

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke	)	Case No. 14-0841-EL-SSO
Energy Ohio for Authority to Establish a	)	
Standard Service Offer Pursuant to §4928.143,	)	
Ohio Rev. Code, in the Form of an Electric	)	
Security Plan, Accounting Modifications and	)	
Tariffs for Generation Service.	)	
	)	
In the Matter of the Application of Duke	)	
Energy for Authority to Amend its Certified	)	
Supplier Tariff, P.U.C.O No. 20.	)	Case No. 14-0842-EL-ATA
	)	

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**REPLY BRIEF OF OHIO ENVIRONMENTAL COUNCIL**

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Trent Dougherty, **Counsel of Record** (0079817)  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449  
(614) 487-7506 - Telephone  
(614) 487-7510 - Fax  
[tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)

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**Counsel for the Ohio Environmental Council**

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## I. INTRODUCTION

In the above-captioned proceeding Ohio Power Company (“AEP Ohio” or “Company”) is seeking Commission approval of its Application for Authority to Establish a Standard Service Offer Pursuant to ORC §4928.143, in the Form of an Electric Security Plan (“Application” or “ESP”). After an extensive hearing, and pursuant to the procedural schedule established by the Attorney Examiners in this case, parties filed initial Post-Hearing Briefs on December 15, 2014. Ohio Environmental Council (“OEC”) filed an initial post hearing brief focusing on recommendations for Open Data Access and Performance Metrics Reporting, and opposition to Duke’s proposed Price Stabilization Rider (“PSR” or “Rider PSR”) and its potential for customer subsidized detriment to a competitive market and to Ohio’s environment.

Now, again, pursuant to the procedural schedule established by the Attorney Examiners in this case, OEC submits its Reply to the Initial Post-Hearing Briefs submitted. Any omission by OEC, hereto, of specific reference to any intervenor’s brief or any specific issue expressed in any post-hearing brief filed in this docket shall not be construed as OEC’s support for or acquiescence to the argument of that intervenor or that issue.

## II. ARGUMENT

### **A. The Commission should follow the lead of the Intervenors and Staff who nearly unanimously oppose the Company’s Rider PSR as unlawful, unreasonable, and bad public policy.**

#### *i. Duke has not met its burden of proof vis-à-vis its Proposed PPA Rider in the face of wide spread and diverse opposition*

OEC, in its initial brief, criticized the Company’s proposed Rider PSR as having direct negative consequences on the environment, customers, and future of electric competition. We

further asserted that there was no legal basis for such a generation related charge under Ohio Law. OEC was certainly not alone in these sentiments that the proposed Rider PSR is unlawful, unreasonable, and bad public policy. Duke's request is unlawful, unreasonable, imprudent, and not supported by the record. None of the Company's explanations of possible benefits of the PSR go to support the Company's burden to prove that there is a legal basis for this generation related non-bypassable charge. As Sierra Club points out, the ESP statute allows cost recovery only for fuel used to generate electricity supported under an SSO offer; power purchased to supply the offer; emission allowances; and federally mandated carbon and energy taxes.<sup>1</sup> And as the Club, OEC, and others assert, the Company has not requested any of the above in Rider PSR.

Duke begins its defense of Rider PSR by stating that "Ohio law allows an ESP to include terms and conditions and charges related to bypassability as would have the effect of stabilizing or providing certainty regarding retail electric service."<sup>2</sup> Duke suggests that this ESP provides "stability and certainty in retail rates at a time when the wholesale market is facing unprecedented change."<sup>3</sup> The Company then suggests that its Rider PSR will provide for fuel diversity, which is necessary for rate stability.<sup>4</sup> However, that is patently false. The OVEC generating units, as OEC pointed out in its initial brief are not one of the 27,000 MWs poised to retire by 2019. Even if this was the case, protecting a coal generation supply in an Ohio market that is vastly coal powered, without any regard to any true diversity of fuel resources (Duke has not suggested subsidizing renewable, gas, nuclear, or any other generation source), will not provide diversity. Duke then attempts to paint intervenors such as OEC, Sierra Club and others

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<sup>1</sup> Sierra Club Brief at 21.

<sup>2</sup> Duke Brief at 18.

<sup>3</sup> Duke Brief at 10.

<sup>4</sup> Duke Brief at 21.

as those driven only by environmental concerns without regard to the cost<sup>5</sup> (again patently false even with the most cursory review of testimony and briefs in this proceeding). However, it is not merely those enviro-centric intervenors who contest Duke's scheme and question the basis it loosely hanging, but the expert Staff of this Commission, manufacturers, and residential consumers, and CRES providers.

As other Intervenor have shown, the benefits, if any, are all in the distant future and are dependent on market price assumptions several years into the future which may not prove to be accurate. It is only beginning in 2019 that Duke projects the revenue from the sale of its OVEC entitlement will exceed costs. Given that the entire analysis beginning in 2019 is speculative, there is no evidence upon which the Commission can base a factual decision on the impact of the OVEC subsidy on Duke's distribution customers beyond the negative impact during the term of the ESP.<sup>6</sup> Simply, Duke, not its customers, is receiving a hedge as Duke will be shielded from the risk of the OVEC generating units being uneconomical.<sup>7</sup> Yet, as OCC states, the Rider PSR would be "risky and costly to customers" pointing to Dukes calculated \$22 Million cost for the scheme.<sup>8</sup> This is a very hefty price to pay for the mere promise of stability.

ii. *The future of Ohio's Competitive Electricity Market is in jeopardy under the Rider PSR*

A competitive market is not only good for customers' financial bottom-line, but good for development of clean energy options and innovation in supply- and demand-side services like demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure that benefit customers and the state as a whole. OEC grieves for, however, the future of such economic and

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<sup>5</sup> Id.

<sup>6</sup> OPAE Brief at 12.

<sup>7</sup> OMA Brief at 22.

<sup>8</sup> OCC Brief at 34.

environmental benefits of the market at both the micro and macro level with this proposed Rider PSR. In fact, the Staff's brief summed it up best, saying that the "PSR will move Duke in the opposite direction of market-based competition by providing Duke a guaranteed revenue stream for these generation assets, irrespective of market forces."<sup>9</sup> It is true that, as the Company states, that Duke Energy Ohio retail customers will continue to have the right to engage in choice and that all generation serving shopping and non-shopping customers will either be provided by CRES providers or procured from wholesale auction winners.<sup>10</sup> No party, to our knowledge is saying that approval of this ESP will end the wholesale electric market. However, that electric market will be altered for the duration of the OVEC entitlement, and dare we say for the detriment of Duke's retail customers.

Commission Staff, in particular, stated that its primary concern is that "the PSR conflicts with the Commission's goal of transitioning the Ohio electric distribution companies toward a fully-competitive retail-market construct."<sup>11</sup> However, Duke suggests that the Commission should not consider retail choice in a vacuum, with disregard for factors that influence the markets that form the basis for retail rates,<sup>12</sup> and thus, flying in the face of the Commission's staff experts, wants the Commission to renege on the transition. As enforcers of the state's laws and policies ensuring a fully competitive market, the Commission must heed the legislature's directive.

For good or bad in a given period, Ohio's General Assembly has charged the PUCO to ensure a competitive market. We agree with the Staff that "it is only fair to assign not only the risks but the potential rewards associated with Duke's entitlement in the OVEC generation to the

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<sup>9</sup> Staff Brief at 5.

<sup>10</sup> Duke Brief at 19.

<sup>11</sup> Staff Brief at 4.

<sup>12</sup> Duke Brief at 19.

owners of Duke Energy Ohio.”<sup>13</sup> This outcome is what the current state of Ohio Law and codified state policy provides. This risks and rewards are just that, risks that costs will be higher than benefits at times, and rewards in other times where the benefits outweigh the costs. The proposal to manipulate that system is unpermitted in Ohio law.

However, Duke is not merely suggesting that the Commission simply use discretion allowed it by the legislature, but to rule that the legislature was wrong in 1999 and in 2008 when market based generation, corporate separation, and retail innovation was codified, amended, and supported by the Ohio General Assembly. This is not simply a “philosophical debate” as the Company suggests,<sup>14</sup> although there are philosophical differences between the parties as to the benefits and costs of market based electricity. For the Commission, this is a legal debate, and one where the Company wants the Commission to disregard the law in light of potential volatility or impending polar vortexes, and where a vast majority of customers and stakeholders wish to see the Commission follow the letter of Ohio’s energy law and policy.

*iii. Rider PSR will not provide the reliability promised by Duke*

The Company’s claim that establishing Rider PSR will assist the Company in continuing to ensure that Ohio consumers have access to reliable power and that OVEC provides steel in the ground benefits are red herrings.<sup>15</sup> Yet, the “benefits” from Rider PSR “will not give Ohio customers any greater reliability than any other customer located in PJM.”<sup>16</sup>

PJM operates a regional wholesale market which procures energy, capacity and ancillary service through competitive auctions. The PJM markets have also been successful in procuring these services at a reasonable cost. If the Companies’ customers would subsidize the plants

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<sup>13</sup> Staff Brief at 5.

<sup>14</sup> Duke Brief at 19.

<sup>15</sup> OMA Brief at 24

<sup>16</sup> *Id.*

through the Rider PSR, this would allow the plants to remain in operation even though their actual operating would exceed the revenues earned in the competitive market. This would allow the plants to remain open even though they are non-economic. This would artificially keep wholesale prices lower, and would discourage other market participants from investing in new generation resources. In the long run, the lack of new generation investment would harm the competitive market.

Furthermore, Staff rightfully opines that there are other ways to meet the stated goal of the company to “mitigate some of the volatility in overall rates.”<sup>17</sup> Staff states that SSO auction structure mitigates market volatility for SSO customers through laddering and staggering the auctions, and shopping customers have market-based options that alleviate market volatility.<sup>18</sup> The Commission should allow these already tried and true hedges continue to work, before approving an extraordinary Rider that, as OCC states would be “risky and costly to customers”.

*iv. Commission approval of Rider PSR is preempted by Federal Law*

As Sierra Club points out, the Federal Power Act preempts the state of Ohio’s approval of the Company’s proposed Rider PSR. The Club states that the Rider would supplant the rates that Duke would otherwise receive in the PJM wholesale market, and would infringe on the FERC’s and PJM’s exclusive control by providing an out-of-market support to the wholesale energy and capacity prices that Duke would otherwise receive from its 9% share of OVEC.<sup>19</sup>

Furthermore, Staff (and others) point out that the PSR runs afoul of federal law, as the United States Court of Appeals has ruled against similar schemes.<sup>20</sup> Fourth Circuit, recently held in *PPL EnergyPlus, LLC v. Nazarian* that Maryland’s scheme to subsidize generators

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<sup>17</sup> Duke Ex. 2 at pg. 10.

<sup>18</sup> Staff Brief at 6.

<sup>19</sup> See Sierra Club Brief at 21-22.

<sup>20</sup> See Staff Brief at 18-21.



participating in the PJM markets was preempted.<sup>21</sup> Also, the most recent of those federal cases, Third Circuit Court of Appeals ruled, in a September 11, 2014 decision, that the New Jersey legislation and the contracts approved by the BPU were preempted by the Federal Power Act, which grants the federal government exclusive jurisdiction over interstate sales and transmission of energy. It appears that the Companies tried to distinguish their case from the New Jersey and Maryland programs by providing that the plants' output will not be used to serve default customers. But this is a distinction without a difference. The essential fact is that the Companies would be distorting the wholesale auction process by bidding in ratepayer-subsidized plants, and as a result could be subject to PJM market mitigation measures.

As the IEU cites from the New Jersey decision, "because FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand,"<sup>22</sup> and the same result will inure to the Rider PSR.

In addition, even if the Commission approved the Rider PSR and the Companies bid the plants' energy and capacity into the PJM markets, and it survived a federal preemption challenge, it is very possible that PJM would apply mitigation measures to the bids, resulting in the bids not clearing the auctions. This could prevent the Companies from receiving a significant amount, and possibly all, of the revenues projected. The Commission should not approve such a federally unenforceable proposal.

v. Rider PSR, if approved, would violate the terms of the Stipulation agreed upon by Duke in regards to Corporate Separation

The previous ESP, Case No. 11-3549-EL-SSO, ended in a mutually agreed upon Stipulation. This Stipulation envisioned full corporate separation for Duke. The Commission

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<sup>21</sup> *Id.*

<sup>22</sup> IEU Brief at 24.

neither intended for not authorized Duke to indefinitely retain and in so doing, monetize its OVEC contractual entitlements in the context of an ESP.<sup>23</sup> The PSR does, however, exactly what the Stipulation in 11-3549-EL-SSO prohibits.<sup>24</sup> Despite the fact that the Stipulation mandates that the Company transfer its ownership in OVEC or seeks a waiver, Duke, a signer of said Stipulation, Duke asserts that it does not have to transfer these generation assets.

As pointed out by OMA, Section VIII(B) of the Stipulation states that approval of the agreement will serve as approval of full legal corporate separation as soon as it is possible.<sup>25</sup> OCC, in fact, goes into great detail to show that no divesting, or even the semblance of divesting the OVEC generation units pursuant to the stipulation has occurred.<sup>26</sup> Just as Staff stated in its brief, there was “no provision in Section VIII of the *ESP II* stipulation that specifically excluded from the transfer requirement Duke Energy Ohio’s entitlement in the OVEC generating stations.”<sup>27</sup> Simply, “Duke has not modified its application or supporting testimony to remove said option that appears no longer feasible or is at least nonsensical.”<sup>28</sup>

The Commission should not reward the Company for such a transgression.

vi. *Early termination provision in the Application could negate the “benefits” of the Rider PSR and should be denied*

The Company also seeks approval of a two-year ESP, with a one-year extension the Company could exercise unless there are changes to law.<sup>29</sup> The events that function as conditions precedent to Duke terminating the proposed ESP one year early are undefined.<sup>30</sup> The

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<sup>23</sup> OMA Brief at 18.

<sup>24</sup> Id. at 27.

<sup>25</sup> Id. at 25.

<sup>26</sup> See OCC Brief at 48-54.

<sup>27</sup> Staff Brief at 11-12.

<sup>28</sup> OMA Brief at 17.

<sup>29</sup> See Duke Brief at 35-36.

<sup>30</sup> OMA Brief at 5.

company, as OMA puts it, can tailor its rationale for early termination of the ESP to fall within virtually any of the change of law categories in the early release provision.<sup>31</sup>

Duke, in its brief, proposes that Rider PSR be in effect for as long as it is entitled to energy from the ICPA to allow the benefits from the hedge to benefit customers for longer than the life of the ESP.<sup>32</sup> Duke's own projections show it is unlikely that Rider PSR will provide any credits for customers during the term of the ESP and if it does, Duke can request to have the opportunity to unilaterally terminate the ESP in order to reap those benefits instead of customers.<sup>33</sup> This would make all of the Company's promises for great benefits of the PSR to stability, volatility, and customer protection absolutely baseless. If the Commission chooses to approve this PSR Rider, it must not allow the Company to exercise this option to take the benefits and run.

#### **i. CONCLUSION**

According to the Company, "the Commission should not be persuaded to ignore events that will undeniably impact retail customers" even though EDU's have transferred generation assets. We simply suggest that the Commission should not be persuaded to ignore the law.

THEREFORE, based on applicable Ohio law, the arguments of Ohio Environmental Council and in this brief, and OEC's arguments in its initial post-hearing brief incorporated hereto, the Commission should reject the Company's proposed Rider PSR as unlawful and against public policy, and approve the recommendations for Open Data Access and Performance Metrics Reporting.

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<sup>31</sup> OMA Brief at 6.

<sup>32</sup> Duke Brief at 24.

<sup>33</sup> OMA Brief at 22.



## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this 29th day of December, 2014.

/s/ Trent Dougherty

Trent Dougherty

Amy.Spiller@duke-energy.com  
Elizabeth.watts@duke-energy.com  
Rocco.dascenzo@duke-energy.com  
Jeanne.Kingery@duke-energy.com  
Steven.beeler@puc.state.oh.us  
Thomas.lindgren@puc.state.oh.us  
Ryan.orourke@puc.state.oh.us  
dboehm@BKLLawfirm.com  
mkurtz@BKLLawfirm.com  
jkylercohn@BKLLawfirm.com  
Schmidt@sppgrp.com  
Judi.sobecki@aes.com  
Bojko@carpenterlipps.com  
mohler@carpenterlipps.com  
cmooney@ohiopartners.org  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com  
asonderman@keglerbrown.com  
mkimbrough@keglerbrown.com  
hussey@carpenterlipps.com  
mhpetricoff@vorys.com  
mjsettineri@vorys.com  
glpetrucci@vorys.com

dmason@ralaw.com  
mtraven@ralaw.com  
rchamberlain@okenergylaw.com  
haydenm@firstenergycorp.com  
jmcdermott@firstenergycorp.com  
scasto@firstenergycorp.com  
joliker@igsenergy.com  
mswhite@igsenergy.com  
joseph.clark@directenergy.com  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
callwein@wamenergylaw.com  
tdougherty@theOEC.org  
dhart@douglasshart.com  
gpoulos@enernoc.com  
swilliams@nrdc.org  
tobrien@bricker.com  
ghull@eckertseamans.com  
jvickers@elpc.org

Attorney Examiners:

Christine.pirik@puc.state.oh.us  
Nicholas.walstra@puc.state.oh.us

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