold only addressed one of the factors identified by OCC witness Mierzwa. Mr. Arnold argued that the DCI Rider is needed so that the Utility can maintain its financial stability while at the same time implementing new initiatives to enhance safety and reliability.[256] Despite making this claim, Duke did not demonstrate that its financial stability is contingent upon approval of the DCI Rider. In fact, there is no calculation or economic data in the record showing that Duke has experienced any financial distress because it has had to operate without a DCI Rider in the past few years.

Mr. Arnold made no showing that the magnitude of the DCI-related capital spending was so substantial that the Utility would experience financial distress in the future without a DCI Rider. In evaluating this factor, the PUCO should keep in mind that rejection of the DCI Rider does not mean that Duke does not get cost recovery of prudently incurred costs. It just means that Duke must rely on distribution rate cases for that recovery. Duke has made no showing that the difference in the time lag between distribution base rate cost recovery and DCI Rider cost recovery is sufficient to cause Duke to experience financial distress.

Mr. Arnold also made no claim, let alone any demonstration that the capital costs for the DCI-related programs would be unpredictable or outside the utility's control. Duke also failed to demonstrate that the proposed DCI Rider programs are new initiatives or that they would in fact, enhance safety and reliability in any quantifiable manner. In

[256] Duke Ex. 21 at 16 (Arnold Direct).

fact, the record shows that Duke has been able to maintain and improve its service reliability over the past few years with cost recovery through distribution base rate cases and without the benefit of a DCI Rider.[257]

More specifically, OCC witness Mierzwa noted that Duke's System Average Frequency Index (SAIFI"), the measure of the average number of service interruptions per customer per year, improved almost 35 percent from 1.49 interruptions per customer per year in 2005 to 0.98 interruptions per customer per year in 2013.[258] This compares to the PUCO SAIFI reliability standard for Duke of 1.24.

In addition, the System Average Interruption Duration Index ("SAIDI") the measure of the average time that each customer is interrupted has improved from an average of 130.03 minutes for the period 2005-2011 to 113.58 minutes for the period 2012-2013.[259] This represents an improvement of almost 13 percent.

Even Duke's Customer Average Interruption Duration Index ("CAIDI") that measures the average time required to restore service to a customer, which has not improved over the same time period, is better than the PUCO's standard for Duke of 118.14 minutes.[260] The average CAIDI for the period 2005 to 2011 was 97.49 minutes and has increased to 110.53 minutes for the period 2012-2013.[261] Yet even this decline in service reliability is explained by the Utility as a reflection of the improved SAIFI. As the Utility has been able to reduce the number of short term interruptions, the remaining

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[257] OCC Ex. 45 at 9 (Mierzwa Direct).

[258] OCC Ex. 45 at 10-11 (Mierzwa Direct).

[259] OCC Ex. 45 at 11 (Mierzwa Direct).

[260] OCC Ex. 45 at 11 (Mierzwa Direct).

[261] OCC Ex. 45 at 11 (Mierzwa Direct).

interruptions last longer, thus the increased CAIDI time from the improved SAIFI interruptions.[262]

In response to these service reliability improvements without a DCI Rider, Duke claimed that the service reliability improvements were the result of the SmartGrid initiative.[263] Again, despite these claims, Duke witness Arnold admitted that the Utility could not separate any service reliability improvements from the SmartGrid program from service reliability improvements attributable to other factors.[264] Thus, there is no evidence in the record supporting the Utility's claims that these improvements are attributed SmartGrid expansion.

Despite the Utility's preference for collecting costs from customers through the DCI Rider, Duke witness Arnold acknowledged that the Utility was able to accomplish the improved level of service reliability using distribution rate cases as the cost recovery mechanism, and without the benefit of a DCI Rider.[265] In addition, Mr. Henning admitted that Duke had been able to improve service reliability without the use of a DCI Rider[266] -- thus demonstrating that DCI Rider was not necessary to maintain and improve service reliability.

Having failed to demonstrate that there is a need for the DCI Rider, and having failed to address the factors that would indicate some need for a Rider, the Utility's request for the DCI Rider should be denied.

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[262] Tr. VIII at 2150-2152.

[263] Tr. VIII at 2153.

[264] Tr. VIII at 2154.

[265] Tr. VIII at 2145.

[266] Tr. VIII at 2144.

### 3. The PUCO should not permit customers to be charged for general distribution plant-related costs as part of the DCI Rider.

Duke proposed to include general plant, including communications or security related equipment as part of the DCI Rider.[267] Such inclusion would constitute a first step in improperly expanding the DCI Rider beyond the limitations in the statute that the charges be distribution system related.[268] The statute permits expenses associated with distribution infrastructure and modernization. It does not permit the Utility to seek general distribution expenditures such as general plant. The Utility's proposed inclusion of general plant would constitute the proverbial nose of the camel creeping under the tent. That is, including general plant-related charges would be nothing more than a first step in expanding the DCI beyond direct infrastructure investment that could eventually include all capital costs in the DCI Rider instead of collecting such costs through distribution rate cases.

Moreover, the proposed inclusion of general plant in the DCI Rider is contrary to the Legislature's intent in implementing distribution riders for other utilities. First, a review of R.C. 4928.143(B)(2) identifies the specific cost items recoverable in an ESP proceeding. General plant is not listed. In an appeal of an AEP Ohio ESP case, the Ohio Supreme Court noted that cost recovery in an ESP case is limited to the categories listed in the statute.[269] Therefore the DCI Rider should not include general plant. Second, no

[267] Tr. XIV at 3903.

[268] R.C. 4928.143(B)(2)(h).

[269] *In Re Application of Columbus Southern Power Company et al.*, 128 Ohio St.3d 512,519, 520 (2011).

other electric distribution utilities in Ohio with a distribution infrastructure rider include general plant in any of the charges included in the rider.[270]

OCC witness Mierzwa testified that it was unreasonable to include common general plant as part of the DCI Rider because general common plant is allocated to customers on various factors.[271] As Duke makes additional plant investment, common general plant allocated to electric distribution services is likely to increase -- with those costs collected in the DCI Rider.[272] Mr. Mierzwa noted that such increases could flow in the DCI rider even if the common general plant investment did not increase.[273] Mr. Mierzwa concluded that it was unreasonable for Duke too be able to increase rates to collect costs associated with additional investment when no additional investment has been made.[274] Customers should not have to pay for charges not actually incurred by Duke.

Staff witness McCarter testified against including general plant in the DCI Rider.[275] Ms. McCarter testified that:

> The overall nature of the assets recorded in the General and Common Plant accounts are more appropriately considered for 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 the DCI.[276]

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[270] However, AEP-Ohio recently requested expansion of its Distribution Infrastructure Rider in Case No. 13-2385-EL-SSO. The PUCO Staff opposed the expansion, similar to its position in the Duke case. Staff Ex. 17 at 3-4 (McCarter Direct).

[271] OCC Ex. 45 at 20 (Mierzwa Direct).

[272] OCC Ex. 45 at 20 (Mierzwa Direct).

[273] OCC Ex. 45 at 20 (Mierzwa Direct).

[274] OCC Ex. 45 at 20 (Mierzwa Direct).

[275] Staff Ex. 6 at 3 (McCarter Direct).

[276] Staff Ex. 6 at 3 (McCarter Direct).

Ms. McCarter added that among the types of general plant that should not be allowed in any DCI Rider are communications-type equipment and security equipment.[277]

#### 4. The expectations of Duke and its customers are not aligned regarding service reliability.

R.C. 4928.143(B)(2)(h) requires that as part of its evaluation of a DCI-type Rider, the PUCO:

> shall examine the reliability of the electric distribution utility's distribution system **and ensure that customers' and the electric distribution utility's expectations are aligned** and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.[278]

Duke argues that the DCI Rider complies with the requirements of R.C. 4928.143(B)(2)(h) because of what it claims are customers increased expectations regarding service reliability.[279] Duke witness Henning claimed that customer expectations regarding service reliability are increasing in an on-going basis.[280] He based that conclusion on what he claimed to be almost daily contacts with industrial, commercial and residential customers.[281] However, despite, admitting that there must be a balance between the cost of service and the level of service reliability,[282] Mr. Henning was not aware of whether the cost issue is raised when the Utility surveys its customers about service reliability.[283] This disconnection between the cost customers are willing to pay for

[277] Tr. XIV at 3903.

[278] R.C. 4928.143(B)(2)(h) (emphasis added).

[279] Duke Ex. 2 at 7 (Henning Direct).

[280] Tr. I at 125.

[281] Tr. I at 125.

[282] Tr. I at 126.

[283] Tr. I at 129.

service reliability and the level of service reliability demonstrates Duke's failure to align its self-serving expectations with those of its customers.

This disconnection is further demonstrated in the testimony of Duke witness Arnold who testified that when determining which infrastructure improvement projects to invest in that, "the Company will give consideration to customer expectations."[284] Apparently, those considerations do not extend to what customers are willing to pay for increased service reliability.

Mr. Arnold testified that the Utility attempts to quantify customer expectations by evaluating its performance through third-party national benchmarking and through "regional surveys generated by Duke."[285] More specifically, Mr. Arnold identified three different studies or surveys: 1) the annual J.D. Powers annual customer satisfaction studies, 2) its own customer regional Ohio and Kentucky surveys, and 3) PUCO directed quarterly surveys.[286] Duke had three customer surveys from which to determine customers' expectations for service reliability. Duke relied solely on the J.D. Power survey -- that did not survey Ohio customers. Duke rejected the results from the PUCO quarterly surveys -- that did survey Ohio customers.

Duke's reliance on the J.D. Power survey is also misplaced because the J. D. Power survey does not indicate whether customers would be willing to pay any additional charges in order to get better service reliability.[287] Asking customers if they want better

[284] Duke Ex. 21 at 8 (Arnold Direct).

[285] Duke Ex. 21 at 11 (Arnold Direct).

[286] Duke Ex. 21 at 11(Arnold Direct), Tr. VIII at 2179.

[287] OCC Ex. 45 at 14 (Mierzwa Direct).

service reliability without asking if they are willing to pay for better service reliability inappropriately ignores the cost portion of the equation.

Another fundamental problem with Duke relying on the J.D. Power survey is that the J.D. Power survey consists of national customers and NOT Duke's local Ohio customers. As noted on the J.D, Power survey attached to Mr. Arnold's testimony, the survey was for Midwest -- and not Ohio -- Results, Trends and Insights.[288] More specifically, the survey was for Duke Energy customers in other states, just not Duke Energy Ohio customers.[289] On the other hand, as noted by OCC witness Williams[290] and as admitted by Mr. Arnold,[291] the PUCO quarterly surveys that Duke did NOT rely on, are based on a survey of only Duke Energy Ohio customers.

Mr. Arnold explained that Duke does not rely on the PUCO quarterly surveys for planning purposes but that they are a useful tool to determine its customers' expectations regarding service reliability.[292] Mr. Arnold further testified that the PUCO quarterly surveys, "give us a picture of, specifically, in the surveys, the outage time and **what customers are willing to pay in addition to not have an outage.**"[293] Thus, Mr. Arnold admitted that even though the PUCO quarterly surveys indicate the customers' expectations regarding service reliability, Duke did not rely on them. Instead, Duke relied on the J.D. Power survey of non-Ohio customers to establish that its expectation and its customers' expectations on reliability are aligned.

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[288] Duke Ex. 21 Attachment 2 at 1 of 47 (Arnold Direct).

[289] Duke Ex. 21 Attachment 2 at 13 of 47, and Attachment 4 at 2 of 4 (Arnold Direct Testimony), OCC Ex. 35 at 24 (Williams Direct). See also Tr. VIII at 2209, 2212, 22114.

[290] OCC Ex. 35 at 24 (Williams Direct).

[291] Tr. VIII at 2216.

[292] Duke Ex. 21 at 14 (Arnold Direct).

[293] Tr. VIII at 2222 (emphasis added).

An examination of the PUCO required quarterly survey indicates that this is the only one of the Utility's three customer surveys[294] that actually asks only Duke Ohio, Ohio residential customers[295] if and how much they would be willing to pay in the form of higher electric rates in exchange for greater electric service reliability.[296] For example, MWA-5, the PUCO Reliability Residential Survey Results for Q1-14 Update specifically asked customers, during a system stress day, such as a hot summer day, how much they would be willing to pay to avoid a one hour service outage.[297] Between approximately 46 percent and 54 percent of customers indicated that they would not be willing to pay anything to avoid such an outage.[298] Another eight percent to -12 percent said they would be willing to pay less than $1.00 per month, and 12 percent to 21 percent indicated they would be willing to pay $1.00 to $4.99 per month.[299]

Thus between 66 percent and 87 percent[300] of Duke's residential customers indicated that they would be willing to pay less than $4.99 per month in order to avoid a one-hour service interruption. Of note, the $4.99 per month represents an annual charge of $59.88 which is considerably less than the $100 per customer per year[301] that the DCI Rider would charge customers by 2018 under the Utility's proposal.

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[294] Duke Ex. 21 at 11 (Arnold Direct), Tr. VIII at 2179.

[295] Tr. VIII at 2216.

[296] Tr. VIII at 2216.

[297] Duke Ex. 21 at Attachment MWA-5 page 17 of 36 (Arnold Direct).

[298] Duke Ex. 21 at Attachment MWA-5 page 17 of 36 (Arnold Direct).

[299] Duke Ex. 21 at Attachment MWA-5 page 17 of 36 (Arnold Direct).

[300] Duke Ex. 21 at Attachment MWA-5 page 19 of 36 (Arnold Direct).

[301] OCC Ex. 35 at 15 (Williams Direct).

When the same question was asked about avoiding a two-hour service outage, the number of customers willing to pay up to $4.99 per month was slightly less[302] Even at a four-hour service outage, 55 percent to 85 percent of residential customers would only be willing to pay less than $4.99 per month.[303] The same PUCO survey for the period Q1-13, attached to the testimony of OCC witness Williams, shows similar results -- that customers do not want to pay more for greater service reliability.

As noted by OCC witness Mierzwa, Duke's failure to consider cost as part of the equation in evaluating customers' expectations is magnified by the fact that in Duke's most recent distribution base rate case -- Case No. 12-1682-EL-AIR -- the testimony from Duke's customers at local public hearings identified electricity rates and not service reliability as the item that was of greatest importance to customers.[304] Customers' opposition to the distribution rate case increases is consistent with the results of the PUCO quarterly reliability surveys that show that most customers are not willing to pay additional costs in order to avoid limited service outages, let alone for service reliability improvements.[305]

Consistently since the last distribution rate case, Duke's customers have told the Utility of their concerns over the prices they pay for electric service. Through the PUCO required reliability surveys, Duke's customers have spoken loud and clear, again -- unfortunately Duke is ignoring them. The PUCO should not.

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[302] Duke Ex. 21 at Attachment MWA-5 page 19 of 36 (Arnold Direct).

[303] Duke Ex. 21 at Attachment MWA-5 page 21 of 36 (Arnold Direct).

[304] OCC Ex. 45 at 16 (Mierzwa Direct).

[305] Duke Ex. 21 at Attachment MWA-5 pages 17, 19, 21 of 36 (Arnold Direct).

### 5. Duke's proposal to charge customers for major storm expenses through a Distribution Storm Rider should be denied absent the establishment of a detailed process for review.

Duke's current distribution base rates include $4.4 million per year for major storm O&M expense recovery.[306] Duke proposes to establish a regulatory asset account to defer the costs above or below this amount in each calendar year. Duke proposes to collect the balance of this deferral in its next distribution rate case unless the cumulative balance exceeds $5 million at the end of a calendar year. Once the balance exceeds $5 million, as either a regulatory debit or regulatory credit, Duke will collect or return to customers the balance in the regulatory account through the distribution storm rider ("Rider DSR") it proposes in this proceeding.[307]

In its direct testimony filed in this proceeding, Duke did not provide any analysis of how (or whether) the amounts accumulated in the new regulatory accounts would be subject to audit or review by Commission and potential intervenors. OCC witness Mierzwa testified that absent a full review of the major storm O&M costs to be collected from customers in a base rate or other separate proceeding, Rider DSR should be denied.[308] As Mr. Mierzwa explained, absent detailed review, the potential for ineligible or improper costs to be collected under Rider DSR would be greater, with the concomitant potential to artificially increase Ohio consumers' rates.[309] Indeed, he noted Duke's previous attempt to recover $30.7 million in storm costs from consumers, the

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[306] See *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, et al., Opinion and Order (May 1, 2013).

[307] Duke Ex. 9 at 6-8 (Laub Direct); OCC Ex. 45 at 22 (Mierzwa Direct).

[308] OCC Ex. 45 at 23-24 (Mierzwa Direct); Tr. XI at 3059.

[309] OCC Ex. 45 at 24 (Mierzwa Direct).

majority of which the PUCO disallowed as improper or unsubstantiated.[310] Thus, absent a separate proceeding to allow for detailed review of Duke's storm costs, Duke's proposed DSR must be denied and major storm O&M costs recovered through base rate proceedings, as historically done.

Staff witness Hecker recommends that Duke's O&M major storm costs be subject to audit.[311] In addition, he recommends that once the regulatory asset account exceeds a positive or negative $5 million, Duke should be required to file a separate application with the PUCO to invoke a DSR charge (if the account is positive) or credit (if the account is negative).[312] In addition, Staff recommends that carrying charges not be assessed until the end of the year when the amount of the deferral (positive or negative) is determined and that no carrying costs should be included during the recovery period.[313]

On cross examination, Duke testified that it had no objection to filing an annual report of its major storm costs included in the regulatory asset account for Staff audit and intervenor review.[314] In addition, Duke confirmed that the determination to invoke the rider would not be made until year end, at which time carrying charges, at Duke's long-

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[310] OCC Ex. 45 at 24 (Mierzwa Direct); *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Opinion and Order (January 11, 2011), affirmed, *In re Application of Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509.

[311] Staff Exhibit 4 at 4 (Hecker Direct). Staff also recommends that it not conduct an audit until the balance of the regulatory account exceeds $5 million. OCC opposes a strict standard as the trigger of an audit. OCC recommends that the Commission have the discretion to conduct an audit at its discretion or upon motion setting forth reasonable grounds.

[312] Id.

[313] Id. at 5. Staff also recommends how Duke should "account" for various O&M major storm costs categories. OCC has no objection to Staff's proposed accounting recommendations, provided that such accounting procedures are subject to review in a proceeding in which Duke files its application to invoke Rider DSR.

[314] Tr. II at 539 (Wathen Jr. Cross); Tr. III at 776 (Laub Cross).

term cost of debt, would be applied whether the regulatory account was negative or positive.[315]

If Rider DSR is to be approved, the PUCO must provide clear guidelines under which the rider may be invoked. Consistent with OCC Mierzwa's alternative recommendation,[316] Staff's testimony, Duke's clarifications on cross examination, and the process ordered in other proceedings.[317] OCC proposes the following guidelines:

1. Duke must file an annual report with the PUCO and serve a copy on OCC after the end of each calendar year. Based upon that report, the Commission may, in its discretion or upon a motion setting forth reasonable grounds, order its Staff to conduct a formal audit of the regulatory asset account.

2. Carrying charges shall not be assessed until the end of the calendar year when the amount of the deferral (positive or negative) is determined and no carrying costs shall be collected during the recovery period.

3. Prior to invoking Rider DSR, Duke must file a separate application to determine prudence with the Commission in which interested parties will be given the opportunity to intervene and conduct discovery. In this proceeding, Duke will bear the burden of proving that the major storm O&M costs were prudently incurred and reasonable. Staff and interested parties shall be permitted to file comments within 60 days after the application is docketed. If any objections are not resolved through consensus between the party and Duke, the PUCO shall require that an evidentiary hearing be scheduled, with the opportunity to present testimony.

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[315] Duke Ex. 9 at 8 (Laub Direct); Tr. II at 539-540, 543 (Wathen Cross).

[316] OCC Ex. 45 at 25 (Mierzwa Direct).

[317] See *In re Application of Duke Energy Ohio, Inc.*, Case No. 09-1946-EL-ATA, Application at 4 (December 11, 2009), citing Case No. 08-709-EL-AIR; *In re Application of Columbus Southern Power Company and Ohio Power Company,* Case No. 11-346-EL-SSO, Opinion and Order at 68-69 (August 8, 2012).

### D. Cost Allocation and Rate Design Issues.

#### 1. Standard Service Offer supplier charges should be charged to customers in the same way they are charged by the SSO supplier, on an energy ($/kWh) basis. Doing otherwise would be unfair and harmful to residential customers.

Although Duke will be charged for generation by SSO suppliers on a $/kWh basis, Duke proposes to charge SSO customers, by class, on a different basis. This artificially raises the cost to residential customers. Specifically, Duke proposes to allocate between customer classes what it says are the SSO generation-related capacity costs on the basis of PJM's 5 Coincident Peak ("5 CP") methodology.[318] It proposes to charge this portion of SSO supplier charges through its Retail Capacity ("RC") Rider.[319]

But it is not appropriate to allocate and charge customers SSO supplier charges on a capacity cost basis when such charges are all billed to Duke on an energy basis. As OCC witness Yankel testified, "the Utility does not pay any directly-billed capacity costs in order to supply its SSO load. Thus, it is not appropriate to charge customers for these costs on any basis other than the manner in which they are charged to the Utility, i.e. as an energy charge ($/MWh)."[320] Duke's proposal is inconsistent with the principle of cost causation because the charges Duke proposes to allocate on the basis of PJM peak demand are not billed to Duke by SSO suppliers on such basis. Because the SSO suppliers do not bill these charges in this manner, it is not appropriate for Duke to bill its customers on this basis.

[318] Duke Ex. 18 at 9 (Ziolkowski).

[319] Duke Ex. 18 at 9 (Ziolkowski).

[320] OCC Ex. 46 at 3 (Yankel Direct).

Duke witness Ziolkowski acknowledged that Duke is billed by SSO suppliers on a $/MWh basis. He stated that SSO suppliers charge a "single dollar per megawatt price for the term -- for the duration of that auction product around the clock."[321] Mr. Ziolkowski also acknowledged that Duke does "not know" nor "from a retail rate making standpoint" is Duke "particularly necessarily concerned with exactly the capacity price as charged to the auction winners by PJM."[322] Thus, Duke's proposed Retail Capacity Rider construct is merely an estimate of what SSO suppliers may pay for capacity – it is a fiction. As OCC witness Yankel testified, "Duke does not incur any direct or known generation-related capacity costs."[323]

Duke's proposal to allocate an assumed level of SSO supplier's generation-related capacity costs to customer classes on the basis of PJM's 5 CP method is inappropriate for other reasons as well. First, Duke's proposal in this case is notably inconsistent with the 12 CP method, which the Utility proposed as an allocation method for generation-related capacity costs in its last ESP proceeding, Case No. 11-3549-EL-SSO.[324] Duke's proposal of a 12 CP method for allocation in the last ESP case was itself inconsistent with PJM's 5 CP method that PJM was using at that time.[325] Rather, a combined energy and capacity product is procured from the SSO wholesale supplier on an energy only basis and, thus, "there are no generation-related capacity costs to be allocated."[326]

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[321] Tr. VI at 1566 (Ziolkowski Direct).

[322] Tr. VI at 1566 (Ziolkowski Direct).

[323] OCC Ex. 46 at 7-8 (Yankel Direct).

[324] OCC Ex. 46 at 5 (Yankel Direct).

[325] OCC Ex. 46 at 7, 9 (Yankel Direct); Tr. VI at 1565 (Ziolkowski Direct).

[326] OCC Ex. 46 at 7-8 (Yankel Direct).

Second, while there may have been some basis in Duke's last ESP case (the currently- effective ESP rates) to have a capacity cost rider because Duke was a Fixed Resource Requirement ("FRR") entity, Duke will no longer be an FRR entity as of the rates established beginning June 1, 2015 in this ESP.[327] While Duke is self-supplying its own capacity requirements during the current ESP period, it will no longer be doing that as of June 1, 2015.[328] Thus, Duke's retail capacity cost rider was "largely predicated upon its costs",[329] i.e. the capacity cost of self-supplying. That will no longer be the case when rates from this proceeding go into effect on June 1, 2015 as Duke "is terminating its FRR and is fully going to market for both energy and capacity."[330] With this significant shift in resource supply, "any attempt to try to relate [SSO suppliers'] all-inclusive energy prices to the previous FRR is meaningless."[331]

Third, despite the fact that there may have been a greater justification for using a capacity cost rider in Duke's last ESP, the Stipulation in that case actually moderated the effect of the capacity cost allocation Duke had proposed in its filing in that case.[332] Specifically, although Duke's filing proposed to allocate 46.76 percent of Duke's capacity costs to residential customers, the approved Stipulation in that case, although it has no precedential value, reduced the residential allocation to 39.12 percent and brought it closer to the energy allocation.[333]

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[327] OCC Ex. 46 at 6-7 (Yankel Direct).

[328] OCC Ex. 46 at 6 (Yankel Direct).

[329] OCC Ex. 46 at 6-7 (Yankel Direct), citing Duke Ex. 18 at 9 (Ziolkowski Direct).

[330] OCC Ex 46 at 7 (Yankel Direct).

[331] OCC Ex 46 at 7 (Yankel Direct).

[332] OCC Ex. 46 at 5-6 (Yankel Direct).

[333] OCC Ex. 46 at 5-6 (Yankel Direct).

Fourth, Duke's attempt to unbundle SSO supplier charges in order to pass them on in a different way to retail customers is unprecedented.[334] Traditional cost-causation principles provide that costs should be allocated "on the same basis that [the utility] incurs those costs."[335] Traditional cost causation principles do not try to "figure out how a supplier incurred costs" and allocate them according to such an investigation.[336] Furthermore, Duke's proposal only looks at certain costs SSO suppliers incur without looking at other costs.[337] As Mr. Yankel testified, Duke did not look at "SSO suppliers' labor costs, its operations and facilities costs, its profit, and many other costs [that] go into the competitively-bid price charged to customers on an energy basis."[338] It is inappropriate for Duke "to attempt to separate out one cost factor from the flat energy price that is paid."[339] Indeed, the whole approach is inconsistent with cost-causation principles.

Fifth, notwithstanding the fact that Duke's proposed allocation of generation-related capacity costs is inconsistent with cost-causation principles, Duke failed to provide the underlying load research data necessary to substantiate its proposed allocation method.[340] As OCC witness Yankel testified, Duke's allocation was based on load research sample data that it did not produce because to do so would impose an undue burden on it.[341] Moreover, this sample data is only as good as Duke's sampling

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[334] OCC Ex. 46 at 10-11 (Yankel Direct).

[335] OCC Ex. 46 at 10 (Yankel Direct).

[336] OCC Ex. 46 at 10 (Yankel Direct).

[337] OCC Ex. 46 at 10 (Yankel Direct).

[338] OCC Ex. 46 at 10 (Yankel Direct).

[339] OCC Ex. 46 at 10-11 (Yankel Direct).

[340] OCC Ex. 46 at 13-14 & n. 11 (Yankel Direct).

[341] OCC Ex. 46 at 13-14 & n. 11 (Yankel Direct).

methodology. And Duke did not demonstrate that its methodology was representative of its customer population as a whole.[342]

Very significantly, Duke's load research data was demonstrated to be substantially inaccurate in Duke's last electric rate case at Case No. 12-1682-EL-AIR.[343] In that case, peak loads predicted by the load research data were more than 110 percent of the actuals for seven out of 12 months of the study year.[344] And all of the load research data was "biased to be higher than actual usage."[345] OCC witness Yankel testified that the "2011 load research data was highly inaccurate."[346] Duke has not presented any evidence in this case that the data utilized to allocate estimated RC Rider costs is any more accurate. Thus, even if such an allocation could be supported by cost-causation principles (which it could not), there is no reliable way to allocate these costs.[347]

Sixth, OCC witness Yankel identified another inaccuracy – that the calculation of "capacity cost to recover" underlying Rider RC includes both Duke Energy Ohio and Duke Energy Kentucky retail loads.[348] He testified that this "capacity cost to recover" is then divided by only the Ohio jurisdictional load, resulting in "assigning to Ohio far more than its share of those theoretical costs."[349] Mr. Yankel testified that Duke has neither

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[342] OCC Ex. 46 at 13 & n. 11 (Yankel Direct).

[343] OCC Ex. 46 at 14 (Yankel Direct).

[344] OCC Ex. 46 at 14, Table 1 (Yankel Direct).

[345] OCC Ex. 46 at 14 (Yankel Direct).

[346] OCC Ex. 46 at 15 (Yankel Direct).

[347] OCC Ex. 46 at 15 (Yankel Direct).

[348] OCC Ex. 46 at 15-16, citing Response to Interrogatory No. OCC-INT-11-322-F (Yankel Direct).

[349] OCC Ex. 46 at 16 (Yankel Direct).

made the correct calculation in this case nor provided the information necessary to make that calculation.[350]

In light of all of these issues, Duke's proposed Rider RC should be rejected and all SSO supplier charges should be allocated on an energy basis ($/MWh) to Duke's retail customers.[351] Neither Duke nor any other party presented rebuttal testimony to Mr. Yankel. OCC's position on this issue should be adopted.

### 2. Charges to customers for riders DCI and DSR, if approved, should be structured in a manner that does not harm residential customers by charging them a higher proportion of such costs.

Duke proposed to allocate Rider DCI and Rider DSR based on total base distribution revenues approved in the Utility's most recent rate case. But this allocation would unfairly charge residential customers a higher proportion of such costs.[352]

Although Duke has not projected any Rider DSR costs, Duke's proposed allocation of Rider DCI would improperly charge residential customers approximately $12.8 million more than their fair share of such costs over the ESP period if such rider were to be approved.[353] If Rider DSR was to be approved, residential customers would similarly be charged an inappropriate level of such costs. This is because the method selected by the Utility -- allocating on total base distribution revenues -- is a method that does not follow cost causation principles.

[350] OCC Ex. 46 at 16 (Yankel Direct).

[351] OCC Ex. 46 at 17 (Yankel Direct).

[352] OCC Ex. 46 at 19, 21 (Yankel Direct).

[353] As shown on pages 20-21 of OCC witness Yankel's testimony, under Duke's proposed total distribution revenue allocator, residential customers would pay 56.4 percent of Rider DCI, or $153,408,000 ($272 million * 56.4 percent). Mr. Yankel's net distribution plant allocator would allocate residential customers $140,624,000 ($272 million * 51.7 percent). Consequently, residential customers should be allocated $12.8 million less.

OCC witness Anthony Yankel testified that Duke's proposal to allocate Rider DCI on total base distribution revenue allocates costs inappropriately by including amounts related to expenses that "have nothing to do with the distribution plant investment costs that are the subject of the Utility's proposed DCI Rider."[354] Mr. Yankel explained that Duke's allocator, while it "captures the capital costs of the distribution equipment costs to be allocated, [ ] it also captures a great deal more, specifically FERC expense accounts 580-932." These accounts include expenses such as "meter reading and billing," that, as noted above, "have nothing to do with the distribution plant investment costs that are the subject of the Utility's proposed DCI Rider."[355] The result is that Duke's proposed allocation factor, while simple, includes "a host of expenses that are not related to the allocation task at hand" and do not reflect cost causation principles.[356]

OCC witness Yankel testified that the capital costs to be allocated should "follow the same cost causation principles that are incorporated in the Utility's cost of service study for similar capital costs."[357] He recommended that the "net plant allocation factors for each customer grouping that came out of the Utility's cost-of-service study in its last distribution rate case (12-1682-EL-AIR) be utilized."[358]

Mr. Yankel's proposed allocation factors for Rider DCI are taken from Schedule E-3.2, page 20 line 38 from Case No. 12-1682-EL-AIR and are shown on pages 20-21 of his testimony in this proceeding.[359] They should be adopted and applied to any prudently

[354] OCC Ex. 46 at 19 (Yankel Direct).

[355] OCC Ex. 46 at 19 (Yankel Direct).

[356] OCC Ex. 46 at 19 (Yankel Direct).

[357] OCC Ex. 46 at 20 (Yankel Direct).

[358] OCC Ex. 46 at 20 (Yankel Direct).

[359] OCC Ex. 46 at 20-21 (Yankel Direct).

incurred capital costs that are approved for collection and actually incurred and charged through Rider DCI.

Similarly, Mr. Yankel testified that Duke's proposed allocation of any Rider DSR costs based on total base distribution revenues is "inappropriate because it is not consistent with cost-causation principles."[360] He testified that Duke's proposed allocator includes Customer Accounts Expenses associated with FERC Accounts 901-912, which includes meter reading and billing."[361] Additionally, he testified that "there are a portion of A&G expenses that are associated with FERC Accounts Customer Accounts Expenses and Customer Service Expenses that should not be included in the development of an allocation factor."[362] Finally, Mr. Yankel emphasized that "[b]ecause DSR costs are all distribution O&M expenses related, the inclusion of distribution plant costs in the development of an allocation factor is equally inappropriate."[363]

Mr. Yankel recommended using the "Distribution O&M Expense Ratios" from Duke's cost-of-service study from its last distribution rate case, Case No. 12-1682-EL-AIR, to allocate any DSR Rider costs the PUCO may approve.[364] He testified that this "makes far more sense and is better reflective of cost-causation than using only total distribution revenue and it is easily calculated." The impact of this change is significant for the residential class, as well as being appropriate. It reduces the allocation of Rider DSR to the residential class from 56.4 percent under the Utility's proposal to 46.2 percent.

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[360] OCC Ex. 46 at 21 (Yankel Direct).

[361] OCC Ex. 46 at 21-22 (Yankel Direct).

[362] OCC Ex. 46 at 22 (Yankel Direct).

[363] OCC Ex. 46 at 22 (Yankel Direct).

[364] OCC Ex. 46 at 23 (Yankel Direct).

Neither Duke nor any other party submitted Rebuttal Testimony in response to Mr. Yankel's recommendations. The PUCO should adopt Mr. Yankel's recommendations on these issues.

**3. Duke's Interruptible Service should be eliminated consistent with the Utility's proposal. This would get rid of the subsidy charged to other customers that supports the interruptible service rate.**

Duke proposes to eliminate the offering of interruptible service. OCC agrees. This is especially appropriate because Duke will no longer be responsible for meeting generation demand as of June 1, 2015. Additionally the interruptible credit would be an inappropriate subsidy paid for on the backs of customers

As a result of the Stipulation in Duke's last ESP case at Case No. 11-3549-EL-SSO, Duke offered interruptible service for transmission voltage customers with loads greater than 10 MW.[365] This service offering was clearly intended to terminate at the conclusion of the current ESP on May 31, 2015. This was clear because the offering of this service was tied to Duke's obligation as a FRR entity. Section IX-N of the Stipulation specifically declared that interruptible customers acknowledge "that Duke Energy Ohio may use such interruptible load in Duke Energy Ohio's FRR plan * * *."[366] The Stipulation also provided that Duke "will terminate its election of an FRR plan and provide written notice by March 2, 2012, to the PJM Office of the Interconnection of its intent to participate in the RPM and base residual auction ("BRA") for the 2015/2016 planning year."[367] This meant that generation capacity utilized to serve Duke's retail

[365] OCC Ex. 46 at 27 (Yankel Direct), *citing* Case No. 11-3549-EL-SSO, Stipulation, at. 32-33 (Oct. 24, 2011).

[366] OCC Ex. 46 at 27 (Yankel Direct).

[367] OCC Ex. 46 at 28 (Yankel Direct), *citing* Case No. 11-3549-EL-SSO, Stipulation, at 13(Oct. 24, 2011).

customers would be obtained through the PJM auction mechanism and would no longer be directly self-supplied by Duke beginning June 1, 2015.

Section IX-N of the Stipulation in the ESP was even more explicit in limiting interruptible service to the term of the ESP. There it ties interruptible service to the term of the ESP, by stating such offering as "During the term of this ESP, . . ." Furthermore, in October 2013 and January 2014, Duke provided notice to its interruptible customers that it intends to terminate the interruptible rate program effective May 31, 2015.[368]

OCC witness Yankel explained that with Duke giving up its FRR status, "it will no longer be responsible for meeting its own generation capacity needs" and "[i]n such a situation, an interruptible load has essentially no value to the Utility."[369] While utilities which continue to offer generation service may still obtain value from interruptible service, distribution-only utilities such as Duke would obtain no benefit from a customer interruption.[370] In such a circumstance, any "interruption credit" given by a distribution-only utility should be viewed as a "subsidy."[371] Customers must go elsewhere to sell their interruptible benefit.[372]

As Mr. Yankel explained, eliminating the interruptible credit will not affect the reliability of Duke's service after it is no longer an FRR entity:

> Interruptible loads are just as important now, within the PJM system, as they were before – it is just a question of who has the responsibility for meeting the reliability requirements and who is going to pay for this reliability. Duke no longer has that

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[368] OCC Ex. 46 at 29 (Yankel Direct), *citing* Duke Response to OEG-DR-02-011.

[369] OCC Ex. 46 at 29 (Yankel Direct).

[370] OCC Ex. 46 at 29 (Yankel Direct).

[371] OCC Ex. 46 at 29 (Yankel Direct).

[372] OCC Ex. 46 at 30 (Yankel Direct).

> responsibility and therefore Duke's customers should not pay for interruptible load that provides little, if any, value to the Utility.[373]

Regardless of how issues regarding PJM's demand response program are resolved, the continuation of Duke's current interruptible program does not make sense because the value of that program to Duke's customers depends on whether Duke experiences reduced generation capacity costs. Since Duke will no longer provide generation service or retain generation capacity, Duke itself will no longer need to curtail its customers' loads as a backup to its own generation service.

Furthermore, there would be no agreement between interruptible credits and actual reduced generation charges for interruptible or curtailed usage, because there is no mechanism to pass these savings along through the fixed auction rates that have been, or will be established. It is only PJM's demand response program that currently determines a market value of a customer's willingness to curtail. In the absence of such a program, any demand response from large customers cannot be fairly valued or such value passed through to Duke's customers.

Consequently, Duke's interruptible service and the associated credit should be terminated as Duke has proposed.

#### 4. If any PSR is approved, it should be allocated on a $/kWh basis to all customers as proposed by Duke.

If Rider PSR is approved in any form, contrary to OCC's recommendations otherwise, OCC supports Duke's proposed allocation of the PSR on a $/kWh basis as discussed by OCC witness Yankel.[374] Mr. Yankel explained that the PSR is basically a

[373] OCC Ex. 46 at 30 (Yankel Direct).

[374] OCC Ex. 46 at 24-26 (Yankel Direct).

"profit (or loss) sharing mechanism."[375] Although the calculation of the net charge or credit from the PSR is tied to the profitability of Duke's OVEC interest, no capacity or energy used to serve customers will come from (or be displaced by) the OVEC sales.[376] Thus, as Mr. Yankel testified, there is no basis for allocating the PSR costs differently based on any specific OVEC cost or revenue component.[377]

Indeed, the proposed PSR hedge "would work by selling energy, but not necessarily capacity."[378] As Mr. Yankel testified, the PSR proposal "fits what historically has been known as 'opportunity sales,' which are essentially made with no long-term commitment but are 'as, if and when' energy sales and price."[379] It is typical, and appropriate, to allocate such sales on the basis of energy and the PUCO should do so here.[380]

### E. The PUCO should deny the RESA proposal to replace the standard service offer, as the default service, with a market energy plan that could lead to customer confusion and ultimately higher electric prices for consumers.

R.C. 4928.141 requires utilities to provide an SSO option for customers. RESA's market energy plan ("MEP") would have the effect of eroding the benefit of the SSO option for customers by artificially inducing customers to choice. Absent a change in the law, the PUCO should not adopt the MEP that would erode the SSO.

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[375] OCC Ex. 46 at 25 (Yankel Direct).

[376] OCC Ex. 46 at 25 (Yankel Direct).

[377] OCC Ex. 46 at 25 (Yankel Direct).

[378] OCC Ex. 46 at 25-26, *quoting* Duke Ex. 6 at 14 (Wathen Direct).

[379] OCC Ex. 46 at 26 (Yankel Direct).

[380] OCC Ex. 46 at 26 (Yankel Direct).

In proposing a the MEP,[381] RESA presented no documentation in the form of analysis, surveys or studies to support its proposal.[382] Instead, RESA presented only five pages of testimony that offered only a skeletal outline. Moreover, RESA witness Pickett was not able to provide details about the MEP and its implementation, instead offering a proposal to fill in details after the PUCO has approved the MEP.[383] The MEP is inadequate and should be rejected.

As proposed, the MEP would require Duke to market the MEP to all customers that contact the Utility except for termination or emergency callers.[384] The MEP would provide a three percent discount to the applicable price-to-compare -- or the Standard Service Offer.[385] The MEP would be for a period of six months, and it would have no early termination fee.[386]

Beyond these three basic components, RESA witness Pickett explained that all other aspects of the MEP would be determined at some point in the future by a working group made up of interested stakeholders.[387] Neither RESA nor Mr. Pickett provided any details about the terms and conditions that would govern the MEP contracts.

In addition, Mr. Pickett's testimony offers no details provided regarding the process that would govern the working group as it attempts to fill in critical components of the plan. For example, would the working group have to reach consensus or would a

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[381] RESA Ex. 4 (Picket Direct).

[382] For example see, Tr. XIII at 3646.

[383] For example see Tr. XIII at 3652-3654

[384] RESA Ex. 4 at 9 (Pickett Direct).

[385] RESA Ex. 4 at 8 (Pickett Direct).

[386] RESA Ex. 4 at 8 (Pickett Direct).

[387] RESA Ex. 4 at 12 (Pickett Direct).

simple majority rule? Also, the makeup of the working group would be critical depending on how decisions were made. If a majority would decide issues, then the marketers could determine outcomes through sheer numbers of interested participants.

Even for the items that RESA proposed as firm factors, there is no explanation or support for the proposal. For instance, Mr. Picket's testimony provided no explanation for the three percent discount or the six month term period. Mr. Pickett provided no analysis to support these aspects of the proposal.

RESA's proposal includes a $25 per-customer fee to be charged to marketers to cover the costs to a utility to enroll customers in the MEP.[388] Again, Mr. Pickett's testimony included no analysis or documentation supporting calculation of the $25 fee demonstrating that it was an accurate reflection of costs or reasonable.[389]

The lack of analysis supporting the three percent discount is problematic even if this three percent discount is a benefit for customers. The problem is that the very same CRES provider that participates in the MEP could be offering greater discounts on the apples-to-apples chart. But customers would have the MEP rate more aggressively marketed to them by the Utility -- thus lending to the MEP offer. This scenario would put the Utility at risk for customer frustration or anger that the customer signed up for an offer that the Utility marketed, that may not be the best offer available, perhaps even from the same CRES supplier. The same marketer could be offering a greater discount on the apples-to-apples chart, but customers would be marketed a three percent discount by the Utility in the MEP.[390] The Utility should not be put in that position.

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[388] RESA Ex. 4 at 11 (Pickett Direct).

[389] RESA Ex. 4 at 11 (Pickett Direct).

[390] Tr. XIII at 3662-3664.

Another key shortcoming of the MEP is that as currently proposed customers would be subject to automatic renewal at the end of the initial six month term.[391] Such automatic renewal is unreasonable especially when the three percent discount is nothing more than a teaser rate. Under the RESA proposal a customer could be automatically renewed at a significantly higher rate than the initial three percent discount.[392] Although a customer could terminate a renewal contract (without any early termination fee[393]) the termination would only occur **after** a customer was charged the higher rate for at least one month. The RESA proposal exposes customers to this potential harm.

RESA claimed that a selling point of the MEP is that it provides a greater level of education for customers because customers would be actually enrolled and participate in choice.[394] Under this form of "education," a customer could learn about electric choice if the customer signed up for a MEP contract and then was automatically renewed at a significantly higher rate. Only after realizing that the rate paid for a period of time --again for at least one month -- was greater than the three percent discount the customer will have "learned" whether they liked or did not like choice. This "education" could prove to be very costly for customers.

In sum, RESA's proposal for a market energy plan should be denied. Changing to the market energy plan would cause customer confusion and frustration. This potential for customer confusion combined with the inadequate elements (or lack of elements) of the plan as described above, make it unreasonable for the PUCO to approve the plan.

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[391] Tr. XIII at 361. Despite claims that the MEP does not include automatic renewal, Ohio law currently permits automatic renewal.

[392] Tr. XIII at 3654.

[393] RESA Ex. 4 at 9 (Pickett Direct).

[394] Tr. XIII at 3651.

### F. The PUCO should deny the RESA proposal for the enrollment of customers "from your wallet" without the need for an account number which could put customers at greater risk.

RESA also proposed an option to permit customers to enroll in electric choice from their wallet.[395] Under RESA's proposal, customers would not have to have their account number to enroll with a marketer. Instead customers could simply use information already in their wallet.[396] Of course if a customer carried his or her account number in a wallet they could in fact enroll from their wallet.

RESA raised this same issue in the PUCO Retail Market Investigation (Case No. 12-3151-EL-COI). Although the PUCO acknowledged the difficulty of enrolling customers who do not have immediate access to their account number, the PUCO did not adopt RESA's proposal and Staff's recommendation:

> Initially, the Commission agrees with Staff's recommendation that, at present, only customers should be able to authorize the release of their customer account numbers by an EDU. The Commission finds that privacy concerns and slamming prevention necessitate this finding at this time. However, the Commission acknowledges the concerns voiced in this proceeding regarding the difficulty of enrolling customers who may not have immediate access to an account number when attempting to enroll with a CRES provider.[397]

Despite acknowledging those concerns, the PUCO declined to adopt the RESA proposal.[398] The PUCO recognized that this same difficulty acts to protect customers from illegal slamming.[399] The requirement of an account number serves to protect

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[395] RESA Ex. 4 at 6-7 (Pickett Direct).

[396] RESA Ex. 4 at 4-5 (Pickett Direct).

[397] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 35 (March 26, 2014).

[398] Id.

[399] Id.

customers because access to account numbers is limited. This limitation reduces the opportunities for slamming. RESA has presented no additional or compelling evidence in this case, and the PUCO should again reject the proposal.

RESA's proposal also does not address the fact that in addition to an account number a customer's bill contains other important information for a customer to make an informed decision about electric choice. Among the other information is the price to compare, and the customers' specific usage data and history. Thus if a customer does not have this information with them, they are at risk of making an uninformed decision? The requirement of an account number to sign up for electric choice has the additional safeguard of making the additional information from a bill available to the customer when making the decision.

Finally, RESA went as far as to argue that requiring customers to have their account number was a barrier to Choice.[400] However, in making this argument, RESA submitted no analysis or documentation to support the claim. RESA presented no economic analysis to demonstrate that customers are harmed if they cannot sign up with a marketer because they did not have their account number with them at any particular point in time.[401] RESA presented no documentation of this, instead relying on anecdotal stories instead of any evidence.[402] The PUCO should reject the proposal.

### G. Duke's proposed reservation of the right to unilaterally terminate its ESP one year early is unreasonable and unlawful

In its ESP Application, Duke "reserves the right" to terminate its three-year ESP one year early, May 31, 2017, "in the event there is a substantive change in either Ohio or

[400] Tr. XIII at 3654.

[401] Tr. XIII at 3656.

[402] Tr. XIII at 3656.

federal law that affects SSOs or rate plans concerning the same."[403] Duke's proposal is not supported by any other party to this proceeding (including Staff), is unreasonable and unlawful, and must be denied.

### 1. Duke's proposal is unlawful because an ESP must be of a determinate length for a utility to sustain its burden of proof under R.C. 4928.143(c)(1).

As a threshold matter, a utility has the burden of proving that its proposed ESP is more favorable in the aggregate than an MRO.[404] To carry that burden, the utility is required to include in its application sufficient documentation and analyses of the effect of the ESP for its duration.[405] In this proceeding, while Duke is seeking a three-year ESP, the Utility is also asking the PUCO to conditionally approve a two-year ESP. Although Duke provided analyses to attempt to support its proposed three-year ESP, it failed to provide any analyses related to an ESP of only two years in length.[406] Without the proper analyses, the PUCO cannot make its statutorily mandated comparison of the two-year ESP to an MRO of a like term. Because Duke has failed to carry its burden that a conditional two-year ESP is more favorable than an MRO, its proposed reservation of the right to unilaterally terminate must be denied. Indeed, if Duke is concerned with events occurring after the initial two years of its proposed three-year ESP, it simply should have filed a two-year ESP, rather than seeking this unlawful "regulatory out" at the expense of Ohio's consumers, as discussed subsequently.

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[403] Duke Ex. 1 at 16 (Application).

[404] R.C. 4928.143(C)(1).

[405] OAC 4901:1-35-03(C).

[406] Tr. II at 437.

### 2. **Duke's proposal is unlawful because the general assembly has provided neither Duke nor the PUCO the ability to terminate an ESP for the reasons Duke requests.**

It is axiomatic that the PUCO, as a creature of statute, can exercise only that authority given it by the General Assembly.[407] Moreover, in the highly regulated electric industry in which ESPs are created by statute, the regulated utility that chooses to implement an ESP must abide by the legislative scheme enacted.

In enacting R.C. 4928.143, the General Assembly provided the PUCO with the authority, as stated previously, to approve an ESP for a determinate period of time. However, the General Assembly severely restricted the PUCO's and the utility's ability to terminate an implemented plan. The PUCO may do so only when the ESP is for a term of four or more years, and the mandated four-year review shows that the ESP is no longer more favorable than an MRO, or that the utility's earning exceed the SEET ROE Threshold and the PUCO orders a refund.[408] A utility may terminate a plan with a determinate term of three years or less only if the PUCO finds its earnings exceed the SEET ROE threshold and orders the utility to refund the excess to its customers.[409] The comprehensive scheme for regulating ESPs provides no other reasons for their early termination. Thus, the PUCO, as a creature of statute, is without authority to grant Duke's request for authority to unilaterally terminate its 3-year ESP after two years in the event

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[407] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 620 N.E.2d 835 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820 (1981); and *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051 (1980).

[408] R.C. 4928.143(E).

[409] R.C. 4928.143(F). See, also, R.C. 4928.143(C)(2)(a), which permits a utility to withdraw, and thus "terminate," an "application" if the PUCO modifies it, which is distinguishable from terminating an implemented ESP.

of a "substantive change" in law. Duke's only recourse is through the General Assembly. Its proposal made in this proceeding clearly is unlawful and must be denied.

### 3. Dukes' early termination proposal is unreasonable because it likely will increase SSO and shopping customers' price for electric supply.

As stated previously, in its application Duke "reserves the right" to terminate its three-year ESP one year early "in the event there is a substantive change in either Ohio or federal law that affects SSOs or rate plans concerning the same."[410] Suppliers will not be aware of this change when bidding on SSO supply or entering into contracts as CRES suppliers. Therefore, Duke's proposal will shift the risk and costs of changes in law to suppliers and could translate into higher prices for customers.

Duke proposes to secure electric supply for the SSO through a Competitive Bidding Process ("CBP").[411] Under the proposed CBP, two auctions will be held each year and will include products of various contractual lengths.[412] The first set of auctions will have products of one, two and three years (June 2015 through May 2018). The second set will have products of one and two years (June 2016 through May 2018), and the third set will have products of one year (June 2017 through May 2018).[413] Thus, in the first four auctions suppliers will be bidding on products that extend into the third delivery year of Duke's ESP (June 2017 through May 2018), without suppliers knowing

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[410] Duke Ex. 1 at 16 (Application).

[411] Duke Ex. 4 at 2 (Lee Direct).

[412] Id. at 8.

[413] Duke Ex. 1 at Attachment B (Application).

whether changes in Ohio's laws would occur that could cause Duke to exercise its proposed right to terminate its plan early.[414]

Duke would require the successful bidders to enter into the Master Supply SSO Agreement ("MSSA").[415] The MSSA would bind successful suppliers to provide electric supply for the third delivery year of the ESP[416] and also permit Duke to terminate the MMSA for the June 2017 to May 2018 delivery period without recourse by the suppliers.[417] Suppliers,[418] the PUCO's Staff,[419] and even Duke witness Lee[420] acknowledge that the uncertainty and instability wrought by the early termination provisions of the MSSA (without recourse) would subject wholesale suppliers to increased risks. These risks would stifle competition among wholesale suppliers for products extending into the ESP's third delivery year and could translate into higher SSO prices.[421]

Moreover, RESA witness Campbell testified that if retail suppliers offer long term contracts beyond the potential early termination date, they would have to build into their costs the possibility that Duke could terminate the ESP early.[422] By extension, Ohio's shopping consumers also likely will bear the cost of this risk through increased prices.

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[414] Duke's proposed Master Supply SSO Agreement provides that notice of early termination would be provided to SSO suppliers by December 31, 2016. Duke Ex. 1 at Attachment F at 13, ¶ 2.4 (Application). The notice date is after the fourth auction has been held. See Duke Ex. 1 at Attachment B (Application).

[415] Duke Ex. 4 at 12 (Lee Direct).

[416] Tr. II at 328-329 (Lee Cross Examination).

[417] Duke Ex. 1 at Attachment F, at 13, ¶ 2.4 (Application).

[418] RESA Ex. 3 at 20 (Campbell Direct).

[419] Staff Ex. 3 at 3-4 (Strom Direct).

[420] Tr. II at 318.

[421] RESA Ex. 3 at 20 (Campbell Direct); Staff Ex. 3 at 3-4 (Strom Direct); Tr. XIII at 3831.

[422] RESA Ex. 3 at 20 (Campbell Direct).

Duke's early termination proposal benefits only Duke. It is unreasonable for it to shift the risk and costs of potential changes in law to Ohio's SSO and shopping consumers. If Duke is concerned that substantive changes in law may occur after the ESP has been implemented for two years, its recourse under existing law is to file a plan for a two-year duration. Accordingly, its proposed reservation of rights to terminate the ESP also should be denied as unreasonable.

## H. Duke's proposed SEET return on common equity threshold is unlawful and not supported by any evidence.

### 1. Background

As an intended consumer protection in Senate Bill 221, the Ohio Legislature enacted what has become known as the Significantly Excessive Earnings Test, or "SEET.[423]" It is unfortunate that the electric utilities succeeded in codifying that they may charge customers for excessive earnings; only "significantly" excessive earnings are proscribed. Given that the utilities may charge for excessive earnings, the PUCO should be especially vigilant in securing for customers the limited protection against paying for significantly excessive earnings.

[423] R.C. 4928.143(F) provides in pertinent part:

> With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, ***following the end of each annual period of the plan***, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned ***during the same period*** by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The ***burden of proof*** for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility.*** [Emphasis supplied.]

Similarly, OAC 4901:1-35-03(C)(10)(a) provides in pertinent part:

> (a) For the annual review pursuant to division (F) of section 4928.143 of the Revised Code, the electric utility shall provide testimony and analysis demonstrating the ***return on equity that was earned during the year*** and the ***returns on equity earned during the same period*** by publicly traded companies that face comparable business and financial risks as the electric utility.*** [Emphasis supplied.]

The test is not a part of the determination to be made pursuant to R.C. 4928.143(C)(1) as to whether the proposed ESP is more favorable in the aggregate than an MRO. Rather, it is to be applied in a stand-alone proceeding conducted after "each annual period" of the ESP.[424] In the stand-alone proceeding, the EDU has the burden of proving that the return on common equity is not significantly in excess of the return on common equity that was earned "during the same period" by comparable publicly traded companies.[425] The evidence and analyses that an EDU must file to sustain its burden in the annual proceedings is set forth in the PUCO's rules,[426] as supplemented by the PUCO's order issued after its investigation of the development of the SEET test.[427]

In Duke's first ESP proceeding, the PUCO approved a stipulation on December 17, 2008, in which the parties agreed that a return on common equity above 15 percent would be deemed significantly excessive (the "SEET ROE Threshold").[428] In Duke's second ESP proceeding, the PUCO approved a stipulation on November 22, 2011, in which the SEET ROE Threshold also was set at 15 percent.[429] The stipulation in *Duke ESP II* specifically provided that it shall not be binding in any other proceeding or be offered in or relied on in any other proceeding, except as necessary to enforce the terms

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[424] Id.

[425] R.C. 4928.143(F).

[426] OAC 4901:1-35-03(C)(10)(a).

[427] See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010) ("*SEET Investigation*").

[428] See *In the Matter of Duke Energy Ohio Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO Opinion and Order at 21 (December 17, 2008), ("*Duke ESP I*").

[429] See, *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. 11-3549-EL-SSO, et al., Stipulation and Recommendation at Attachment H (October 24, 2011), and Opinion and Order at 35 (November 22, 2011), ("*Duke ESP II*"). See, also, Duke Ex. 9 at 8, Att. PAL-2 (Laub Direct).

of the stipulation.[430]

In this proceeding, no stipulation has been entered by any party to resolve the level of the SEET ROE Threshold. Moreover, Duke has not filed the evidence or analyses required by the PUCO's rules or the *SEET Investigation* upon which the PUCO may make a determination as to the return on common equity earned by comparable publicly traded companies (Duke's peer group).[431] Indeed, on cross examination, Duke witness Laub admitted that, other than relying on the stipulations in these prior proceedings, Duke presented no evidence supporting the 15 percent SEET ROE Threshold.[432] Instead, in her direct testimony, Duke witness Laub simply proposes that the SEET ROE Threshold remain at 15 percent, as first stipulated six years ago (2008) in *Duke ESP I* and again in 2011 in *Duke ESP II*.[433] Duke's proposal must be rejected because it is unlawful and not supported by any evidence.

### 2. It is unlawful to establish the SEET ROE Threshold before the end of each annual period of the ESP.

R.C. 4928.143(F) clearly requires that the SEET test be applied "following the end of each annual period of the [ESP]." The purpose in doing so is to compare the ROE of the EDU earned during that year with the return on equity earned by the EDU's peer group "during the same period." By prospectively establishing the SEET ROE Threshold, Duke is projecting the return on equity of its peer group for the entire term of the three-year ESP, and not at the end of each annual ESP period as required by law. Duke's

[430] OMA Ex. 2, *Duke ESP II*, Stipulation and Recommendation at 2 (October 24, 2011), OCC Ex. 32 at 30 (Kahal Direct).

[431] OCC Ex.32 at 30 (Kahal Direct).

[432] Tr. III at 784 (public); see, also, Tr. VII at 1814 (Kahal Cross Examination, the SEET ROE Threshold is "completely unsupported.").

[433] Duke Ex. 9 at 8, Att. PAL-2 (Laub Direct).

prospective calculation of the ROE Threshold violates R.C. 4928.143(F) and OAC 4901:1-35-0-3(C)(10)(a) and, thus, is unlawful.

**3. Duke has failed to sustain its burden of proof.**

R.C. 4928.143(F) clearly places the burden of proof in SEET proceedings on the EDU. As admitted by Duke witness Laub, Duke has not provided any of the evidence and analyses required by statute, rule and the *SEET Investigation* to sustain its burden of demonstrating its peer group's return on equity. Instead, Duke asks the PUCO to adopt the stipulated 15 percent SEET ROE Threshold that first was approved in 2008 in *Duke ESP I.* Even assuming that the SEET ROE Threshold can be set prospectively in an ESP proceeding, the PUCO has recognized that, absent stipulation, the EDU must provide the evidence and analyses its rules and orders require, or the burden of proof cannot be sustained.[434] Lacking any evidence or analyses to support the 15 percent SEET ROE Threshold in this proceeding, Duke has failed in its burden and its proposed SEET ROE Threshold must be denied.

Obviously, it is impossible for Duke to provide the evidence and analysis to support the SEET ROE Threshold in this proceeding because the end of the first annual ESP period has not been reached. As stated previously, the proper remedy is to deny Duke's proposal and to make the SEET ROE Threshold determination in Duke's annual SEET proceeding as required by statute and the PUCO's rules.

**4. Alternatively, if the PUCO determines that the SEET ROE Threshold can be determined prospectively in an ESP proceeding, Duke's SEET ROE Threshold should be set at 12 percent.**

If the PUCO should determine that the SEET ROE threshold can be established

[434] See *SEET Investigation*, Entry on Rehearing at 6-7 (August 25, 2010).

prospectively in an ESP proceeding, the only credible evidence of record as to the appropriate level of the SEET ROE Threshold is that provided by OCC witness Kahal. Mr. Kahal testified that important changes have taken place since Duke's last ESP proceeding that support a significant reduction in the SEET ROE Threshold, including:

- The market cost of capital has declined since *Duke ESP II*, as confirmed by the ROE of 9.84 percent authorized in Duke's 2012 base rate proceeding.

- Duke has divested substantially all of its generation assets since *Duke ESP II*, which improves Duke's business risk profile, considering that monopoly distribution service is viewed as far less risky than the generation supply function, i.e., generation supply is subject to considerable market risk and risks associated with actual and potential environmental compliance.

- Duke in this case has proposed rate rider arrangements that, if approved, will further improve its business risk profile compared not only to conventional base rate case cost collection, but also compared to cost collections available under its last ESP, *Duke ESP II*.[435]

Moreover, Mr. Kahal noted that in the recent Ohio Power and Dayton Power & Light ESP ("DP&L") proceedings, the PUCO established a SEET ROE Threshold of 12 percent for each company.[436] Considering that Duke neglected to present ANY evidence or analyses as to the ROE of its peer group, and that Duke improperly relied a prior stipulation as precedent, the PUCO should set Duke's ROE Threshold at 12 percent, a

[435] OCC Ex. 32 at 31 (Kahal Direct).

[436] Id. See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO, Opinion and Order at 37 (August 8, 2012). See, also, *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan, Case No. 12-426-EL-SSO et al.,* Opinion and Order at 26 (September 4, 2013).

level that also is consistent with the PUCO's orders in the Ohio Power and the DP&L ESP proceedings.

### I. The PUCO should reject Duke's proposal to charge residential consumers a $11 million cost premium for capacity procured in the full requirements auction for SSO load.

Duke proposes to use a competitive bidding process (auctions) to acquire the power supply required to serve SSO load.[437] Duke then proposes to set retail rates for SSO customers based on the blended costs of the full requirement contracts procured in the auctions. However, once the power is procured, Duke also proposes various adjustments to the blended costs to derive the customer class SSO retail rates, including those for residential customers.

One of the adjustments that Duke proposes is to impute a capacity cost to the residential customers and other customer classes' SSO retail rates, resulting in its Rider RC.[438] Such an adjustment must be estimated by Duke because SSO suppliers bill Duke a single, all-in price for their supply and do not separately quantify capacity or any other component of SSO supply.[439] The effect of Duke's adjustment is to assign a substantial cost premium for capacity supplied to residential SSO customers as compared to other classes based on PJM's 5 Coincident Peak ("5CP") method of allocating capacity to load serving entities.[440] This causes the imputed capacity component of the SSO prices for residential SSO customers to be different and more expensive than the capacity for non-

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[437] See Duke Ex. 3 at 8 (Lee Direct).

[438] Duke Ex. 18 at 5, 8-15 (Ziolkowski Direct).

[439] OCC Ex. 32 at 14-15 (Kahal Direct). As Mr. Kahal noted, in addition to the cost of energy, capacity, transmission ancillaries, and other transmission services, wholesale suppliers "must price into their bids the cost (or estimated cost) of each product, along with compensation for risk, its profit requirement, the supplier's administrative costs, etc." Id. But suppliers do not reveal the pricing of any of these individual components. Id.

[440] Duke Ex. 18 at 9 (Ziolkowski Direct); OCC Ex. 32 at 15-16 (Kahal Direct).

residential SSO customers. Duke witness Ziolkowski discusses this adjustment in his testimony.[441]

In discovery, Duke provided its calculation of the cents per kWh capacity charge, by customer class, which would result from its proposed new allocation.[442] As discussed by Mr. Kahal, the residential capacity charge under this proposal would be 1.52 cents/kWh as compared to a total company charge of 1.22 cents/kWh. This creates a $3 per MWh cost premium for residential customers.[443] While this may not sound like much of a difference, when the $3 per MWh is applied to the nearly 3.8 million MWh per year of residential SSO sales, it equates to an approximate $11 million annual cost premium being charged residential SSO customers just for this one adjustment.[444] The residential price premium each year relative to the overall non-residential SSO price will be 24.5 percent if this onerous adjustment is adopted.[445] This proposal also causes the residential premium to "nearly triple" from the 9.5 percent premium in the 2011 ESP settlement.[446]

OCC witness Kahal testified that such a premium is not justified because it is based on an incomplete consideration of the costs of serving the residential SSO load and improperly assumes that SSO suppliers would charge residential loads a cost premium.[447] First, Duke's adjustment is administratively determined and is not the result of the competitive procurement process and supplier bid requirements.[448] As noted by Mr.

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[441] Duke Ex. 18 at 8-15 (Ziolkowski Direct).

[442] OCC Ex. 32 at 18 & Table I (Kahal Direct), citing Duke Response to OCC-INT-12-341.

[443] OCC Ex. 32 at 18 (Kahal Direct)

[444] OCC Ex. 32 at 19 (Kahal Direct).

[445] OCC Ex. 32 at 18 (Kahal Direct).

[446] OCC Ex. 32 at 18 (Kahal Direct).

[447] OCC Ex. 32 at 19-20 (Kahal Direct).

[448] OCC Ex. 13 at 19 (Kahal Direct).

Kahal, there is nothing in the behavior of bidders in the wholesale auction that demonstrates there must be such a price premium for residential customers.

Mr. Kahal stated that, all else being equal, the low load factor for the residential customer class may merit a pricing premium when compared to a higher load factor class. But according to Mr. Kahal, all else is not equal.[449] As he testified there are "two other critical factors that affect market pricing that the Utility's methodology does not consider in setting class-specific SSO rates."

The residential customer class has a large load -- accounting for more than 70 percent of total SSO load.[450] As Mr. Kahal testified, this is "likely to influence wholesale supplier interest in participating in a wholesale auction, with a large load attracting more bidders and therefore a more competitive pricing outcome.[451] The much smaller nonresidential classes of SSO customers will enjoy this benefit provided by the larger residential load. Absent residential class participation, Duke's wholesale auctions "would be quite small and therefore much less attractive to potential bidders."[452]

Second, as compared to the highly market-sensitive nonresidential customers, residential customers have less of a tendency to shop, with less abrupt movement to competitive suppliers.[453] This suggests that wholesale full requirements SSO suppliers will perceive less migration risk (i.e., load uncertainty that cannot be effectively

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[449] OCC Ex. 13 at 20 (Kahal Direct).

[450] OCC Ex. 13 at 20 (Kahal Direct).

[451] OCC Ex. 32 at 20 (Kahal Direct).

[452] OCC Ex. 32 at 20 (Kahal Direct).

[453] OCC Ex. 32 at 20-21 (Kahal Direct).

hedged[454]) associated with residential load than non-residential load.[455] Bidders unquestionably price this perceived risk into their SSO auction bids.[456] And therefore once again, the stability of the residential load provides a pricing benefit to the smaller and less stable non-residential customer classes for SSO supply.[457]

But Mr. Ziolkowski failed to consider these two important factors that affect bidders' perceived costs of serving the residential SSO load. These factors -- size of load and low migration risk -- weigh against assigning a cost premium for capacity to the residential customer class. Additionally, as noted by OCC witness Kahal, Duke failed to provide evidence to support the notion that bidders in the auctions require a price premium to serve the residential class. [458] And the "bidders" (potential marketers) who intervened in this proceeding were silent on this matter.

OCC witness Kahal recommended two possible remedies for the unwarranted and substantial price premium that Duke proposes to charge customers.[459] A direct (and very straight forward) approach is to reject the capacity adjustment that Mr. Ziolkowski proposed, because there is no showing that the market actually requires a price premium for residential customers.[460] If Mr. Ziolkowski's adjustment is rejected, the residential

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[454] OCC witness Kahal provides a more extensive discussion of the fact that migration risk cannot be effectively hedged since SSO suppliers are responsible for a fixed percentage of SSO supply but where the actual MWh load may vary substantially because of migration driven by changing market factors. OCC Ex. 32 at 22-24. The result is that migration risk is perceived as a substantial risk and SSO suppliers will tend to favor load -- residential and small commercial -- that has historically had less migration risk associated with it. Id.

[455] OCC Ex. 32 at 20-21 (Kahal Direct).

[456] OCC Ex. 32 at 20-21 (Kahal).

[457] OCC Ex. 32 at 20-21 (Kahal Direct).

[458] OCC Ex. 13 at 19 (Kahal Direct).

[459] OCC Ex. 32 at 21-22 (Kahal Direct).

[460] OCC Ex. 32 at 21 (Kahal Direct).

retail price derived from the auction for the first year would be reduced by the $3 MWh, using Duke's data.[461]

Alternatively, the PUCO could order the procurement of separate supply contracts for the residential class.[462] Mr. Kahal testified that a separate procurement need not require a separate auction.[463] Instead, the auction could be conducted as planned but with separate residential and non-residential products identified.[464] Bidders would then have the flexibility to submit bids for residential tranches and/or non-residential tranches within the same auction.[465] With separate clearing prices for residential and non-residential firm requirement contracts, the Utility's asserted need for an artificial administratively-determined premium (or discount) would be obviated.[466]

Mr. Kahal testified that the first alternative is "the simplest and most practical solution to the problem," both simplifying the setting of SSO retail rates and eliminating the unwarranted cost premium.[467] He recommended that Rider RC be rejected.[468]

### J. The Attorney Examiners erred in preventing disclosure of the identities of entities seeking to transfer their OVEC generation assets and the entities that denied consent to them, as well as the identities of the entities' representatives communicating regarding such requests.

As part of the evidence in this case concerning the efforts that were made by Duke to sell or transfer its OVEC interest, OCC presented the testimony of OVEC's

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[461] OCC Ex. 32 at 21 (Kahal Direct).

[462] OCC Ex. 32 at 22 (Kahal Direct).

[463] OCC Ex. 32 at 22 (Kahal Direct).

[464] OCC Ex. 32 at 22 (Kahal Direct).

[465] OCC Ex. 32 at 22 (Kahal Direct).

[466] OCC Ex. 32 at 22 (Kahal Direct).

[467] OCC Ex. 32 at 22 (Kahal Direct).

[468] OCC Ex. 32 at 22 (Kahal Direct).

Chief Financial Officer John Brodt and Duke Energy President Charles Whitlock, along with various exhibits, including Exhibits 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 27, and 44. Mr. Brodt's and Mr. Whitlock's testimony and portions of these exhibits reveal the names of the OVEC Sponsoring Companies' that sought to sell or transfer their interest in OVEC, the specific terms of those proposed transfers, and the names of the entities that sought to transfer their OVEC interests and those entities that did or did not consent to such transfers. They also reveal the identities of the individuals within those entities that exchanged communications regarding these issues of transfer. OCC contended that this information should have been in the public record.[469] But the Attorney Examiners held that this particular information should be treated as confidential. In particular, the Attorney Examiners held "we will close the company names and the individual identifiers that have been proposed to be redacted that would identify specifically who's within the document, but everything else needs to be open."[470]

OCC submits that there is no sound reason to keep from public access and consideration the names of the Sponsoring Companies (and the names of their representatives at OVEC) that sought to sell or transfer their OVEC interest, or communicated regarding such efforts, or the identity of the Sponsoring Companies (and the names of their representatives at OVEC) that either granted or denied consent, or communicated regarding their position on the consent issue.

Under Ohio law, "[e]xcept as provided in section 149.43 of the Revised Code . . . all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of

[469] Tr. Vol. VI at 1506, 1524.

[470] Tr. Vol. IX at 2528, 2541.

every nature in its possession shall be open to inspection by interested parties or their attorneys." R.C. 4905.07. Similarly, "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." R.C. 4901.12. The Ohio Public Records Laws are supported by a strong presumption in favor of disclosure and are "intended to be liberally construed to ensure that governmental records be open and made available to the public * * * subject only to a very few limited exceptions." *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549, 597 N.E.2d 147 (1992). Accordingly, Ohio Adm. Code 4901-1-24(D)(1) limits redactions for confidentiality to only that information that is "essential to prevent disclosure of the allegedly confidential information." But the Attorney Examiners unreasonably and unlawfully granted Duke's request to protect the identities of those OVEC Sponsoring Companies and their representatives as confidential trade secret information, which was inconsistent with Ohio law.

R.C. 1333.61(D) defines trade secret information as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In determining whether certain information meets this standard, the Supreme Court of Ohio has adopted the following 6 factors to assist in analysis:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.,* by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

*State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

The Attorney Examiners' decision that the Sponsoring Companies' who requested and denied consent to OVEC transfers should be treated as confidential was not supported by competent and credible evidence that this information is a trade secret. There was no evidence that the information has economic value or otherwise warrants protection. Because no trade secret exists, no protection is warranted. As a result, the PUCO should reverse the Attorney Examiners' ruling and permit public disclosure of the identities of those Sponsoring Companies, and their representatives, who requested consent to transfer their OVEC interest and those entities which denied such consent.

A complete public record on whether Duke made good faith efforts to transfer its OVEC interest is important to consideration of the merits of Duke's proposed Price Stabilization Rider. Absent a clear and substantial benefit to customers, Duke's proposed PSR Rider is a highly speculative and uncertain proposition. To subject Duke's customers to the business risk associated with retaining Duke's OVEC interest could only be justified, if at all, after Duke has shown all reasonable efforts have been made to transfer its OVEC interest. To prevent public disclosure of the identities of Sponsoring Companies and their representatives regarding such transfers impedes a full and fair assessment by the public of Duke's proposal.

In addition, the ICPA is a federally approved wholesale energy supply contract primarily between regulated companies. The terms by which a Sponsoring Company's interest may be transferred to another entity are specified in the contract. As a federally regulated contract, there is no appropriate purpose served by protecting the identities of entities that seek to transfer their interests under the terms of the ICPA or those who do not agree to such requests.

The PUCO should reverse the Attorney Examiners' rulings that the identities of OVEC Sponsoring Companies and their representatives requesting consent to transfer their OVEC interest and those denying such consent are confidential.

### K. The Attorney Examiners erred by permitting rebuttal testimony.

OCC witness Kahal testified that the DCI Rider mechanism would reduce Duke's business risk profile.[471] He noted there was no DCI Rider in place at the time of Duke's most recent electric distribution rate case (Case No. 12-1682-EL-AIR) -- when the ROE was set. He testified that the DCI Rider would propose a different ROE request,[472] and that no Duke witness had demonstrated that the requested 9.84 percent ROE was

[471] OCC Ex. 32 at 10 (Kahal Direct).

[472] OCC Ex. 32 at 12 (Kahal Direct).

appropriate.[473] Numerous witnesses, including Duke witnesses, acknowledged that the DCI Rider would reduce Duke's business risk.[474]

Ostensibly in response to this testimony, Duke presented the testimony of Dr. Roger Morin.[475] Although the testimony was presented as rebuttal, it was essentially direct testimony that attempted to demonstrate the reasonableness of the 9.84 percent ROE.[476] OCC moved to strike the bulk of the testimony as being improper rebuttal testimony because Duke could have and should have filed the testimony as part of its direct case.[477] Although the Attorney Examiners permitted the testimony, the PUCO should strike the testimony. If the testimony is permitted in the record, it should be accorded little weight given that the testimony is essentially direct testimony submitted as rebuttal thus precluding of a fair opportunity for proper review.

Duke had every opportunity to submit Dr. Morin's testimony as part of its direct case in its Application. Indeed, given Duke's explicit burden of proof obligation on rate of return, the Utility had an obligation to do so. The Utility alone inexplicably made the decision not to submit rate of return testimony as part of its application. Instead, Duke incorrectly assumed that the rate of return from the most recent electric distribution rate case (12-1682-EL-AIR) was the starting point for a rate of return in this case. A major flaw in this assumption is that the rate of return from the 12-1682-EL-AIR case was an

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[473] OCC Ex. 32 at 12 (Kahal Direct).

[474] For example see: Tr. XIII at 3772-3773 (Turkenton), Tr. II at 393 (Wathen), Tr. VI at 1551 (Ziolkowski).

[475] Duke Ex. 40 (Morin Direct).

[476] A comparison of Dr. Morin's alleged rebuttal testimony in this case and the direct testimony he submitted in Duke's most recent rate case (12-1682-EL-AIR) demonstrates that the vast majority of his "rebuttal testimony" is virtually identical to the direct testimony from Duke's recent distribution base rate case. See Tr. XVI at 4196-4197.

[477] Tr. XVI at 4199-4205.

appropriate starting point. The rate of return in Case No. 12-1682-EL-AIR was resolved by a settlement of the parties. As noted by OCC witness Kahal[478] the Stipulation from the rate case explicitly precluded parties from using the settled rate of return in future proceedings:

> The ROE agreed upon in this Stipulation **shall not be used as precedent in any future proceeding** except for the purpose of determining the revenue requirement for collection from customers in proceedings addressing the Company's SmartGrid Rider (Rider DR-IM).[479] (Emphasis added).

Thus, Duke filed testimony that directly contradicted the Stipulation language. Duke witness Laub identified the same 9.84 percent Return on Equity from the 12-1682-EL-AIR rate case for rate of return purposes in this case.[480] Ms. Laub admitted that the rate of return she used was taken from Duke's most recent rate case.[481]

In addition to improperly using the 12-1682-El-AIR rate case Stipulation, the Utility's tactics also left the Intervenors with no opportunity to scrutinize the testimony, conduct any proper discovery and respond to it. Instead, Intervenors only had two and a half days[482] to review over 70 pages of testimony, and had no opportunity to conduct discovery or to file any responsive testimony. Duke should not be rewarded from manipulating the record in such a manner. Moreover, the PUCO should protect the integrity of the settlement process and the language included in Stipulations by the parties -- and accepted by the PUCO -- by determining that Duke improperly relied on the 12-

[478] OCC Ex. 32 at 12 (Kahal Direct) citing the PUCO May 1, 2013 Opinion and Order in Case No. 12-1682-EL-AIR.

[479] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR, Stipulation and Recommendation at 6 (April 2, 2013).

[480] Duke Ex. 9 at 3-4 (Laub Direct).

[481] Tr. III at 757-758.

[482] Duke Ex. 40 (Morin Rebuttal Testimony) was filed on Monday, November 17, 2014 for the evidentiary hearing that concluded on Thursday, November 20, 1014.

1682-EL-AIR Stipulation as precedent. The PUCO should modify the rate of return to reflect the lower business risk faced by the Utility.

The PUCO has previously ruled that rebuttal testimony should rebut another party and not merely present a position that could have been presented as part of a direct case. In Case No. 98-1398-TP-AMT, the Attorney Examiner denied an attempt by Joint Applicants (Bell Atlantic Corporation and GTE Corporation) to file an attachment to rebuttal testimony. The Attorney Examiner ruled that:

> **Rebuttal testimony is appropriate for the purpose of contradicting the opponent's evidence**. Such evidence should be utilized for the purpose of demonstrating that intervenors criticisms were actually addressed in joint applicants' direct case or that such criticisms are unjustified based on the existing record. Through the introduction of their commitment matrix, joint applicants are not attempting to accomplish either of these objectives, **but rather are supplementing issues not previously presented or now, for the first time, providing specific detail** to previously stated generic commitments.[483] (Emphasis added).

Applying this analysis to Dr. Morin's alleged rebuttal testimony demonstrates that the rate of return testimony is merely an attempt to supplement the record with complete direct testimony. Only pages 69-75 of Dr. Morin's testimony even claim to rebut positions taken during the evidentiary proceeding.

Similarly, in case No. 96-922-TP-ATA ("96-922"), the PUCO upheld an Attorney Examiner decision to strike rebuttal testimony submitted by a number of Competitive Local Exchange Carriers ("CLECs").[484] In addition to the prior PUCO precedent, two different Ohio Courts of Appeal have also relied on this standard for judging rebuttal

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[483] *In the Matter of the Joint Application of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change in Control,* Case No. 98-1398-TP-AMT, Entry at 4 (July 16, 1999).

[484] *In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic; In the Matter of the Application of Ameritech Ohio for Approval of Carrier to Carrier Tariff,* Case No. 96-922-TP-ATA, Opinion and Order at 17 (October 4, 2001) ("96-922 Case").

testimony. In *Nickey v. Brown*,[485] the Ninth Appellate District in Ohio applied this same standard, as did the Seventh Appellate District Court in *Weimer v. Anzevino*.[486]

Duke argued that Dr. Morin's testimony was rebutting testimony of various witnesses including three Duke witnesses.[487] To the extent that Dr. Morin was attempting to rebut the testimony of Duke's own witnesses, that is an improper use of rebuttal testimony because it is not rebutting facts given in evidence by "the adverse party." Duke had ample opportunity to conduct redirect cross-examination of its own witnesses on this topic but elected not to do so. Instead, the utility submitted DR. Morin to, in part, rebut its own witnesses. The PUCO should reject the Utility's tactics and reduce Duke's Rate of Return to reflect its reduced business risk if the DCI Rider is implemented.

## IV. CONCLUSION

The concept of the electric security plan has outlived any purpose it may have served for customer protection (if it did protect customers), under Senate Bill 221. It operates now as circumventions of both the market pricing intended in 1999 under Senate Bill 3 and the regulation of monopoly distribution service under Revised Code Chapter 4909. And, to provide the benefits of competitive pricing to consumers, an electric security plan is not needed. The provision of a standard service offer based upon a wholesale auction can be accomplished through the Market Rate Offer in the law.

In this regard, former PUCO Chairman Snitchler wrote earlier this year to propose eliminating the electric security plan as soon as 2015:

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[485] *Nickey v. Brown*, 7 Ohio App.2d 32, 35 (1982) (quoting 31 Corpus juris Secundum 818 *Evidence* ¶ 2).

[486] *Weimer v. Anzevino*, 122 Ohio App. 3d 720.

[487] Duke Ex. 40 at 4 (Morin Rebuttal).

> The fundamental, structural changes that have occurred since 2011, including resolving generation ownership and corporate separation of all investor owned utilities, eliminates the need for the ESP or MRO filing.... For these reasons, the requirement that such filings be made should be eliminated from the statute starting in 2015 or at the time 100% of the Standard Service Offer (SSO) load is secured at wholesale auction.[488]

The PUCO should propose eliminating the electric security plan as an option, if opportunities for doing so are presented before the General Assembly. But the PUCO need not wait for that day. R.C. 4928.143(C)(1) allows the PUCO to modify an electric security plan. Modifications to the utility's plan should include restructuring the electric security plan so that instead the standard service offer is provided through a market rate offer.

Under a market rate offer, much of the added costs that customers are being asked to pay, including the purchased power charge and the distribution charges, would be eliminated. This would save customers money and is consistent with the fact that the Utility is offering standard service through a competitive bid process, as envisioned under a market rate offering. The PUCO should modify the Utility's plan and require the utility to file a new standard service offer in the form of a market rate offer.

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[488] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, PUCO Case 12-3151-EL-COI, Concurring Opinion at 3 (March 26, 2014).

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief (PUBLIC VERSION) by the Office of the Ohio Consumers' Counsel has been served electronically upon those persons listed below this 15th day of December, 2014.

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