

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Authority to)	
Establish a Standard Service Offer)	
Pursuant to R.C. 4928.143, in the Form of)	Case No. 14-841-EL-SSO
an Electric Security Plan, Accounting)	
Modifications, and Tariffs for Generation)	
Service.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Authority to Amend)	Case No. 14-842-EL-ATA
its Certified Supplier Tariff, P.U.C.O. No.)	
20.)	

**JOINT APPLICATION FOR REHEARING
BY
CONSTELLATION NEWENERGY, INC.
AND
EXELON GENERATION COMPANY, LLC**

Now come Constellation NewEnergy, Inc. and Exelon Generation Company, LLC pursuant to Section 4903.10, Revised Code, and jointly petition the Public Utilities Commission of Ohio (“Commission”) to grant rehearing for the purpose of modifying its April 2, 2015 Opinion and Order in the Duke Energy Ohio, Inc. Electric Security Plan III proceedings. The requested modifications are required for the following reasons:

- (1) It was unjust and unreasonable for the Commission to authorize Duke Energy Ohio, Inc. to establish a placeholder non-bypassable rider (Rider PSR) as part of the utility’s third electric security plan when the Commission found that it was not “appropriate to adopt the proposed PSR at this time.”
- (2) The Commission should have been more explicit in its additional critical factors/information that must be addressed in the ratepayer-guaranteed rider

(Rider PSR) to ensure that such a rider complies with state and federal law and is in the best interest of ratepayers.

- (3) Without further clarifications, the placeholder Rider PSR violates other Ohio laws and federal laws.
- (4) It was unjust and unreasonable for the Commission to include the entirety of proposed Section 3.9 in the approved Master Supply Agreement as it unfairly allows Duke Energy Ohio, Inc., too much discretion to unilaterally modify the Declaration of Authority for any reason.

The reasons for and arguments in support of these grounds for rehearing are set forth in greater detail in the attached Memorandum in Support.

Respectfully Submitted,



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**MEMORANDUM IN SUPPORT OF
THE JOINT APPLICATION FOR REHEARING OF
CONSTELLATION NEWENERGY, INC.
AND
EXELON GENERATION COMPANY, LLC**

I. Introduction

On May 29, 2014, Duke Energy Ohio, Inc. (“Duke”) filed an application to establish a third electric security plan (“ESP III”) that would commence on June 1, 2015, and continue through May 31, 2018.¹ Numerous issues were raised and numerous witnesses testified during the 16 days of the evidentiary hearing. On April 2, 2015, the Public Utilities Commission of Ohio (“Commission”) approved the ESP III application with significant modifications. Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (collectively “Constellation”) jointly seek rehearing only as to the creation of a placeholder rider for Duke’s price stabilization rider (“Rider PSR”) and one ruling regarding the Master Supply Agreement (“MSA”). Specifically, Constellation files this Application for Rehearing because the Commission lacks the authority and it is unreasonable to have a placeholder Rider PSR. Further, without additional conditions and clarifications, the placeholder Rider PSR is incomplete and thus unlawful. Constellation also believes that the Commission decision to include the entirety of proposed Section 3.9 in the approved Master Supply Agreement unfairly allows Duke Energy Ohio, Inc., too much discretion to unilaterally modify the Declaration of Authority for any reason.

¹ Duke’s ESP III proposal also contained a provision by which it could unilaterally terminate the ESP III at the end of the second year. That termination proposal was rejected by the Commission and, as a result, the Commission has approved a three-year ESP III. Opinion and Order at 81.

In addition, Constellation notes its support for two other aspects of the Commission's April 2 decision. Specifically, Constellation believes that, based on the ruling in the ESP III, the Commission does not intend to automatically allow the Supplier Cost Reconciliation Rider ("Rider SCR") to become non-bypassable when the balance reaches the ten-percent threshold set forth in the rider. Instead, the Commission will closely monitor and obtain information for consideration in any future application regarding that rider. Additionally, Constellation commends the Commission's decision to hold only one auction in advance of the start of Duke's ESP III. That aspect of the modified competitive bidding schedule is especially important given that the ESP III will be starting in the very near future.

II. It was unjust and unreasonable for the Commission to authorize Duke Energy Ohio, Inc. to establish a placeholder non-bypassable rider (Rider PSR) as part of the utility's third electric security plan when the Commission found that it was not "appropriate to adopt the proposed PSR at this time."

Duke asked for authority to establish a non-bypassable Price Stabilization Rider ("Rider PSR") that would guarantee it ratepayer coverage for its Ohio Valley Electric Corporation ("OVEC") generation costs in exchange for the ratepayers receiving any upside profits from the sale of power from its OVEC holdings.² The purported reason for the Rider PSR is to stabilize overall retail electric rates under the theory that, if capacity costs increase, it is likely that OVEC would have profits and the profits would offset in part such retail electric rate increases.³ If capacity rates stayed low, then Rider PSR would increase retail electric rates.

After examining all the factual and legal issues raised concerning Duke's proposed Rider PSR, the Commission rejected the Rider PSR proposal for OVEC.⁴ The Commission then established a placeholder Rider PSR in Duke's tariff.⁵ In order for the placeholder rider to be implemented, Duke

² Duke Ex. 1 at 13-14.

³ *Id.*

⁴ Opinion and Order at 46.

⁵ *Id.* at 47.

must submit a new application, and there will be another hearing and a new Opinion and Order must be issued. Further, in the new application Duke has the burden of proof to show the new application meets all the legal and factual requirements, in addition to various criteria the Commission set forth in its Opinion and Order.⁶ As such, the placeholder Rider PSR approved for Duke's tariff merely reflects the Commission's view that, at some point in the future, it may be possible under Section 4928.143(B)(2)(d), Revised Code, to have a PSR proposal that actually meets the statutory standards⁷ and the additional criteria the Commission sets forth in the Opinion and Order.

While the Commission is within its authority to provide dicta on how it is possible, at some future point, to have a reasonable Rider PSR proposal that has the effect of stabilizing or providing certainty as to retail electric service rates, the Commission is not authorized by Section 4928.143, Revised Code, to establish a "placeholder" Rider PSR. In other words, the Commission does not have the authority to approve a non-bypassable rider based on the hope that, at some unknown point in the future, there will be a power purchase agreement ("PPA") that benefits ratepayers. Instead, there must be a showing that the rider and any associated PPA actually will benefit ratepayers as proposed. This is especially true in the matter at bar as the Commission ruled that proposed Rider PSR would not actually promote rate stability⁸ and will not provide rate certainty regarding retail electric service.⁹ In fact, the Commission stated it could not even determine the rate impact of the Rider PPA.¹⁰ Because the Commission did not find that Rider PSR as proposed will satisfy the "providing

⁶ *Id.*

⁷ Section 4928.143(B)(2)(d), Revised Code, states that an ESP may provide for or include "[t]erms, 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."

⁸ Opinion and Order at 46.

⁹ *Id.*

¹⁰ *Id.*

certainty” aspect of Section 4928.143(B)(2)(d), Revised Code, the Commission erred in permitting Duke to include the placeholder Rider PSR in its tariffs.

The Commission noted in its Opinion and Order that it had previously allowed the establishment of a placeholder rider within an ESP.¹¹ However, when a rider in an application is accepted and all that is needed is the submission of the dollar amounts based on future cost occurrences, a rider is actually established. For instance, Duke was permitted to establish the Distribution Rider – Infrastructure Modernization (Rider DR-IM), initially set a zero, while actual costs were incurred. In that situation, Duke’s underlying proposal was approved, although a specific rider rate could not be set on day one. Additionally, the FirstEnergy electric distribution utilities were permitted to establish the Delta Revenue Recovery Rider (Rider DRR) for recovery of delta revenues for reasonable arrangements approved after a specific date. This rider too was an approved rider that had to be initially set at zero until the costs were incurred. In stark contrast, the Commission rejected Duke’s Rider PSR and Duke was required to file anew, if it decides to move forward.

In sum, the Commission reviewed the plain and clear language of Section 4928.143(B)(2)(d), Revised Code, and compared it with Duke’s proposal. The plain and clear language of Section 4928.143(B)(2)(d), Revised Code, was not met in order to establish and approve a placeholder PSR rider. The statute does not allow it to be met based on the hope that at some future point a PSR proposal will exist that benefits ratepayers. Accordingly, upon finding that Duke’s proposal did not satisfy the statutory requirements, the Rider PSR proposal should have been rejected and nothing further on this point established. It was unjust and unreasonable to conclude that a placeholder Rider PSR, combined only with the hope for a reasonable PSR proposal at some future date, satisfied the statutory requirements. Section 4928.143(B)(2)(d), Revised Code, does not allow an ESP to include a term, condition or charge that hopefully meets the components of the statute in the future.

¹¹ *Id.* at 47.

III. The Commission should have been more explicit in its additional critical factors/information that must be addressed in the ratepayer-guaranteed rider (Rider PSR) to ensure that such a rider complies with state and federal law and is in the best interest of ratepayers.

The Commission's approval of the placeholder Rider PSR is premised on the notion that Duke may present at some future date a "reasonable PSR proposal that provides for a significant financial hedge that truly stabilizes rate."¹² In support of this notion, the Commission listed the following factors it would take into consideration in deciding whether to approve a future PPA application:¹³

- Financial need of the generating plant;
- Necessity of the generating facility in light of future reliability concerns, including supply diversity;
- Description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;
- Impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development;
- Rigorous Commission oversight of the rider, including a process for periodic substantive review and audit;
- Commitment to full information sharing with the Commission and its Staff;
- An alternative plan to allocate the rider's financial risk between the company and its ratepayers; and
- Severability provision recognizing that other provisions of the ESP will continue if the PPA rider is invalidated.

The above criteria form the foundation for what is essentially a cost-benefit analysis for finding that a future PSR proposal is necessary and appropriate. However, the Commission should have been more explicit as to what additional information must be provided to meet each of these criteria. Constellation contends that the Commission erred in not requiring that other critical factors/information be addressed and considered in all future applications seeking approval of a PSR mechanism. Further detail is necessary in order to provide stakeholders, including the Commission, with objective standards by which to measure each of these elements.

¹² Opinion and Order at 47.

A. A competitive bid process will provide the lowest cost solution for Ohio.

The list of criteria for approving a future PPA in the Opinion and Order is missing one additional and important element – whether the plant seeking a PPA is the lowest cost alternative. Duke must take steps to assure that any application for a future Rider PSR has made a good faith search of all the possible power plants that could be used. In the current case, Duke only reviewed its affiliated OVEC power plants. A future application should also address the opportunity for the Rider PSR to have non-affiliated power plants considered. This can easily be done with a request for proposal or other mechanism for competitive bidding. Competitive bidding will allow for lower cost alternatives to be selected and avoid any claims of corporate separation issues¹⁴ or appearances of impropriety through affiliates-only being considered for Rider PSR. This too will provide greater transparency, demonstrating that indeed the power purchased will not be unduly discriminatory or preferential.

B. The financial need element should take into account PJM capacity market reforms.

For the “financial need of the generating plant” factor, the Commission must include more detail and explanation. One factor the Commission should consider under financial need is whether the generating plant cleared the most recent Capacity Auction of PJM Interconnection LLC (“PJM”), and what type of capacity resource it cleared as. The Commission should require the applicant to address the impact of the PJM’s proposed Capacity Performance (“CP”) product, which is currently awaiting a decision from the Federal Energy Regulatory Commission (“FERC”).¹⁵ The CP product will potentially have a profound effect on the capacity market and is likely to materially impact the generator’s financial need for a PPA. At the very least, the Commission should grant rehearing in this case in order to conduct an assessment to fully understand the potential impact of CP. Any

¹³ *Id.*

¹⁴ Corporate separation is addressed below and the statute outlining corporate separation is quoted in footnote 22.

findings from this assessment should be documented in the record for the Commission to consider either with respect to its criteria for approving a future Rider PSR, or in revisiting the decision as to whether the placeholder Rider PSR is necessary in the first instance.

C. The financial risk element must also take into account PJM capacity market reforms and the Capacity Performance penalty risk must not be shifted to ratepayers.

In its list of criteria to approve a future Rider PSR, the Commission also identifies the inclusion of an “alternative plan to allocate the rider’s financial risk between the company and its ratepayers.”¹⁶ The Commission’s focus on a shifting of risk in a Rider PSR is appropriate. However, the Commission erred by not specifically requiring that, in order to meet this financial risk criteria, the utility seeking Rider PSR must show that the ratepayer benefits are not outweighed by the risks.

The shifting of risk under a Rider PSR will become a vital consideration for the Commission if the unit seeking a PPA also qualifies as a CP resource. While CP would result in increased capacity revenues, these revenues also would come with significant penalty risks for non-performance. In fact, the proposed CP penalties are so severe that they far exceed the potential CP revenues.¹⁷ So while at first glance CP may look like it could result in a credit to customers under a Rider PSR proposal, if the risk of non-performance by the generator also is shifted to customers under the PPA, CP could be a disaster for ratepayers.

Furthermore, shifting the CP penalty risk to ratepayers would undermine the entire purpose behind CP, as it would eliminate the incentive of a generator to make the investments necessary to make a plant CP-compliant. If ratepayers are financially responsible for the CP non-performance penalty under a PPA, the generator has no real incentive to spend the money or to make the investment necessary to ensure performance. This would have the perverse impact of actually

¹⁵ *In re: PJM Interconnection, LLC*, Docket No. ER15-623-000.

¹⁶ Opinion and Order at 47.

increasing the reliability risk, not decreasing it. Therefore, while CP revenues may look enticing as a potential credit to ratepayers, this value can only be preserved if the risk of non-performance remains with the generator. Otherwise, the risk associated with generator non-performance can eviscerate the revenues from CP and then some, resulting in a horrible outcome for Ohio consumers, as well as the reliability of the grid.

D. Environmental factors should require a showing of actual environmental *value* to ratepayers, not just bare minimum environmental compliance.

The Opinion and Order also states that a future PPA application must provide a description of how “the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations.”¹⁸ This criteria merely reflects the bare minimum environmental obligations of a plant. The Commission erred by not establishing a more robust standard that measures whether a plant seeking a PPA provides actual environmental *value* to Ohio consumers that justifies the potential cost to consumers under Rider PSR. Low-carbon-emitting generation provides a value to consumers beyond just the energy and capacity the generation provides. For example, a low-carbon resource such as a nuclear generator not only provides value to the environment by emitting zero carbon, it also provides incredible value to Ohio and the region in its ability to meet potential future federal emissions requirements. Whether a plant provides this additional value to ratepayers is a criteria that should be recognized more objectively in a Commission determination to approve a Rider PSR application. The Commission should amend this factor to require a showing of the affirmative environmental value of a unit seeking a PPA beyond just minimum compliance with environmental standards and its ability to provide energy and capacity. Therefore, the Commission should require that any future Rider PSR application include a description of (a) any low-carbon benefits of the PPA generating plant along with any other environmental

¹⁷ CP as proposed could have penalties of up to 1.5 Net CONE (over \$400/MW-Day) so customers may be in line to receive \$269/MW-Day, but be at risk to be charged \$400/MW-day.

benefits of the generating plant, and (b) whether the generating plant provides value to Ohio under state and federal environmental policies.

E. Reliability needs should be supported by a reliability study.

With regard to the “future reliability concerns” included in the factors to be addressed, greater details are also warranted. The Commission erred by not requiring that, in order to meet the reliability need criteria in a future Rider PSR application, a showing must be made that, absent the Rider PSR, the generating plant will retire. The Commission further erred by not requiring that a reliability study must be conducted by a third party demonstrating the reliability needs of the generating plant based on commonly accepted local or regional reliability standards. Specifically, the Commission should require that the reliability study provide, at a minimum:

- A demonstration of the reliability needs of the generating plant
- A description of the methodologies and findings in the underlying reliability studies

The Commission also should require that a Rider PSR application that is premised on reliability needs should also be temporary in nature and address the need to retain certain generating plants until more permanent solutions are in place. This recommendation is consistent with concerns the FERC has recognized as recently as February 2015 for certain PPAs in the wholesale market administered by the New York Independent System Operator, Inc., under which the generation resources would continue to operate and recover costs that would not otherwise be recovered through generator sales of energy, capacity and ancillary services in NYISO’s markets.¹⁹ Specifically, the FERC stated, “agreements should be of a limited duration so as to not perpetuate out-of-market

¹⁸ Opinion and Order at 47.

¹⁹ *New York Independent System Operator, Inc.*, 150 FERC ¶61,116, at P 2 (2015), citing *PJM Interconnection, L.L.C.*, 107 FERC ¶61,112, at PP 20-21 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶61,163, at P 368, reh’g denied, 109 FERC ¶61,157 (2004) (RMR program is backstop measure designed to meet short-term reliability need).

solutions that have the potential, if not undertaken in an open and transparent manner, to undermine price formation.”²⁰

Altogether, the Commission should require submission of the additional critical factors/information listed above in all future Rider PSR applications regarding a competitive bidding process used, financial need of the generating plant, future reliability concerns, and compliance with environmental regulations. At a minimum, the Commission should grant rehearing in this case in order to fully understand the potential impact of CP and have any findings documented in the record for the Commission to consider it with respect to its criteria for approving a future Rider PSR, or revisiting the decision as to whether the placeholder Rider PSR is necessary.

IV. Without further clarifications, the placeholder Rider PSR violates other Ohio laws and federal laws.

A. Rider PPA is not permissible under Section 4928.17, Revised Code.

Shopping customers already pay their competitive retail electric service suppliers for the power they use and, under Rider PSR, the shopping customers would potentially also pay for some of the cost of power from OVEC that they did not use because OVEC’s power price is above market.²¹ Duke is not allowed to supply a noncompetitive retail electric service (i.e., distribution service) and a competitive retail electric service (i.e., generation service) except under a corporate separation plan. *See*, Section 4928.17(A), Revised Code.²²

²⁰ *New York Independent System Operator, Inc.*, 150 FERC ¶61,116, at P 2 (2015).

²¹ RESA Ex. 3 (Direct Testimony of Campbell) at 12.

²² Section 4928.17(A), Revised Code, requires Duke to have a corporate separation plan approved and supervised by the Commission. At a minimum, the corporate separation plan must contain the following:

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

In Duke's second ESP proceeding, Duke agreed to and was directed to complete full corporate separation by the end of 2014.²³ Nothing in that ESP II stipulation or decision reflected that Duke would not divest/transfer its OVEC entitlement, and otherwise "carved out" the OVEC entitlement from the requirement to accomplish full corporate separation. Moreover, the Commission affirmed in these cases that it approved the stipulation with the expectation that Duke would divest/transfer its OVEC entitlement.²⁴ Constellation commends the Commission for directing Duke to pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of the OVEC asset.²⁵

The fact is that Duke still retains its OVEC entitlement at this time and Rider PSR will potentially cause shopping customers to pay for some of the cost of power from OVEC that they did not use. This is contrary to the corporate separation directives in Ohio law.

B. Rider PPA is not permissible under Section 4928.02(H), Revised Code.

Section 4928.02, Revised Code, is the State Energy Policy, which complements the corporate separation plans by strictly forbidding subsidies to flow (either direction) between a regulated non-competitive company and the non-regulated affiliates of the distribution company. Section 4928.02(H), Revised Code, instructs the Commission to take the necessary actions to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates[.]"

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

²³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, Stipulation at 25 (October 24, 2011) and Opinion and Order 44-46 (November 22, 2011).

²⁴ Opinion and Order at 48.

²⁵ Opinion and Order at 48.

Rider PSR violates Section 4928.02(H), Revised Code, by requiring shopping customers to pay part of the cost of the OVEC generation and creating a subsidy for Duke's generation service.²⁶ Rider PSR will recover from all ratepayers (both shopping and non-shopping ratepayers) the OVEC generation costs. This subsidy will exist regardless of whether OVEC's power sales revenue exceed the OVEC costs. Duke's ratepayers are guaranteeing that the OVEC generation earns a profit by covering any difference in the revenues from the sale of the power and cost of generation (the costs of generation include a profit amount).²⁷ This guarantee frees Duke entirely from any market/price risk associated with the OVEC generation. Moreover, the OVEC generators have an advantage over other competitive generators because the OVEC units would be guaranteed to recover their cost, including a return on equity.

The Commission acknowledges that Rider PSR will be a generation-related rate.²⁸ As such, Rider PSR will recover generation-related costs. However, the Commission concluded that Rider PSR will not recover generation-related costs through distribution or transmission rates,²⁹ which overlooks the fact that Rider PSR will be imposed by Duke on all Duke ratepayers. The shopping customers in Duke's territory pay Duke only for its distribution and transmission services. As a result, Rider PSR would recover a generation-related costs through distribution or transmission rates at least as to the shopping customers in Duke's territory. There is no other cost category or conclusion to be reached based on the evidence of record.

Moreover, Commission has previously determined that a proposal to recover costs, on a non-bypassable basis, related to a generating unit of Ohio Power Company would "effectively allow [Ohio Power Company] to recover competitive, generation-related costs through its noncompetitive,

²⁶ RESA Ex. 3 (Direct Testimony of Campbell) at 10.

²⁷ Duke Ex. 6 at 13; IEU Ex. 5 at 7-10; Tr. Vol. III at 651-652.

²⁸ Opinion and Order at 48.

²⁹ *Id.*

distribution rates....”³⁰ The Commission further concluded that the *Sporn* rider proposal would be contrary to Section 4928.02(H), Revised Code.³¹ A comparison between Ohio Power’s rejected *Sporn* rider and Duke’s Rider PSR shows no appreciable difference to justify a different conclusion by the Commission:

<i>Sporn</i> Rider Proposal	Rider PSR Proposal
Nonbypassable charge imposed on all customers of the utility	Nonbypassable charge imposed on all customers of the utility
Generation-related costs compose the proposed rider – generating plant closure costs	Generation-related costs compose the proposed rider – generating plant power costs
Generating plant owned by utility	Generating plant partly owned by utility

For purposes of evaluating the propriety of Rider PSR under Section 4928.02, Revised Code, Ohio Power’s *Sporn* rider proposal is the same as proposed by Duke’s Rider PSR. Rider PSR would effectively allow Duke to recover competitive, generation-related costs through its noncompetitive, distribution rates, contrary to Section 4928.02, Revised Code. The Commission erred in not concluding that Rider PSR is impermissible under Section 4928.02, Revised Code.

C. Rider PSR will violate federal law.

Rider PSR will violate federal law and two recent federal decisions have confirmed this argument. In those recent federal cases, the federal courts tossed out efforts to require retail customers to buy or subsidize the wholesale sale of power on the ground that they are preempted by federal law. *See, PPL Energy Plus v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) and *PPL Energy Plus v. Solomon*, 766 F.3d 241 (3rd Cir. 2014).

The Commission did not address the federal law arguments in its decision, specifically opting not to.³² It was unjust and unreasonable for the Commission to approval a Rider PSR when it will violate Ohio laws and federal law. At a minimum, the Commission should have indicated in its

³⁰ *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).

³¹ *Id.*

Opinion and Order that, under federal law, the FERC and the Regional Transmission Agencies have primary responsibility for reliability and the pricing of power for resale (wholesale transactions). Any mechanism that the Commission proscribes in which the true price of a wholesale power transaction is being set will have to comply with federal law. Using Duke's cost projection,³³ Rider PSR as proposed has a subsidy flowing back to Duke from ratepayers that effectively increases the actual value of the wholesale sale. The Commission, if it is authorized to issue a placeholder Rider PSR, must assure that its placeholder Rider complies with Ohio and federal law.

V. It was unjust and unreasonable for the Commission to include the entirety of proposed Section 3.9 in the approved Master Supply Agreement as it unfairly allows Duke Energy Ohio, Inc., too much discretion to unilaterally modify the Declaration of Authority for any reason.

Section 3.9 addresses the Declaration of Authority. As proposed, it states:

As designated or otherwise required by Duke Energy Ohio, Duke Energy Ohio and each SSO Supplier shall execute a Declaration of Authority, a representative form of which is attached hereto as Attachment G. Duke Energy Ohio shall have the right to modify at any time the Attachment A – Addendum to the Declaration of Authority. In the event Duke Energy Ohio exercises such right to modify the Attachment A – Addendum, each SSO Supplier shall execute an amendment to the Declaration of Authority or a new Declaration of Authority within fifteen (15) Business Days as required by Duke Energy Ohio.

Constellation had recommended that only the first sentence of this section remain because Duke should not have the unilateral right to change the Declaration of Authority.³⁴ In addition, Section 3.9 would allow Duke to unilaterally modify the Declaration of Authority for any reason whatsoever, which is unfair. Duke had argued that it needs the flexibility to run its auctions consistent with good business practices, including ensuring that auction participants are properly credentialed.³⁵ Constellation's recommended revision to Section 3.9 would not remove flexibility for Duke or

³² Opinion and Order at 48.

³³ OCC Ex. 4A.

³⁴ Exelon Ex. 1 at 4 and Attachment 1, page 18.

³⁵ Duke Reply Brief at 13.

preclude Duke from protecting standard service offer customers. Constellation's recommended revision to Section 3.9 will ensure that (a) no unfair unilateral actions are taken by Duke and (b) Duke can still run its auctions consistent with good business practice. Accordingly, the Commission should revise its earlier decision on this point and strike the second and third sentences of Section 3.9 of the Master Supply Agreement.

VI. The Commission properly determined that, in the event that the balance of the Supplier Cost Reconciliation Rider appears to be reaching the ten-percent threshold set forth in the rider, the Commission will closely monitor and obtain information.

Rider SCR applies to all standard service offer ("SSO") customers only and, as such, it is a bypassable rider.³⁶ Rider SCR recovers the difference between payments made to the SSO suppliers and the revenues collected through Duke's Riders Retail Capacity and Retail Energy. It contains a provision that will make it become applicable to all Duke ratepayers (making it non-bypassable) if the amount in the SCR account is equal to or greater than 10 percent of the SSO revenues collected for the prior 12-month period under five other riders.³⁷ Constellation had urged the Commission to remove the automatic conversion provision and recommended that the Commission review the cause(s) and solution(s) to resolve such development in the balance of Rider SCR.³⁸

The Commission did not change the wording of Rider SCR.³⁹ However, the Commission stated that, if it appears the 10 percent threshold will be reached during the ESP III, the Commission will closely monitor the situation and obtain further information for consideration.⁴⁰ Constellation interprets the Commission's ruling as its intention (a) to not automatically make Rider SCR non-bypassable if the threshold is reached and (b) to evaluate the best approach(es) to resolve the

³⁶ Duke Tariff, P.U.C.O. Electric No. 19, Sheet 115.9.

³⁷ *Id.*

³⁸ RESA Ex. 3 (Direct Testimony of Campbell) at 16; Constellation Reply Brief at 12-13.

³⁹ Opinion and Order at 65.

⁴⁰ *Id.*

situation. Inasmuch as this is what Constellation requested, Constellation believes that the Commission reached the correct conclusion.

If Constellation's understanding is incorrect, Constellation seeks rehearing and urges the Commission to make the specific evaluation of the circumstances giving rise to the balance amount, and to craft a specific resolution that best resolves the problem.

VII. When modifying the competitive bidding schedule for the new electric security plan, the Commission properly decided that only one auction should take place prior to its start on June 1, 2015.

As part of its ESP III application, Duke proposed a competitive bidding process ("CBP"). The Commission approved that CBP, but modified its auction schedule along with a few other aspects. As a result, the schedule is as follows:⁴¹

Auction	Timeframe to Occur
First	In advance of the end of the ESP II term on May 31, 2015, with delivery to commence on June 1, 2015
Second	November 2015
Third	March 2016
Fourth	November 2016
Fifth	March 2017

Constellation commends the Commission for scheduling only one auction before the end of the ESP II. The ESP III will commence on June 1, 2015, and thus there is little time before it will begin. It was fair and reasonable to schedule an auction, and even more appropriate to hold only one auction in the little time that remains.

VIII. Conclusion

For the foregoing reasons, the Commission should granted this Application for Rehearing and modify its April 2, 2015 decision accordingly.

⁴¹ Opinion and Order at 51.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on 1st day of May 2015 upon all persons/entities listed below.



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