BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO PARTNERS FOR AFFORDABLE ENERGY'S APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10, Ohio Partners for Affordable Energy ("OPAE") hereby submits to the Public Utilities Commission of Ohio ("Commission") this Application for Rehearing from the Commission's April 2, 2015 Opinion and Order in these proceedings considering the applications made by Duke Energy Ohio ("Duke") for authority to establish a standard service offer ("SSO") in the form of an electric security plan ("ESP") and for approval of certain accounting authority. The Commission's Opinion and Order is unreasonable and unlawful on the following grounds:

1) The Commission acted unreasonably and unlawfully when it found that the Price Stabilization Rider ("PSR") would be allowable as a financial limitation on customer shopping pursuant to R.C. 4928.143(B)(2)(d). Opinion and Order at 45.

2) The Commission acted unreasonably and unlawfully when it found that a PSR proposal, if properly conceived, has the potential to supplement the benefits derived from the staggering

and laddering of the SSO auctions and to protect customers from price volatility in the wholesale market particularly during periods of extreme weather. Opinion and Order at 46-47.

3) The Commission acted unreasonably and unlawfully when it found that the adoption of a PSR was consistent with the state policy specified in R. C. 4928.02(A) and R. C. 4928.02(H). Opinion and Order at 47-48.

4) The Commission acted unreasonably and unlawfully when it ignored obvious federal preemption issues associated with a PSR. Opinion and Order at 48.

5) The Commission acted unreasonably and unlawfully when it authorized Duke to establish a placeholder PSR. Opinion and Order at 47.

6) The Commission acted unreasonably and unlawfully when it approved Duke's Retail Capacity Rider ("Rider RC") and the cost allocation of Rider RC. Opinion and Order at 59-60.

7) The Commission acted unreasonably and unlawfully when it approved Duke's Distribution Capital Investment Rider ("Rider DCI") and Storm Damage Rider ("Rider SD"). Opinion and Order at 71-72.

8) The Commission acted unreasonably and unlawfully when it disregarded the requirement at R.C. 4928.02(L) to protect at-risk populations when it approved the ESP. Opinion and Order at 79.

The Commission should grant rehearing and correct these errors in its Opinion and Order for the reasons set forth in the attached Memorandum in Support of this Application for Rehearing which is incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF OHIO PARTNERS FOR AFFORDABLE ENERGY

ALLEGATION OF ERROR 1

1) **The Commission acted unreasonably and unlawfully when it found that the Price Stability Rider ("PSR") would be allowable as a financial limitation on customer shopping pursuant to R.C. 4928.143(B)(2)(d). Opinion and Order at 45.**

The Commission did not approve Duke's proposed PSR but found that a PSR could be approved as a component of an ESP under R.C. 4928.143(B)(2)(d). The Commission found that a PSR functions as a financial limitation on shopping that would help to stabilize rates and that the PSR would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. Opinion and Order at 45.

This finding is wrong, both factually and legally. First, the PSR was not proposed by Duke as a financial limitation on customer shopping or as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. The applicant in this proceeding has the burden of proof and if the applicant did not propose the PSR as a financial limitation on customer shopping, then the applicant could not have met its burden of proof that the PSR complied with R.C. 4928.143(B)(2)(d) as a financial limitation on shopping. While the Commission cited the argument on brief of the Ohio Energy Group ("OEG") that the PSR constituted a financial limitation on customer shopping that would help to stabilize rates, OEG was not the applicant in these proceedings, nor was its brief part of the application. Id.

R.C. 4928.143(B)(2)(d) states that an ESP charge must be related to these specific categories: limitations on customer shopping, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, or accounting deferrals that would have the effect of stabilizing or providing certainty regarding retail electric service. The PSR is none of these, but the Commission was not deterred. Even though Duke did not propose its PSR as a financial limitation on customer shopping and the PSR is not a limitation on customer shopping in any way, the Commission, searching for a category to which a PSR would fit, found that the PSR was a financial limitation on customer shopping as suggested by OEG in its brief.

The PSR is not related to any of the categories that may be addressed through an ESP charge authorized under R.C. 4928.143(B)(2)(d). The statute refers to "limitations on customer shopping." The PSR did not limit customer shopping in any way. To overcome this obvious fact, the Commission imagined new concepts of limitations on customer shopping: there is the "physical constraint" and the "financial restraint." The Commission acknowledged that the PSR would impose no "physical constraints" on customer shopping but then decided that the PSR was a "financial restraint." Id. Using common sense, a "financial restraint" on shopping would be a shopper's lack of finance. There is no evidence at all whether customers are financially restrained from shopping by a PSR. The Commission decided, however, not to limit any customer's shopping but to restrain financially the amount of money an Ohio electric generator could lose in the market. This is not a limitation on shopping that complies with R.C. 4928.143(B)(2)(d).

Obviously, the PSR does not limit customer shopping at all. The PSR was proposed to shield Duke from the risk associated with the financial losses of the OVEC generating stations, whose costs Duke is obligated to absorb. Under Duke's PSR, Duke's distribution customers would pay the losses of the OVEC generating units. This stability and certainty of the guarantee of Duke's profit from these generating units was the purpose of the proposed PSR.

There is only one situation under Ohio law where a distribution utility such as Duke can recover the costs of a power plant from distribution customers. Under R.C. 4928.143(B)(2)(b), a utility may recover the costs associated with constructing a new generation facility, but only if "the Commission first determines…there is a need for the facility based on resource planning projections submitted by the electric distribution utility." Duke did not propose a new facility and did not demonstrate the need for a new facility. It did not justify the need for OVEC, which, of course, is not a new facility. The auctions which provide generation service to Duke's SSO customers have been oversubscribed, and there is excess generation available in PJM, the regional transmission organization ("RTO") to which Duke belongs. Ohio law does not authorize the subsidy to the OVEC generating stations that Duke was requesting.

The purpose of the PSR was to shift the business risk -- whether an asset makes a profit or produces a loss -- associated with the OVEC generating stations to Duke's distribution customers. The PSR, if approved, would be paid by all Duke's distribution customers. To obtain generation service, all of Duke's distribution customers either shop individually or take generation through a governmental aggregation or have their generation procured through the Commission-administered SSO auctions. Under Ohio's competitive retail generation market, Duke's distribution customers cannot be required to subsidize energy and capacity produced by any particular power plants unless Duke demonstrates a need for a new plant and wins the right to build a new one.

The PSR is simply an additional charge on a customer's distribution bill. The PSR will not provide any additional stability or reliability for customers. The shareholders of generation companies should bear the risk of a generation unit's profits or losses, not distribution ratepayers. The Commission should not allow an opening for future PSRs and should not set a precedent to require distribution customers to pay for generation units that are not profitable.

In endorsing a PSR, the Commission also ignored the statutory test set forth in R.C. 4928.143(C)(1) that an ESP must be more favorable in the aggregate than would be expected under a Market Rate Option ("MRO") under R.C. 4928.142. In this case, after denying the PSR as no benefit to customers, the Commission found that the modified ESP was more favorable quantitatively than an MRO because the rates to be charged SSO customers would be established through a fully auction-based process and therefore will be "equivalent" to the results that would be obtained under R.C. 4928.142, the MRO. Opinion and Order at 96.

In determining that the modified ESP was more favorable than the MRO, the Commission emphasized the benefit of the full market pricing that would result from its approval of the ESP without a PSR. Given that Ohio law requires that an ESP be more favorable in the aggregate than an MRO, the Commission stated that this ESP without a PSR was "equivalent" to the MRO. Id. The MRO is the standard. The MRO is the fully market-based SSO rate. It is not possible that an ESP that includes a PSR charge priced higher than market could ever, under any circumstances, be equivalent or more favorable in the aggregate than an MRO. Ohio law guarantees ratepayers full market-based SSO generation rates unless an ESP option is more favorable. A PSR would have to be priced below market to satisfy R.C. 4928.142, but then it would not be a charge under R.C. 4928.143(B)(2)(b).

Thus, the Commission acted unreasonably and unlawfully in finding that an above-market rate PSR could be approved as part of an ESP under circumstances that the PSR was an above-market charge that functions as a financial restraint on customer shopping to provide stability to retail electric generation service. This is not Ohio law. The "financial restraint" and "stability" claims do not overcome the statutory requirement that an ESP be more favorable in the aggregate than an MRO. Under Ohio law, SSO generation rates cannot be stabilized above-market. Shopping cannot be limited to achieve above-market prices. Duke proposed the PSR to require distribution ratepayers to pay the above-market costs of the OVEC generating units through a PSR. A PSR with above-market costs cannot satisfy R.C. 4928.143(C). There is no place in Ohio law for a PSR.

ALLEGATION OF ERROR 2

2) **The Commission acted unreasonably and unlawfully when it found that a PSR proposal, if properly conceived, has the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions and to protect customers from price volatility in the wholesale market, particularly during periods of extreme weather. Opinion and Order at 46-47.**

In addition to a PSR having nothing to do with limiting customer shopping, physically, financially, or otherwise, a PSR will not provide a hedge against volatility. Ohio's SSO customers already have a sufficient hedge against volatility. The structure of SSO auctions in Ohio eliminates the need for a PSR. Ohio's SSO auctions provide whatever hedge is needed against price volatility. A PSR cannot enhance the price stability provided through the SSO auctions. Even if SSO customers were exposed to significant price volatility, which they are not, a PSR would just as likely move in the same direction as market prices as contrary to market prices, thus doing nothing to address volatility.

Customers receiving service under the SSO are served under one- and two-year full requirements contracts established through periodic auctions. Therefore, SSO customers are not exposed to substantial market price volatility under any foreseeable circumstances. This was true during the polar vortex event in the winter of 2014; SSO customers were protected from the price volatility because the auction-winning suppliers were under contract to deliver at a fixed price and had incorporated a risk premium into their bid prices to cover such an event. Thus, while the SSO auctions are a real hedge against volatility, the PSR has another true purpose. It shifts the risk of the profitability of the OVEC plants onto distribution customers and away from one of the plants' owners, Duke.

The Commission claims that a PSR will provide a hedge for consumers against market volatility. However, as Staff witness Hisham M. Choueiki explained, there are far more effective approaches for mitigating price volatility that do not violate Ohio law. Staff Exhibit 1 at 12-13. In administering all past SSO procurement auctions, the Commission has adopted a staggering and laddering approach that has already effectively mitigated price volatility for SSO customers. Id.

The Office of the Ohio Consumers' Counsel ("OCC") witness James F. Wilson testified that the PSR could itself add to volatility. OCC Exhibit 43 at 12. The PSR could either move contrary to or in the same direction as market prices. Under the PSR, the cost incurred in one quarter by OVEC would appear on distribution customers' bills in the next quarter. The potential for the PSR to act as a hedge against volatile market prices or contribute to price stability is doubtful. OCC Ex. 43 at 13. Any benefit from the PSR would be insignificant when compared to the expected net cost and the risk of even higher costs to Duke's captive distribution customers. OCC Ex. 43 at14.

Under the PSR, customers will pay Duke more but reliability will not be enhanced. Reliability is already assured through the capacity market authorized under the PJM tariffs approved by the Federal Energy Regulatory Commission ("FERC"). These PJM tariff charges are designed to ensure a supply of capacity to meet the region's needs. The PSR does not give Ohio customers any greater reliability than any other customer in PJM. Direct Exhibit 1 at 7.

There is no need for the PSR as a hedge against volatility in SSO prices. The SSO is not particularly volatile. The Commission-administered auction system for determining SSO prices resolves any issues of volatility in SSO rates. There are other more effective tools to stabilize rates than a PSR. In addition to the SSO auction process, the Commission has tools under the ESP to either order an electric distribution utility to build new generation or competitively bid for additional generation. If additional generation was ever needed for stability, the best available source would be through a competitively bid Request for Proposals for new or additional generation.

The Commission acted unreasonably and unlawfully in claiming that a need for additional stability justifies a PSR. There is no need at all for a PSR to provide additional stability, even if such a rider would do so. The SSO auction process provides the needed hedge against volatility in SSO prices. Competitive Retail Electric Service ("CRES") providers secure their own stability. The RTO PJM provides stability and reliability in the wholesale power market. A PSR would add nothing. If additional generation is ever needed in Ohio, Ohio law provides the process to obtain it.

ALLEGATION OF ERROR 3

3) **The Commission acted unreasonably and unlawfully when it found that adoption of a PSR was consistent with the state policy specified in R. C. 4928.02(A) and R. C. 4928.02(H). Opinion and Order at 47-48.**

The Commission found that adoption of a PSR was consistent with the policy of the State of Ohio specified at R.C. 4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service. Opinion and Order at 47-48. Given that the Commission denied approval of the PSR proposed by Duke in this case on the basis that it did not benefit customers, the Commission did not find that the PSR proposed in this case would ensure the availability to consumers of reasonably priced retail electric service pursuant to R. C. 4928.02(A). It is only in the context of a PSR not proposed here and not under consideration in this case that the Commission finds that some other PSR might conform to R.C. 4928.02(A).

A PSR that would benefit customers through an ESP would be one that is set lower than market prices. It would be a credit, not a charge. Given that under Ohio law, customers are entitled to a market rate option ("MRO") for SSO service when the MRO is more favorable in the aggregate than an ESP, the only justification for a PSR as part of an ESP would be that the PSR resulted in lower prices than market prices. R.C. 4928.142.

In addressing R.C. 4928.02(H), the Commission found that a PSR would not permit recovery of generation-related costs through distribution rates because a PSR would be a generation rate authorized by R.C. 4928.143(B)(2)(d). Opinion and Order at 48. However, the PSR does not comply with R.C. 4928.143(B)(2)(d), and R.C. 4928.02(H) cannot be written out of Ohio law by the Commission. Under R.C. Section 4928.02(H), the Commission is to:

> avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation related costs through distribution or transmission rates….

The PSR violates the state's policy at R.C. 4928.02(H), which declares that it is the state's policy to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. The PSR would force all of Duke's distribution customers, including those paying directly for generation supplied by CRES providers, to subsidize the OVEC units when under Ohio law it is OVEC's shareholders that should bear the risk of OVEC's profits or losses in the market. A charge levied on all distribution customers cannot be a generation charge when all generation is procured through the competitive market. The PSR is a classic example of an anti-competitive subsidy.

Approving a PSR would directly contravene the decision of the General Assembly to ensure that generation is competitive and that there is no cross-subsidization of any competitive product or service by a noncompetitive service. A PSR would subsidize the rates Duke can charge for power from OVEC because Duke's noncompetitive distribution service customers will pay the difference between the cost of OVEC and market. What is being described as a hedge is actually a guarantee that the OVEC plants will produce a guaranteed profit for Duke. It is a subsidy flowing from the noncompetitive distribution service to the competitive generation service. The PPA violates Ohio law. R.C. 4928.02(H).

The PSR also violates R.C. 4928.38 and 4928.39. The Commission found a PSR could be a generation charge allowable under R. C. 4928.143(B)(2)(d) but did not recognize that assigning the costs of above-market generation to all distribution customers makes distribution customers responsible for Duke's legacy generation costs long after the period for transition cost recovery has ended. The subsidy would insulate Duke and its shareholders from the risk of the competitive market associated with Duke's interest in the OVEC generating units when Ohio law requires that the utility shall be fully on its own in the competitive market. The PSR would be a form of transition revenues Under R.C. 4928.38 and 4928.39, recovery of above-market generation transition costs by Ohio public utilities has long ended.

The PSR as proposed had no basis in Ohio law; it violates R.C. 4928.02(A), R.C. 4928.02(H), R.C. 4928.38 and R.C. 4928.39. The PSR was not an authorized ESP charge under R.C. 4928.143(B)(2)(d). A PSR set above market would not allow an ESP to pass the MRO test. The PSR is anti-competitive as it clearly puts some electric generators on a different level if one generator's profits are guaranteed by distribution ratepayers. R.C. 4928.02(H). The PSR corrupts Ohio's statutory scheme for competitive generation markets. The Commission acted unlawfully in failing to recognize that Ohio law does not allow for a PSR.

ALLEGATION OF ERROR 4

4) The Commission acted unreasonably and unlawfully when it ignored obvious federal preemption issues associated with a PSR. Opinion and Order at 48.

The Commission declined to address constitutional issues raised by the parties because the Commission believed that such issues were best reserved for judicial determination. Opinion and Order at 48. Issues of federal preemption are so fundamental to a PSR that they cannot be credibly dismissed.

By subsidizing wholesale generation with distribution customer funds, a PSR will corrupt the operation of the regional wholesale generation market, which violates federal law. Ohio relies on the regional transmission organization ("RTO") PJM for wholesale generation, and PJM operations are regulated by the Federal Energy Regulatory Commission ("FERC"). All wholesale generation participating in the PJM market must be treated the same – i.e., operate without subsidies -- or there is a violation of the Federal Power Act. *EnergyPlus LLC v. Nazarian,* 753 F. 3d 467 (4th Cir. 2014) (affirming *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp.2nd 790 (D. Md. 2013), and *PPL EnergyPlus, LLC v. Hanna,* Case No. 13-4330 (slip opinion) (3rd Cir.2014 (affirming *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372 (D.N.J. 2013).

A PSR gives assurance of cost recovery and profitability to a designated wholesale generator, a subsidy which is not afforded to all other wholesale generators in the PJM and Ohio SSO wholesale market. OVEC could bid its generation into PJM at zero cost as a price taker making it virtually impossible to determine the cost of the subsidy for the generation in a market where prices change hourly. The only way to avoid this problem is not to allow an unlawful subsidy from Ohio distribution customers to the privileged wholesale generator(s).

The PSR would have passed through to Duke's retail distribution ratepayers the costs and revenues of OVEC generating units plus a guaranteed profit although the Commission lacks jurisdiction to review those wholesale purchased power costs and revenues. Duke receives the OVEC generation through a wholesale contract, which is subject solely to the jurisdiction of FERC. FERC has long held jurisdiction over the field of wholesale power sales, and federal law preempts state law in this field. This makes the PSR wholly inappropriate as a non-bypassable retail charge on captive distribution customers and illegal under the Federal Power Act. If all of PSR costs are guaranteed by Ohio's retail distribution ratepayers, Duke has no incentive to minimize costs because the Commission has no authority to regulate the costs. There are no regulatory limits on the amount that can be recovered through a PSR.

If the Commission were to ignore the Federal Power Act and approve a PSR, customers would be inherently harmed. Under Ohio law, rates authorized under an order issued by the Commission are assumed to be lawful. The federal issue cannot be appealed to the Ohio Supreme Court so there is no possibility to stay the collection of the charge nor post a bond during an appeal to the Ohio Supreme Court. As a result, Ohio utility customers would be required to pay the rider until the federal courts ultimately rule the PSR unlawful, yet there is no mechanism to refund the illegal charges to Ohio retail customers. Willingly ignoring federal law will inevitably lead to Ohio utility customers paying an illegal charge with no opportunity to recover for the financial damages that result. The Commission cannot simply ignore federal constitutional issues.

The Commission acted unreasonably and unlawfully in avoiding the obvious federal preemption issues of a PSR. The PSR will recover costs of a wholesale purchased power contract that is subject to exclusive federal jurisdiction. Wholesale generation markets are under the exclusive jurisdiction of FERC. The Commission's approval of a PSR interferes with federal jurisdiction of wholesale power purchases and RTOs. The temporary imposition of a charge illegal under federal law would deny Ohio retail customers any remedy.

ALLEGATION OF ERROR 5

5) The Commission acted unreasonably and unlawfully when it authorized Duke to establish a placeholder PSR. Opinion and Order at 47.

The Commission concluded that a PSR could be a financial limitation on customer shopping that is intended to stabilize rates. Therefore, a PSR could satisfy the criteria of R.C. 4928.143(B)(2)(d). While not approving the proposed PSR before it, the Commission invited Duke to propose another PSR that could be authorized under the Commission's theory of R.C. 4928.143(B)(2)(d). The Commission authorized Duke to establish a placeholder PSR at an initial rate of zero, for the term of the ESP Opinion and Order at 47.

The Commission should not have authorized a placeholder PSR set at zero when the Commission denied Duke's proposed PSR. The Commission correctly denied the proposed PSR that was before it. The Commission should not have encouraged Duke to file another proposal using the Commission's theory of the magic words (a rider as a generation charge that financially limits customer shopping to stabilize rates) to satisfy R. C. 4928.143(B)(2)(d).

The problem with a PSR is not finding the magic words to fit a charge under R. C. 4928.143(B)(2)(d). Whether the Commission ignores them or not, there are many other provisions of Ohio law that a PSR violates. There is also federal preemption. Therefore, it was unlawful and unreasonable for the Commission to have encouraged Duke to file another PSR proposal and to have allowed Duke to establish a placeholder PSR in the event a PSR is ever approved. .

ALLEGATION OF ERROR 6

6) **The Commission acted unreasonably and unlawfully when it approved Duke's Retail Capacity Rider ("Rider RC") and Duke's cost allocation methodology for Rider RC. Opinion and Order at 59-60.**

The Commission approved Duke's proposed allocation methodology for Rider RC. Opinion and Order at 59-60. The Commission found that it was reasonable for Duke to calculate its allocation of Rider RC based on the 5CP method, which is used to allocate the cost of capacity set in the PJM market. The Commission also stated that the methodology is structured to avoid a disparity between SSO rates and CRES offers and to provide customers with an effective mechanism to compare SSO and CRES offers. Id.

The Commission did not trouble itself to consider whether there is any need for Rider RC at all. The fact that Rider RC creates cost components for the

SSO that actually do not exist did not concern the Commission. But the evidence of record demonstrates that there is no need for Rider RC at all.

OCC witness Anthony J. Yankel testified that Duke does not incur capacity costs associated with SSO service apart from the capacity costs that are built into the competitively bid auction prices. OCC Ex. 46 at 3. Capacity and energy for SSO load come as a package and are simply sold on the basis of energy alone. Duke does not incur any direct or known generation-related capacity costs. Marketers incur capacity costs and build those costs into their unbundled bids. Because Duke incurs no direct capacity costs, there are no capacity costs to be allocated. OCC Ex. 46 at 7-8.

OCC witness Kahal also testified that Rider RC is unneeded and improperly charges residential SSO customers a price premium. Winning suppliers in the SSO auction bid and are paid on a flat dollar per MWh basis to supply a bundled capacity, energy, ancillary services, and load-following generation product. The pricing of each individual component of the generation is not revealed. Capacity costs are an implicit and unquantified component of the total payments to SSO suppliers. In addition, the suppliers do not bid nor are they paid by SSO customer class. OCC Ex. 32 at 5. Suppliers do not reveal their pricing requirements to serve individual customer classes. The specific effects of the customer class mix on bids cannot and need not be determined by Duke. OCC Ex. 32 at 15. Duke only charges SSO customers for power supply based on the blended prices resulting from the SSO auctions. The cost of capacity is not separately identified, nor is the cost to serve a particular class identified. Imputing capacity costs is nothing more than a guess at best, and a fraud at worst, because marketers do not purchase capacity based on 5CP; they purchase it based on forward market prices that do not reflect peak usage.

While ignoring the fact that Rider RC is not needed at all, the Commission approved Duke's new customer class allocation for Rider RC. Duke will translate the bundled SSO contract payments into SSO customer class rates and create an implied capacity component. Then Duke will perform a separate calculation of the implied capacity charge for each customer class with the residential SSO customers being required to pay a cost premium as compared to other customer classes. Duke's allocation method penalizes members of the residential class, as it increases the allocation of what are alleged to be capacity charges from 39.12% to 45.37%, a 16% increase in the residential allocation as opposed to the current ESP. This would translate into an $11 million per year increased cost for residential SSO customers. OCC Ex. 32 at 19. Imposing this residential cost premium was both unnecessary and improper. OCC Ex. 32 at 5.

The price premium should not have been approved as there was no showing that the premium is required by SSO suppliers to serve residential customers. It is not reasonable to charge residential customers a premium for capacity in the context of a purely market-based SSO. The cost causation principle applies to cost-of-service regulation, and there is no evidence that the winning bidders in the SSO auctions would charge residential classes a cost premium, as compared to non-residential customers. Duke alone determined the allocation based on market prices that are not based on the bidding approach used to price the contracts that supply the SSO loads.

Moreover, the residential premium is unfair. The residential class is more than 70% of the SSO kWh sales, and absent the residential class, Duke's SSO auctions would be quite small and therefore much less attractive to potential bidders. Bidders are exposed to unpredictable SSO load changes over the term due to customer migration. This risk will be priced into their bids. Large non-residential customers have a greater tendency to migrate. Half of residential and small commercial customers remain on Duke's SSO. There was no showing that bidders in the auction require a price premium to serve the residential class. OCC Ex. 32 at 21. There was no showing that the market actually requires a price premium to serve the residential SSO class.

Therefore, the Commission acted unreasonably and unlawfully when it approved Duke's Rider RC. The evidence demonstrates that Rider RC is unnecessary. Eliminating Rider RC would simplify the setting of SSO retail rates and eliminate the unwarranted cost premium to the residential class. After unreasonably failing to reject Rider RC, the Commission should have rejected Duke's capacity cost allocation adjustment in the customer class pricing. The allocation was unjustified and unfair to the residential class.

ALLEGATION OF ERROR 7

7) **The Commission acted unreasonably and unlawfully when it approved Duke's Distribution Capital Investment Rider ("DCI") and Storm Damage Rider ("SD"). Opinion and Order at 71-74.**

The Commission found that Duke's proposed Rider DCI was reasonable and should be adopted despite the fact that the Commission found that Duke was already dedicating sufficient resources toward reliability. Opinion and Order at 71. The Commission found that utilities should replace and modernize infrastructure and therefore found it reasonable to permit the recovery of prudently incurred distribution infrastructure investment costs through an ESP rider. The Commission accepted Duke's recommended return on equity ("ROE") of 9.84% for the rider and found that the lack of business risk, which occurs because the investments are recovered through the rider as they are incurred along with the ROE, does not have a substantial enough impact to warrant lowering the ROE. The Commission also found that Duke's storm damage rider ("SD") was reasonable and should be approved. Opinion and Order at 74.

Duke's Riders DCI and SD will recover distribution costs and investments from customers through pre-approved riders instead of through base distribution rates set in distribution base rate cases. The move to cost recovery through distribution riders approved in ESP cases allows the distribution utility to recover costs and investments on an immediate basis without the Commission's consideration of all factors that would be considered in a base rate case. This move is harmful to distribution ratepayers who are forced to pay the higher rates through the riders, without any consideration whether those higher rider rates reflect the actual cost of distribution service. Cost of service is supposed to be the basis of regulated distribution service rates. The purpose of the distribution riders approved in ESP cases is to detach the cost of distribution service from the amount paid by customers for distribution service.

OCC witness Jerome D. Mierzwa testified that riders provide for the automatic collection of certain costs from customers outside the context of a base rate proceeding where all elements of the cost of service are examined. OCC Ex. 45 at 3. This is contrary to sound ratemaking principles. When the utility is permitted to collect costs through a rider, the incentive for the utility to control costs that pass through the riders is reduced. The existence of riders can cause the utility to incur costs that are allowed through the riders and avoid incurring costs that remain recoverable only in base rates.

To the extent that riders are approved, they should be limited to cost items that are substantial, unpredictable, and beyond the utility's control. Riders are also used when essential to protect a utility from dire financial situations. Duke presented little evidence that the costs it is seeking to collect through the riders meet these criteria. Duke has also not shown that its financial integrity would be compromised if the costs were collected through base rates established in base rate proceedings, where costs are subject to closer scrutiny. The collection of costs through riders can lead to increases in utility rates and revenues even when the utility does not have a revenue deficiency. Under normal circumstances, a regulated utility should be able to implement rate increases only after a comprehensive base rate proceeding where all costs and revenues under present rates are taken into consideration.   OCC Ex. 45 at 5-6.

Duke's Rider DCI will recover a return on incremental capital investment and the associated depreciation and property taxes for the distribution-related investment that is not otherwise recovered through existing base rates and riders. Duke did not demonstrate that it is necessary to increase rates through these riders to maintain the present level of service reliability. OCC Ex. 45 at 9. Duke did not demonstrate that the riders were necessary to avoid putting Duke in a dire financial situation. Duke presented no evidence that reliance on a base rate proceeding as authorized under Ohio law would impact the reliability of its distribution system to the detriment of its customers. Utilities are already required to maintain distribution facilities under R.C. 4905.22.   Current distribution rates already compensate Duke for this responsibility. Duke already has met or exceeded reliability standards for each year since 2011. OCC Ex. 47 at 21. In fact, the reliability of Duke's distribution system has been increasing under the base rate setting process. OCC Ex. 45 at 10-11. The evidence demonstrated that Duke was already dedicating sufficient resources to the reliability of its distribution system. Id. at 17. Duke presented no evidence that the reliability of its distribution system will improve if the riders are approved.

Duke also did not claim there will be a reliability benefit to customers associated with Rider DCI. OCC Ex. 47 at15-16. The rider is only meant to maintain the existing system. Rider DCI will fund a maintenance program rather than an infrastructure modernization program that might qualify for incentive ratemaking through an ESP rider. OCC Ex. 47 at 17-19. While R.C. 4928.143(B)(2)(a) may permit distribution expense to be collected as part of an ESP if the distribution expense relates to infrastructure modernization, the statute does not permit expenses associated solely with maintaining a distribution system to be collected through an ESP rider. Duke did not demonstrate that Rider DCI will fund an infrastructure moderation program as required by law.

OCC witness Matthew J. Kahal discussed the appropriate rate of return for Rider DCI if the Commission were to approve it. OCC Ex. 32 at 4. Mr. Kahal testified that the ROE for the rider requested by Duke was excessive given the rider's very low risk and the beneficial effect of the rider on Duke's overall financial risk profile. The requested ROE for the rider was established in Duke's last base rate case based upon Duke's business risk at that time. Id.

When the Commission approved Rider DCI, Duke's proposed 9.84% ROE should have been reduced to reflect the low risk attributes of the rider and Duke's improved financial risk profile that would result from the rider. Rate setting through the rider would materially improve Duke's business risk profile for providing distribution service. This risk reduction and the rider's practically immediate cost recovery mean that Duke's business risk decreases. The 9.84% ROE does not reflect the risk reducing attributes of the investment rider. OCC Ex. 32 at 9. Using a rate of return established for a base rate case is inappropriate for an ESP rider because it is logical that the ROE established in a base rate case is too high for such a rider. Lower risk results in a lower cost of equity. Therefore, the ROE component of the rider should have been reduced from the 9.84% approved in the last base rate case in order to reflect the lowered risk. OCC Ex. 32 at 10.

There was also no evidence that the storm damage ("SD") rider was necessary. Duke's current distribution base rates include $4.4 million per year for major storm expense recovery. Duke proposed to establish a regulatory asset account to defer the costs above or below this base rate amount in each year. Duke proposed to recover the balance of this deferral in the next distribution base rate case unless the balance exceeds $5 million at the end of a calendar year and then Duke would collect or return to customers the balance through the storm damage rider with carrying costs. OCC Ex. 45 at 22-23.

As with the Rider DCI, Duke did not demonstrate that base rate proceedings for storm damage expenses have threatened Duke's financial integrity. A full review of storm damage costs would more likely occur in a separate proceeding, if necessary, or in a base rate case. The storm damage rider also lowers Duke's business risk. No Duke witness demonstrated that the 9.84% ROE approved in the last base rate case is appropriate for the rider.

The Commission should not have approved the distribution cost riders and instead should have relied on base rate proceedings to determine distribution rates. Given that the Commission approved these riders, the Commission should have adopted the recommendations of OCC witnesses Mierzwa, Kahal and Yankel to mitigate the basic unfairness of these riders.   The issue here is not cost recovery but the method of cost recovery. Simply put, distribution service cost recovery is best accomplished through base rate proceedings. Riders frustrate the public policy inherent in base rate proceedings.

ALLEGATION OF ERROR 8

8) The Commission acted unlawfully and unreasonably when it disregarded the requirement at R.C. 4928.02(L) to protect at-risk populations when it approved the ESP. Opinion and Order at 79.

The Commission found that the concerns expressed by OPAE that the ESP does not protect at-risk customers were addressed by the entirety of the Opinion and Order. Opinion and Order at 79. In other words, rejecting or modifying some of Duke's proposals so that Duke did not receive all the cost increases it requested was sufficient to meet the statutory criteria at R.C. 4928.02(L) to protect at-risk populations. The Commission stated that the approved ESP, with its modifications, created a reasonably priced rate structure for customers. Id.

The Commission must assure affordability and the protection of at-risk populations when determining the outcome of Duke's proposed ESP. R.C. 4928.02(A) and (L) set forth the policy of the state of Ohio for competitive retail electric service. The State policy is to:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
> . . .
>
> (L) Protect at-risk populations, including, but not limited to, when considering implementation of any new advanced energy or renewable energy resource;

The Commission has a duty to ensure that the policies specified under R.C. 4928.02 are being implemented through the ESP, but nothing in the ESP as approved by the Commission addresses the affordability of electric service or the protection of at-risk populations. On the contrary, the approved ESP will increase the cost of electricity for residential and small commercial consumers without addressing the impact on consumers, especially low-income, at-risk residential consumers.

The at-risk population of Duke's customers who live in counties where poverty levels exceed the statewide average should be a concern for the Commission. The poverty level in Hamilton County is 17.1%, well in excess of the statewide poverty level of 16.3%. The City of Cincinnati had a poverty level of 29.4% in 2012 compared to 24.3% in 1999. OCC Ex. 47 at 7. Middletown had a poverty level of 23.8% in 2012 compared to a 15.4% poverty level in 1999. Id. Customers whose incomes are slightly above the poverty level are also at-risk but may not qualify for income-based assistance programs. A third of the population of Hamilton County is designated as close to the poverty level as is over a third of the population of Montgomery County. These at-risk Ohioans are already facing significant drains on their incomes for basic living expenses such as shelter, food, transportation, and health and safety. Increases in the cost of electric service have to be absorbed in budgets that are already stretched thin. OCC Ex. 47 at 8-9.

Even without the additional price increases in the approved ESP, Duke's electric bills have increased at a level of twice the rate of inflation over the last decade. In July 2004, a residential customer bill for 750 kWh was $60.71, and in July 2014 it was $93.82. Therefore, customers' electric bills have increased by

54.5% in just ten years, while the cumulative rate of inflation was only 26.1% during the same ten years. OCC Ex. 47 at 9.

There is ample proof that Duke's electric service is unaffordable for many of its customers and that Duke's residential customers are struggling to pay their bills. Approximately 83,199 (or 13.5%) of Duke's residential customers were disconnected for non-payment in 2013. This is a 19.1% increase from the number of disconnections in 2011. OCC Ex. 47 at 11. Approximately 28,468 (or 4.6%) of Duke's low-income customers were on the Percentage of Income Payment Plan ("PIPP"), which is designed to provide a rate that low-income customers can theoretically afford. Another 13,193 of Duke's customers were on other payment plans. Thus, 125,000 of Duke's 615,000 residential customers are struggling to pay their electric bills. Id. at 12. This is 20.3% of the total Duke residential customers.

The numbers show that affordability is a serious issue that the Commission should have addressed. The approved ESP will make electric service rates even higher and more unaffordable for many customers. This is inconsistent with the policies of the state of Ohio. R.C. 4928.02(L) provides that it is the policy of the state of Ohio to protect vulnerable populations.

OCC witness Williams testified that because affordability of electric service is an issue in Duke's service territory, the expected rate increases from the ESP riders could result in even more customers being disconnected for non-payment, more customers ending up on PIPP and other payment plans, and more at-risk customers facing potential health and safety issues. OCC Ex. 47 at15. Based on the number of at-risk customers in Duke's service territory who will be hurt by unreasonable price increases for electric service, the DCI and SD riders should have been rejected.

Ohio law requires the Commission to assure affordability and protection of at-risk customers. To comply with the law, the Commission should have denied the distribution cost riders that Duke proposed in this ESP. The Commission approved Duke's Rider DCI to collect routine maintenance expenses from customers on an expedited basis without considering the impact on affordability. The Commission approved Rider SD when storm damage costs should be recovered through base distribution rates.

These riders will harm all customers, but they will especially harm at-risk populations. OCC Ex. 47 at 5. The riders will increase costs and undermine affordability and protection of vulnerable customers. The Commission should have denied these riders and to protect at-risk customers the Commission should have adopted OPAE's recommendation and exempted at-risk customers from the payment of these riders. It was unjust and unreasonable for the Commission to fail to exempt at-risk populations from payment of the riders.

Wherefore, the Commission should grant this application for rehearing to assure the affordability of retail electric service for all consumers, including at-risk consumers, in Duke's service territory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing and Memorandum in Support of Ohio Partners for Affordable Energy was served by electronic transmission this 1st day of May 2015 upon the following:

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