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

APPLICATION FOR REHEARING
OF
THE RETAIL ENERGY SUPPLY ASSOCIATION

Now comes the Retail Energy Supply Association ("RESA")[1] and pursuant to Section 4903.10, Revised Code, requests the Public Utilities Commission of Ohio ("Commission") to grant rehearing for the purpose of modifying its April 2, 2015 Opinion and Order ("Order") in the above-styled proceedings. Specifically, the April 2, 2015 Order is unlawful and unreasonable for the following reasons:

(1) The Order is unlawful and unreasonable because it prohibited competitive retail electric service providers and third parties from utilizing the consolidated utility bill to invoice and collect charges related to products and services other than retail electric service while, at the same time, allowing

[1] The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

Duke Energy Ohio, Inc.'s affiliate, Duke Energy One, Inc. to utilize the consolidated utility bill to invoice and collect such charges.

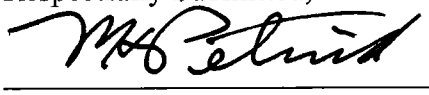
(2) The Order is unlawful and unreasonable because it approved Duke Energy Ohio, Inc.'s Supplier Tariff language that allows a default and the pursuit of termination or suspension through an automatic ten-business-day process if a competitive retail electric service provider submits other than commodity-only charges under bill-ready billing.

(3) The Order is unlawful and unreasonable because the Commission improperly established a placeholder Price Stabilization Rider for Duke Energy Ohio, Inc. when such a rider does not comply with Sections 4928.143(B)(2)(d), 4928.17, and 4928.02(H), Revised Code, nor with federal law preemptions as to state subsidies on wholesale sales of power.

(4) The Order is unlawful and unreasonable because, having rejected the proposed Price Stabilization Rider as not being appropriate, the Commission improperly permitted Duke Energy Ohio, Inc. to include the Price Stabilization Rider in its tariff even though the rider cannot be implemented without further Commission approval.

The facts and arguments that support these grounds for rehearing, and the suggested remedies are set forth on the attached Memorandum in Support.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. Introduction

Duke Energy Ohio, Inc. ("Duke") filed an application seeking approval of a third electric security plan ("ESP III") that would commence on June 1, 2015, and continue through May 31, 2018. On April 2, 2015, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("Order") in which it modified the ESP III and approved it as modified.[2] The Retail Energy Supply Association ("RESA") supports most of the conclusions of fact and law reached by the Commission in these proceedings. RESA finds, however, that a few conclusions are unlawful and unreasonable, and thus warrant modification. First, the Commission unfairly precluded competitive retail electric service ("CRES") providers and third parties from including non-commodity charges on Duke's bill-ready consolidated customer bills, while allowing Duke's current practice of including on customer bills the non-commodity charges of its affiliate to continue.

Second, the Order is also problematic because the Commission adopted language for Duke's certified supplier tariff that allows the utility to declare a default and pursue termination or suspension through an automatic ten-business-day process if a competitive retail electric service provider submits other than commodity-only charges under bill-ready billing.

[2] Duke's application included an option to terminate the ESP at the end of the second year. That termination proposal was rejected by the Commission. Opinion and Order at 81. As a result, the Commission has approved a three-year ESP.

Third, RESA has grave concerns with regard to the Commission's approval of a theoretical Price Stabilization Rider ("Rider PSR"). RESA points out that the Commission correctly determined that Duke did not meet its burden of proof to establish Rider PSR to collect or credit the difference between (a) what Duke pays its affiliate Ohio Valley Electric Corporation ("OVEC") for generation under a power purchase agreement ("PPA") and (b) what its receives when Duke subsequently resells that power and capacity in the wholesale market. The Commission opined that, under facts and circumstances different from those contained in the application and the hearing record, a PPA rider such as Rider PSR could be approved under Ohio law. Such dicta is within the prerogative of the Commission, but the Commission committed error when it approved a theoretical Rider PSR to be placed in Duke's tariff. The Commission ignored multiple state statutes that prohibit Rider PSR and ignored federal case law that prohibits Rider PSR. Moreover, the Commission, as a state agency, can only exercise that authority which has been specifically delegated to it by the General Assembly.[3] There is no express authority for the Commission to authorize a theoretical tariff provision.

II. The Order is unlawful and unreasonable because it prohibited competitive retail electric service providers and third parties from utilizing the consolidated utility bill to invoice and collect charges related to products and services other than retail electric service while, at the same time, allowing Duke's affiliate, Duke Energy One, Inc. to utilize the consolidated utility bill to invoice and collect such charges.

The Order authorized Duke to amend its tariff to prohibit CRES providers from using the bill-ready function to bill for non-commodity products and services.[4] The Order did so despite the fact that Duke is currently including on the consolidated EDU bill non-commodity charges for its

[3] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051.

[4] Order at 89.

affiliated company.[5] The Order held that Duke's request is reasonable because Duke does not have the capability to separate CRES-related non-commodity charges from its purchase of receivables ("POR"), stating:

> Because all customers must bear the cost of unpaid bills, and because the evidence in these cases reflects that Duke does not have the technology to separate commodity and non[-]commodity charges, the Commission does not find it reasonable to allow various non[-]commodities to be added to the bills.[6]

The Order also determined that Duke Energy One, Inc. is not a CRES provider; thus, it is not "parallel to a CRES provider", stating:

> In regards to the Company's affiliate, Duke Energy One, the Commission points out that, because it does not provide retail electric service, the entity is not parallel to a CRES provider. For the above reasons, the Commission finds that Duke's request to amend the tariff is reasonable.[7]

Moreover, the Order refrained from addressing claims that Duke's proposal would allow it to evade corporate separation requirements by providing an undue preference and competitive advantage to its affiliate. Rather, the Order alluded that CRES providers should file a complaint if they have concerns regarding Duke's compliance with its corporate separation plan, stating, "[r]egarding IGS's and RESA's concerns, the Commission affirms that, as discussed further below, this is not the proper forum to address those issues."[8]

As further explained below, the Order is unlawful and unreasonable and should be reversed on rehearing.

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[5] IGS Ex. 10 (White Direct Testimony) at 8; Tr. Vol. IV at 1047, 1049.
[6] Order at 89.
[7] *Id.*
[8] The Order does not appear to contain any additional discussion regarding the Commission's recommended forum to address issues regarding Duke's compliance with corporate separation.

A. **The Order is unlawful and unreasonable inasmuch as it authorized Duke Energy Ohio , Inc. to provide an undue preference and competitive advantage to its affiliate, Duke Energy One, Inc. and to discriminate against competitive retail electric service providers and third parties in violation of Sections 4905.35 and 4928.03, Revised Code. The Order denies competitive retail electric service providers and third parties comparable and nondiscriminatory access to the utility bill, a non-competitive retail electric service.**

B. **The Order is unlawful and unreasonable inasmuch as it authorized Duke Energy Ohio, Inc. to evade its corporate separation requirements by providing an undue preference and competitive advantage to its affiliate, Duke Energy One, Inc., in violation of Sections 4928.17(A)(2) and (3), Revised Code, and Rule 4901:1-37-04(D)(10)(c), Ohio Administrative Code.**

The Order prohibits CRES providers from billing non-commodity charges on the Duke bill while granting Duke's unregulated affiliate access to the electric distribution utility ("EDU") bill. The Order violates several Ohio laws and Commission rules and thus should be reversed on rehearing.

Section 4905.35(A), Revised Code, provides that "no public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality." Rule 4901:1-37-04(D)(10)(c), Ohio Administrative Code, also states that an "electric utility *shall not*, through a tariff provision, a contract, or otherwise, *give its affiliates* or customers of affiliates *preferential treatment or advantages over nonaffiliated competitors...* to *any product and/or service*" (emphasis added). Section 4928.03, Revised Code, states, "each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state ...." And, Section 4928.04, Revised Code, identifies billing as a non-competitive service. Further, Section 4928.17(A)(2), Revised Code, requires a corporate separation plan to prevent an "unfair competitive advantage," and Section 4928.17(A)(3), Revised Code, prohibits a utility from extending any "undue preference or

advantage to any affiliate." In short, the Ohio Legislature and the Commission have, under no uncertain terms, made clear that a utility *shall not* grant preferential treatment to any market participant, and especially not to an affiliate.

Duke is currently billing for non-commodity products and services for its affiliate Duke Energy One.[9] Specifically Duke is billing for StrikeStop service, which is an energy-related, insurance service that provides coverage for damage caused to the customer's home from electric surges. Duke is also billing for Underground Protection service, which is an energy-related, insurance service that covers damage to the customer's underground electric lines.[10] Thus, Duke is currently utilizing the billing assets of distribution customers to place non-commodity charges for its unregulated affiliate on the EDU bill.

As IGS witness Matthew White testified, it is a tremendous advantage for Duke's affiliate to be able to bill its non-commodity charges through the EDU bill. Not only are there cost savings associated with utilizing the EDU bill, there is a great convenience given to the EDU affiliate's customers to have a single bill for electric distribution and generation service, along with non-commodity charges. [11] As Mr. White noted, customers do not want separate bills for each individual component of a bundled electric product and customers often want a bundled all-in price.[12] Thus, "in order for CRES providers to offer value added products and services that customers prefer it is important to have billing flexibility for electric service."[13]

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[9] IGS Ex. 10 (White Direct Testimony) at 8; Tr. Vol. 4 at 1047, 1049. *See, also*, Duke Ex. 11 (Hollis Direct Testimony) at Attachment MEH-1 page 26.
[10] *Id.*
[11] IGS Ex. 10 (White Direct Testimony) at 15.
[12] *Id.* at 15.
[13] *Id.*

By prohibiting CRES providers from utilizing the utility bill to invoice and collect for non-commodity charges, the Order has authorized Duke to grant preferential treatment to its affiliate.[14] Given the directives of Ohio law to prohibit such preferential treatment, the Order is unlawful and unreasonable.

The Order's claim that Duke Energy One and CRES providers are not parallel does not save the Order. CRES providers offer the same products and services as Duke Energy One. Duke cannot use its billing assets to provide Duke Energy One a competitive advantage or preference. Moreover, CRES providers, too, have affiliates that offer products and services other than retail electric service. These companies are no different than Duke Energy One. But the Order does not allow such companies to utilize the utility bill for non-commodity products. Thus, the Order unlawfully authorizes Duke to provide a competitive advantage to one competitor in the market.

The Order will also work against innovation. As Mr. White notes in his testimony, "one of the major benefits of competition is that it encourages the development of innovative products and services that add value to customers beyond the electric commodity."[15] Mr. White also explains that, in competitive electric markets throughout the country, CRES providers are beginning to offer sophisticated products and services such as "electricity bundled with energy efficiency, demand response, direct load control, smart thermostats, distributed solar generation and other forms of on-site generation, micro-grids, battery storage technology, products bundled with loyalty rewards and products bundled with home protection, to name a few."[16] The Order forecloses the ability of CRES providers to offer these bundled products to customers.

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[14] Duke witness Jones made it clear that, without the ability to include non-commodity charges in bill-ready billing, CRES providers would have no way to invoice and collect for non-commodity charges on the utility bill. Tr. Vol. 4 at 1046. Duke's proposal in these proceedings seeks to change its tariff to expressly preclude non-commodity charges from CRES providers on the bill-ready bills.
[15] IGS Ex. 10 (White Direct Testimony) at 6.
[16] *Id.* at 6-7.

Rather than restrict and hamper the development of the market for bundled products and services, the Commission should reverse its Order and direct Duke to allow CRES providers to utilize the utility bill to invoice and collect for non-commodity charges. Otherwise, as the Order suggests, CRES providers and their affiliates will have no other option than to file a complaint and request damages.[17] Additional litigation, however, is unnecessary and should be avoided. The record has already been developed in this proceeding and the inequity and illegality of Duke's conduct is admitted and undeniable.

C. The Order is unlawful and unreasonable inasmuch as it is against the manifest weight of the evidence. The Order did not rely upon credible record evidence regarding Duke's ability to separate non-commodity-related charges from its purchase of receivables program.

The Order justifies discriminating against CRES providers on the basis that Duke cannot currently separate non-commodity charges from its purchase of receivables ("POR") program.[18] To support this conclusion, the Order relies upon pages 96-100 of Duke's Reply Brief. But that portion of Duke's Reply Brief does not contain even one citation to any part of the record. Thus, there is no basis set forth in the Commission's decision that relies on the evidence in the record. However, the Commission is required to issue orders based upon the record. Section 4903.09, Revised Code. Accordingly, its determination is unlawful and based upon conjecture.

Even assuming that Duke truly cannot separate commodity and non-commodity charges at this time, the *evidence in the record* still does not justify discriminating against CRES providers by adopting Duke's proposed tariff language for the ESP term and potentially longer. Duke had the burden of proof and it failed to adequately demonstrate its claim that it cannot separate commodity

[17] As permitted by Section 4928.18(D)(1), Revised Code, the Commission may "[i]mpose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation."
[18] Order at 89.

and non-commodity charges. The Commission cannot rely on outside-the-record claims and, therefore, should reverse its approval of Duke's tariff language on this point.

D. The Order is unlawful and unreasonable inasmuch as it is arbitrary and against the manifest weight of the evidence. The Order arbitrarily, unjustly, and unreasonably prohibited competitive retail electric service providers and third parties that do not participate in the purchase of receivables program from utilizing the utility bill to invoice and collect charges related to products and services. The Order's reasoning is not applicable to this class of providers.

As discussed above, the Order relied upon Duke's unsupported claim that it cannot separate non-commodity charges from its POR program. But, not all CRES providers participate in the POR program.[19] Indeed, the Order specifically holds that CRES providers may utilize consolidated billing but elect to opt-out of the POR program.[20] In that case, there is no basis to prohibit a non-POR CRES provider from including non-commodity charges on the consolidated utility bill.

Moreover, CRES provider affiliates may offer non-commodity services. These companies do not participate in Duke's POR program. The Order also identified no justifiable basis to discriminate against these companies that compete directly with Duke Energy One.

Therefore, the Order contains overly broad prohibitions against non-commodity billing, which are not supported by the record evidence. On rehearing, at a minimum, the Commission should reverse its Order and direct Duke to allow CRES providers and their affiliates to place their non-commodity charges on the consolidated utility bill to the extent that they do not participate in the POR program.

[19] Duke Ex. 13 (Jones Direct Testimony) at 7.
[20] Order at 89.

E. The Order is unlawful and unreasonable inasmuch as it perpetuates Duke's unfair and discriminatory practices afforded to its affiliate. The Commission must take further action and impose additional requirements on Duke.

If the Commission does not accept RESA's arguments above to reject Duke's tariff language and order Duke to allow CRES providers to include non-commodity charges on the utility bill and it, nonetheless, finds and accepts Duke's claim that it truly cannot separate commodity and non-commodity charges at this time, then the Commission should preclude Duke from allowing its affiliate (Duke Energy One) to include Duke Energy One's non-commodity charges on the utility bill until Duke is able to separate commodity and non-commodity charges for others, including CRES providers and their affiliates. As reflected earlier, it would be unfair and discriminatory to allow the status quo to continue. Again, if it is found that Duke truly cannot separate commodity and non-commodity charges at this time, RESA would understand the Commission giving Duke a reasonable amount of time to effectuate the changes needed so that all providers of non-commodity products and services have a fair and equal ability to include their charges on the utility bill.

If Duke refuses to extend to CRES providers the same non-commodity billing opportunity that it is currently allowing for its affiliate Duke Energy One, then Duke should be precluded from allowing that non-commodity billing opportunity altogether.

Similarly, if Duke refuses to extend to the non-POR CRES providers the same non-commodity billing opportunity that it is currently allowing for its affiliate Duke Energy One, then Duke should be precluded from allowing that non-commodity billing opportunity, unless Duke makes the billing opportunity available to CRES provider affiliates who do not provide CRES.

Given that Duke has a state-granted monopoly for the provision of distribution service, which includes the provision of billing, Duke should not be permitted use its unique position to give itself and/or its affiliate an advantage to the detriment of others or the competitive market. For the

many reasons argued earlier, Ohio law and Duke's corporate separation plan cannot permit this unfair and discriminatory action to continue.

III. The Order is unjust and unreasonable because it approved Duke Energy Ohio, Inc.'s Supplier Tariff language that allows a default and the pursuit of termination or suspension through an automatic ten-business-day process if a competitive retail electric service provider submits other than commodity-only charges under bill-ready billing.

Duke proposed and the Commission approved Supplier Tariff language restricting bill-ready billing by CRES providers to electric commodity only.[21] As a result, the only charges that CRES providers will be able to put on Duke's bill-ready bill are commodity charges and "commodity" is defined in the Supplier Tariff as "the unbundled generation service of electric energy which End-use Customers may purchase from a Certified Suppliers in the Customer Choice Program."[22]

Duke's newly approved Supplier Tariff language also includes the following: "The act of submitting charges for items other than electric commodity will be considered a condition of default as described in Section 19.1 herein." The default provisions in Duke's tariff (specifically provision 19.2) include that, in the event of default, Duke can seek to terminate or suspend a CRES provider and following an extremely abbreviated process, the termination or suspension "shall be deemed authorized" automatically:[23]

> Notwithstanding any other provision of this tariff or the Certified Supplier Service Agreement, in the event of default, the Company shall serve a written notice of such default, providing reasonable detail and a proposed remedy, on the Certified Supplier, with a copy contemporaneously provided to the Commission. On, or after, the date the default notice has been served, the Company may file with the Commission a written request for authorization to terminate or suspend the Certified Supplier Service Agreement. Except for default due to failure by the Certified Supplier to deliver Competitive Retail Electric Service, if the Commission does not act within ten business days after receipt of the request, the Company's request to terminate or suspend

[21] Duke Ex. 13 (Jones Direct Testimony) at Attachment DLJ-1 page 18; Order at 89.
[22] P.U.C.O. Electric No. 20, Sheet No. 20.3, Page 2 of 5. *See, also*, Duke Ex. 13 (Jones Direct Testimony) at Attachment DLJ-1 page 2.
[23] Duke Ex. 13 (Jones Direct Testimony) at Attachment DLJ-1, page 23.

> shall be deemed authorized on the eleventh business day after receipt of the request by the Commission. * * *

RESA opposed the "commodity only" restriction for bill-ready billing because it is not specific enough.[24] However, RESA is not seeking rehearing with respect to that aspect of the Commission's decision. Rather, with the Commission's approval the "commodity only" restriction and the other provisions in Duke's Supplier Tariff, the Commission has approved tariff language that unreasonably and unjustly allows Duke to terminate or suspend through an abbreviated and one-sided process a CRES provider who submit non-commodity charges. Such a submission could be accidental or under a different point of view. However, the Supplier Tariff language would subject CRES providers to the harshest of penalties. Moreover, because determinations of whether charges are "commodity only" will be within Duke's discretion, RESA is concerned that the totality of the approved tariff language in Supplier Tariff Sections 10.9(b), 19.1(g) and 19.2 allow Duke to implement this change arbitrarily to stop customary CRES charges.

RESA's concern is not theoretical or remote. In June 2013, Ohio Power Company (Ohio Power") sought to terminate or suspend FirstEnergy Solutions Corp. ("FES"), a CRES provider, after Ohio Power tried to impose certain credit requirements that were not as set forth in its supplier tariff. Ohio Power's default process had language similar to Duke's default tariff provisions.[25] FES complained that Ohio Power unfairly and arbitrarily imposed credit requirements on FES based on inadequately defined credit requirements.[26] The dispute was ultimately resolved when Ohio Power received approval to waive certain customer switching provisions in its supplier tariff.[27]

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[24] RESA Ex. 1 (Ringenbach Direct Testimony) at 7, 12. *See, also*, RESA Initial Brief at 4-5.
[25] *In the Matter of Ohio Power Company's Request for Authorization to Suspend its Service Agreement with FirstEnergy Solutions Corp.*, Case No. 13-1427-EL-UNC, Application (June 18, 2013).
[26] *In the Matter of FirstEnergy Solutions Corp. v. Ohio Power Company*, Case No. 13-1439-EL-CSS.
[27] *Ohio Power, supra*, Case No. 13-1427-EL-UNC, Entry (July 2, 2013).

The Supplier Tariff language approved for Duke's ESP III sets up – unreasonably and unjustly – an equivalent situation, which must be avoided. Accordingly, the Commission should revise its Order to ensure that Duke cannot arbitrarily rely on this new revised Supplier Tariff language to prevent CRES providers from billing customers for charges. In particular, the Commission should:

- Put Duke on notice that it expects Duke to make all efforts in good faith to work with CRES providers if Duke has concerns about the submitted charges before exercising any of its tariff-based remedies in Section 19.2; and

- Require Duke, for any alleged violation of its Supplier Tariff Section 10.9(b) or 19.1(g), to first obtain an affirmative Commission order before ceasing to bill the CRES provider's charges.

IV. It was unjust and unreasonable to establish a placeholder Price Stabilization Rider for Duke Energy Ohio, Inc. when such a rider does not comply with Sections 4928.143(B)(2)(d), 4928.17, and 4928.02(H), Revised Code, nor with federal law preemptions as to state subsidies on wholesale sales of power.

Duke's proposed Rider PSR has been a highly contested aspect of the matter at bar. Extensive testimony and arguments on this one issue have been presented by the parties. Rider PSR is an attempt on the part of Duke to transfer the entire commercial risk of losses related to Duke's only remaining affiliated generation from the Duke shareholders to the Duke ratepayers. Further, Duke requests that customers not be able to elect not to take the alleged hedging service. Specifically, Duke's Rider PSR will pass on to all ratepayers, via a non-bypassable rider, any differences between the purchase costs of the energy, capacity and ancillaries from Duke's affiliate (OVEC) and the sale price when that energy, capacity and ancillaries is sold into the PJM market. In Duke's second ESP proceeding, it voluntarily agreed to complete full corporate separation by the

end of 2014.[28] The Commission specifically accepted that term, noting that the full legal separation was a beneficial term of the stipulation as it would advance the competitive market in Ohio and also granting Duke a waiver, to the extent necessary, to accomplish full legal separation.[29] Duke, however, did not divest its entitlement in OVEC.[30]

The Commission made five conclusions with regard to Rider PSR:[31]

- The Commission concluded that a PPA Rider such as Rider PSR (in concept) was a permissible provision of an ESP under Section 4928.143(B)(2)(d), Revised Code.
- The Commission found that Duke had not proven that its specific Rider PSR proposal should be approved.
- After rejecting Duke's proposal, the Commission nonetheless approved and established a Rider PSR for the ESP III term.
- The Commission concluded that Rider PSR would not violate other Ohio laws.
- The Commission outlined a number of factors that Duke should include in a future Rider PSR application and which the Commission might consider in deciding such future Rider PSR application.

The Commission correctly rejected the Rider PSR proposal, but erroneously concluded that, since Ohio law could permit such a rider based on a different application and a different set of facts, a placeholder Rider PSR could be placed in Duke's tariff. That conclusion was unjust and unreasonable and as such, should be reversed.

A. The Price Stabilization Rider is not authorized by Section 4928.143(B)(2)(d), Revised Code, as the rider is for generation costs and thus involves a competitive service.

Duke tried to justify Rider PSR as a permissible provision for its ESP III by citing Section 4928.143(B)(2)(d), Revised Code.[32] That code section states that an electric distribution utility's

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[28] *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 et al., Stipulation at 25 (October 24, 2011).
[29] *Id.* at Opinion and Order at 44-46 (November 22, 2011).
[30] Duke Ex. 1 (Application) at 13; Duke Ex. 2 (Henning Direct Testimony) at 10; Duke Ex. 6 (Wathen Direct Testimony) at 11.
[31] Opinion and Order at 42-48.

ESP can 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."

The Commission found that Rider PSR involves generation. More specifically, the Commission stated that Rider PSR "would be considered a generation rate," whether a charge or a credit.[33] RESA agrees. However, in Ohio, generation is a "competitive retail electric service". *See*, Sections 4928.01(A)(27) and 4928.03, Revised Code. Moreover, in Ohio, the electric utility is limited to providing non-competitive utility services only. The exception is that the utility can provide competitive services as part of a bundled, default full electric retail service for those customers who have not selected a CRES provider.[34] Rider PSR does not provide bundled generation to any Duke customers. Under Rider PSR, the OVEC generation is sold wholesale into the PJM market. Section 4928.143(B)(2)(d), Revised Code, does not expressly or implicitly authorize Duke to provide this PPA mechanism to all its ratepayers, especially the shopping customers who have separately contracted for the competitive portion of their retail electric service. Moreover, shopping customers are not permitted to "opt out" of Rider PSR if they have fixed-priced arrangements or if they have made other hedging arrangements. As a result, Rider PSR mandates that all Duke ratepayers pay for the costs of OVEC generation above any amounts received when

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[32] Duke Initial Brief at 18-22.

[33] Opinion and Order at 48. Similarly, the Commission stated that Rider PSR's impact "would be reflected as a charge or credit for a generation-related hedging service." Opinion and Order at 44. RESA disagrees that Rider PSR will actually have an appreciable hedging effect, especially during the ESP III term, but RESA agrees with the Commission that Rider PSR is generation related.

[34] Sections 4928.01(A)(11) and 4928.141, Revised Code, authorize an electric company such as Duke to provide competitive retail electric services in addition to utility distribution services, and such competitive retail electric services must be needed to maintain "essential" electric service to default customers. There was no Commission finding (nor did Duke even argue) that Rider PSR is needed to maintain "essential" electric service to default customers.

that generation is sold in the wholesale market. In sum, Rider PSR is not authorized by Section 4928.143(B)(2)(d), Revised Code, because the rider is for generation costs and thus involves a competitive service.

B. The Price Stabilization Rider cannot be lawful under Section 4928.143(B)(2)(d), Revised Code, as a non-bypassable rider applicable to all Duke ratepayers because it involves a competitive service per Section 4928.03, Revised Code.

Shopping customers pay their CRES providers for the power they use. Under Rider PSR, the shopping customers would potentially also pay for some of the costs of generation from OVEC (which the shopping customers did not use) because OVEC's generation price is above market.[35]

As explained above, in Ohio, generation is a retail electric service and it is a competitive retail electric service. *See*, Sections 4928.01(A)(27) and 4928.03, Revised Code. The statutory framework limits the electric utilities to supplying only non-competitive services, except when the customer has not selected a CRES provider. Rider PSR will ignore this very framework because, as a non-bypassable rider, it applies to all Duke customers, including the shopping customers, and mandates that all customers pay for the costs of a competitive retail electric service – one that is not even being served to them. Nothing in Section 4928.143(B)(2)(d), Revised Code, authorizes Duke to side-step the statutory framework in this manner.

C. The Price Stabilization Rider violates Section 4928.17, Revised Code, because Duke is contracting with its affiliate without any direct approval of the Commission.

In addition to the statutory limitation found in Section 4928.03, Revised Code, 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) without a corporate separation plan. *See*,

[35] RESA Ex. 3 (Direct Testimony of Campbell) at 12.

Section 4928.17(A), Revised Code. That statute 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.
>
> (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 * * *.

Duke was required to fully separate its generation assets from its distribution assets by the end of 2014.[36] Nothing in that decision reflected that Duke could not divest/transfer its OVEC entitlement, and the Commission affirmed in the matter at bar that, in approving the stipulation, it had expected Duke to divest/transfer its OVEC entitlement and that Duke must divest/transfer its OVEC entitlement.[37]

Yet, Duke still retains its OVEC entitlement at this time and Rider PSR will cause shopping customers to pay for OVEC's generation even though they will not use it. No PPA underlying Rider PSR was submitted to the Commission, and will not be reviewed by the Commission in the future. As a result, the PPA is not a matter within the Commission's regulation and the Commission cannot therefore ensure that, through the agreement "the utility will not extend any

[36] *Duke, supra*, Case No. 11-3549-EL-SSO, Opinion and Order at 44-46 (November 22, 2011).
[37] Order at 48.

undue preference or advantage to any affiliate, division, or part of its own business." The Commission should recognize that Rider PSR is inconsistent with the corporate separation requirements in Ohio.

D. The Price Stabilization Rider violates the state energy policy, particularly Section 4928.02(H), Revised Code.

Section 4928.02, Revised Code, is the State Energy Policy. Subsection H forbids 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[.]"

Rider PSR violates Section 4928.02(H), Revised Code, by requiring shopping customers to pay the cost of the OVEC generation regardless of whether OVEC's generation sales revenue exceed the OVEC costs. Put another way, 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).[38] Since all ratepayers (both shopping and non-shopping ratepayers) will pay the OVEC generation costs, Rider PSR creates a subsidy for the generation service – OVEC will have an advantage over other competitive generators because the OVEC units will be guaranteed to recover their costs, including a return on equity. Plus, Rider PSR will free Duke from any market/price risk associated with the OVEC generation.

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

As was mentioned earlier, the Commission acknowledges that Rider PSR will be a generation-related rate,[39] recovering generation-related costs. However, the Commission's conclusion that Rider PSR will not recover generation-related costs through distribution or transmission rates[40] is incorrect. Rider PSR will be imposed by Duke on all Duke ratepayers. Because the shopping customers in Duke's territory pay Duke only for its distribution and transmission services, Duke will be recovering, through Rider PSR, generation-related costs through distribution or transmission rates at least as to the shopping customers in Duke's territory.

RESA's position here is not new – the Commission has already acknowledged it. The Commission has already determined that a proposal to recover generation-related costs on a non-bypassable basis effectively would allow a utility to recover competitive, generation-related costs through its noncompetitive, distribution rates.[41] In that case, Ohio Power proposed a new rider to recover, on a non-bypassable basis, its costs to shutdown a generating unit that it owned.[42] In looking at that proposal and Duke's Rider PSR, both rider proposals were (a) non-bypassable, (b) generation-related, (c) based on costs from a generating plant owned, at least in part, by the utility, and (d) entirely unrelated to the utility's default service. Given the *Sporn* precedent, the Commission should modify its conclusion in these proceedings to find that Rider PSR would violate Section 4928.02(H), Revised Code, because it would recover generation-related costs through distribution or transmission rates.

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[39] Order at 48.
[40] Order at 48.
[41] *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).
[42] *Id.*

E. The Price Stabilization Rider violates federal law, and recent holdings in two indistinguishable circuit courts cases confirm this point.

Rider PSR is based on an agreement for the wholesale purchase of generation.[43] Wholesale transactions are within the purview of the Federal Energy Regulatory Commission ("FERC"). Two recent federal decisions have tossed out other attempts to require retail customers to buy or subsidize the wholesale sale of power because those state actions are preempted by federal law.[44] In *Nazarian*, the Maryland Public Service Commission ordered local electric utilities to enter into 20-year contracts with a generation plant owner, and ordered them to pay the difference between the generator's sale of power in the PJM wholesale market and the contract price. The difference was to be passed on to Maryland ratepayers for them to pay. The federal court concluded that the Maryland Public Service Commission's decision fixed a value for the generator's wholesale capacity and energy, and that was not within the state commission's authority (it was with the exclusive jurisdiction of the FERC). Similarly, in *Solomon*, the New Jersey legislature passed legislation allowing the New Jersey Board of Public Utilities to order the electric utilities to enter into contracts with a generation plant owner to pay the difference between the new generators' sale of power in the wholesale market and the contract price. The federal court declared the New Jersey statute null and void because it too was preempted by federal law.

The Commission did not consider the federal law arguments in its decision, specifically opting not to.[45] The Commission should not only analyze Rider PSR in light of its jurisdiction versus federal jurisdiction, but also recognize the similarities between Rider PSR and the schemes involved in those two federal decisions. It was unjust and unreasonable for the Commission to approve Rider PSR without considering relevant and applicable case law.

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[43] IEU Ex. 5.
[44] *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).
[45] Order at 48.

V. Having rejected the proposed Price Stabilization Rider as not being appropriate, the Commission improperly permitted Duke Energy Ohio, Inc. to include the Price Stabilization Rider in its tariff even though the rider cannot be implemented without further Commission approval.

The Commission reviewed the evidence and rejected Duke's Rider PSR completely, stating "[w]e conclude that Duke has not demonstrated that its PSR proposal, as put forth in these proceedings, should be approved under R.C. 4928.143(B)(2)(d)."[46] The Commission rejected the one and only Rider PSR proposal from the applicant.[47] As a result, the Commission did not have any other applicant proposal or any evidentiary basis upon which to find that Section 4928.143(B)(2)(d), Revised Code was actually met and then establish and adopt a Rider PSR.[48] This is particularly apparent since the Commission listed a variety of "factors" that must be presented to it in a future proceeding from Duke when asking for approval of a Rider PSR before it can be found worthy of terms, conditions, rates, etc.[49] The U.S. Supreme Court has reached the same conclusion in a similar situation. In *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio* (1937), 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093, the U.S. Supreme Court reversed a decision that had approved the Commission's adjustment of rates based on "price trends" that were not in the record, but were of record in a separate Commission investigation and analysis. Also, the Ohio Supreme Court has found that there was no evidentiary support for approval on rehearing of an alternative proposal submitted by Cincinnati Gas & Electric Company during rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 2006-Ohio-5789. If the actual Rider PSR proposal submitted by the applicant was not approved and Duke must present a host of other

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[46] Order at 48.
[47] The Commission also did not approve the modified Rider PSR proposed by the Ohio Energy Group. Order at 42-48.
[48] A Commission decision is unlawful if the Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the Commission's Opinion and Order were based. *Ideal Transp. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 71 O.O.2d 183, 326 N.E.2d 816, *See, also, Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87.
[49] Order at 47.

information before a Rider PSR can take effect, then the Commission did not have any evidentiary basis in this case upon which to conclude that Section 4928.143(B)(2)(d), Revised Code, had been satisfied or to establish and approve a Rider PSR.[50]

Moreover, it is unknown whether any such future application will be received, whether Duke will carry its burden of proof with regard to any next proposal for a Rider PSR, and/or whether the Commission will approve such proposal in the term of the ESP III. Duke cannot impose and collect under the approved Rider PSR.

The Commission noted in its decision that it has previously established placeholder riders within an ESP.[51] These instances though were where the Commission found certain known costs were going to exist in the future and the Commission determined that when those costs were presented they could be submitted for review and payment. For example, Duke was permitted to establish the Distribution Rider – Infrastructure Modernization (Rider DR-IM), initially set a zero, while actual costs were incurred.[52] In that situation, Duke's underlying proposal was actually approved and Duke took actions thereon, although a specific rider rate could not be set initially. That is very different from Rider PSR that allows nothing to take place until some future application when new unknown facts will be presented and compliance with the criteria that was not met at this hearing must be proven. Similarly, the FirstEnergy electric distribution utilities were permitted to establish the Delta Revenue Recovery Rider (Rider DRR) for recovery of delta revenues for

[50] Also, from a practical standpoint, it was not necessary for the Commission to have authorized a Rider PSR – Duke cannot use the Rider PSR and cannot include any terms/conditions because none have been approved. The establishment of the Rider PSR in the company's tariff simply confuses the situation, creating the appearance that the company has some authorization for such a rider, but it does not.

[51] Order at 25.

[52] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO et al, Opinion and Order at 17 (December 17, 2008).

reasonable arrangements approved after a specific date.[53] This rider too was an approved rider that had to be initially set at zero until the costs were incurred. Again, those utilities were taking actions based on the approved Rider DRR, so that the specific rate could be determined at a point in the future. Rider DRR is likewise very different from what is involved here with Rider PSR. As mentioned, the Commission did not approve any terms or conditions with regard to Rider PSR. Also, Duke will not actually charge/credit any differences between costs and revenues and Duke will have no other actions to take otherwise. Instead, Duke has to file anew, if it decides to move forward. It was error to allow Duke to establish anything in its tariff for the term of the ESP III relative to the rejected Rider PSR. Furthermore, non-inclusion of Rider PSR does not harm Duke because it will have to propose specific tariff sheets in the future if it wants any Rider PSR to go into effect. Finally, allowing placeholders for matters that have not even been approved, and may never be approved, is not good public policy. Utility tariffs should reflect the services and charges that companies actually provide/impose, not those they may be able to provide/impose at some unknown time in the future.

VI. Conclusion

For the foregoing reasons, the Commission should find that its earlier decision is unlawful and unreasonable, warranting a granting of this Application for Rehearing and modification of its April 2, 2015 decision in the following areas:

(1) Reject Duke's proposal to amend its tariff to prohibit CRES providers from using the bill-ready function to bill for non-commodity products and services and direct Duke to allow CRES providers to include non-commodity charges on the utility bill.

(2) If it is found that Duke truly cannot separate commodity and non-commodity charges at this time, Duke should be precluded from allowing its affiliate (Duke Energy One) to include Duke Energy One's non-commodity charges on the utility bill until Duke

[53] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Opinion and Order at 15 (March 28, 2009).

is able to separate commodity and non-commodity charges for others, including CRES providers and their affiliates. RESA would understand if the Commission gave Duke a reasonable amount of time to effectuate the changes needed.

(3) If the Commission does not fully revise its ruling and reject Duke's proposal to amend its tariff to prohibit CRES providers from using the bill-ready function to bill for non-commodity products and services, the Commission still should revise its ruling to require Duke to allow CRES providers who do not participate in the POR program, including CRES provider affiliates, to use the bill-ready function to bill for non-commodity products and services.

(4) If Duke refuses to extend to CRES providers the same non-commodity billing opportunity that it is currently allowing for its affiliate Duke Energy One, then Duke should be precluded from allowing that non-commodity billing opportunity to others, including Duke Energy One and other affiliates, unless Duke makes the billing opportunity available to CRES provider affiliates who do not provide CRES.

(5) Put Duke on notice that Commission expects Duke to make all efforts in good faith to work with CRES providers if Duke has concerns about the submitted charges before exercising any of its tariff-based remedies in Section 19.2;

(6) Require Duke, for any alleged violation of its Supplier Tariff Section 10.9(b) or 19.1(g), to first obtain an affirmative Commission order before ceasing to bill the CRES provider's charges.

(7) Reject Rider PSR and not establish a placeholder Rider PSR.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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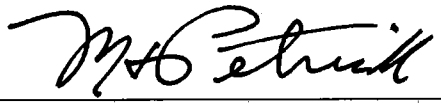

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