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 BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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May 4, 2015

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APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") files this application[1] for rehearing to oppose, inter alia, the latest utility claim for customers to subsidize its operations—this time for power plants that are no longer regulated by the government. In its Opinion and Order of April 2, 2015, the Public Utilities Commission of Ohio ("Commission" or "PUCO") approved a mechanism (a price stabilization rider) that could require customers to pay hundreds of millions of dollars to fund uneconomic generation. The Price Stabilization Rider ("PSR") is unlawful and unreasonable under Ohio law. And the PUCO is preempted by the Federal Power Act from approving the Price Stabilization Rider.

[1] OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

The Opinion and Order approved, with modifications, Duke Energy Ohio's ("Duke" or "Utility") electric security plan ("ESP"), filed in these proceedings on May 29, 2014. Under the modified ESP Duke will collect increased rates from customers for the period June 1, 2015 to May 31, 2018.

The Opinion and Order was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: When the PUCO did not rule on the federal preemption argument, it violated R.C. 4903.09. It should have found Duke's price stabilization rider is preempted under the Federal Power Act ("FPA").

A. Duke's proposed PSR is field preempted under the FPA because it would establish the wholesale market price Duke would receive for its sales into the PJM wholesale markets of the energy, ancillary services and capacity.

B. The PSR is preempted by the FPA under the doctrine of conflict preemption because it would have anti-competitive effects on wholesale markets.

ASSIGNMENT OF ERROR 2: The Commission's approval of a placeholder for a price stabilization rider is unreasonable and unlawful.

A. The PUCO's determination that the proposed PSR may be included in an ESP and charged to all distribution customers under R.C. 4928.143(B)(2)(d) as a "financial limitation on customer shopping" lacks record support, violating R.C. 4903.09.

B. The PUCO's determination that the proposed PSR may be included in an ESP and charged to all distribution customers under R.C. 4928.143(B)(2)(d) as a "financial limitation on customer shopping" contravenes legislative intent and is unlawful.

C. The PSR is unlawful because it does not provide rate stability or certainty to customers as required by R.C. 4928.143(B)(2)(d).

1. The Commission's order is unlawful because it approves a placeholder PSR that customers would fund that is not based upon facts of record, as required by R.C. 4903.09.

2. The theory upon which the Commission adopted the placeholder PSR that customers would fund is flawed and unreasonable.

D. Shopping and SSO customers already have available to them solutions to hedge against price volatility.

E. The PSR provides an anti-competitive subsidy funded by customers under R.C. 4928.02(H). R.C. 4928.02(H) prohibits the recovery of non-competitive generation related costs through distribution rates paid for by utility customers.

F. The PUCO approved the PSR which could require customers to pay an enormous amount of money for lost revenues when the cost to Duke of generation from OVEC is too high to compete in the PJM market. As such the PSR is an unlawful transition charge and must be disallowed under R.C. 4928.38.

G. The PUCO erred in ordering an asymmetric “severability provision” without requiring that the PSR be collected subject to refund to avoid prejudice to Duke’s Ohio’s customers.

H. The factors the PUCO directed the Utility to address in its future PSR proceeding were incomplete and unreasonable because they are skewed in favor of approving the PSR without fully considering the impact of the PSR on customers.

ASSIGNMENT OF ERROR 3: The PUCO unreasonably and unlawfully found that Duke’s electric security plan, as modified, is more favorable in the aggregate to customers than a market rate offer.

ASSIGNMENT OF ERROR 4: The PUCO unreasonably and unlawfully failed to address how the distribution storm rider is to be allocated.

ASSIGNMENT OF ERROR 5: The PUCO is a creature of statute and as such can exert no authority beyond that which it has been granted.

A. The PUCO erred in rewriting R.C. 4928.143(B)(2)(d) to permit a financial limitation on shopping.

B. The PUCO erred in allowing Duke to collect unlawful transition revenues in contravention of R.C. 4928.38.

C. The Commission exceeded its authority in performing the more favorable in the aggregate test, set forth in R.C. 4928.142.

D. The PUCO unlawfully relies upon state policy to consider qualitative benefits under the ESP vs. MRO test.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Public Utilities Commission of Ohio ("PUCO") voted to approve, with modifications, Duke Energy Ohio, Inc.'s ("Duke" or "Utility") electric security plan. While the PUCO did deny some of Duke's many requests for customer funding, it nonetheless allowed the Utility to implement a costly electric security plan in lieu of a market-based plan. The approved electric security plan ("ESP") permits Duke to collect millions of dollars from customers and yet was shown to be more expensive to customers than a market-based approach or market rate offer ("MRO").[2]

And, if Duke is successful in justifying the jewel of its case--a price stability rider --customers will potentially be facing hundreds of millions of dollars more in future rate increases because of the PUCO's decision. While the PUCO rejected the OVEC proposal,

[2] See OCC Ex. 13 at 25 (Kahal).

it conceptually approved the price stability rider as a tool to stabilize customers' rates. But the price stability rider could cost customers hundreds of millions of dollars. It's a bad deal for customers, which unnecessarily enriches the Utility's shareholders.

OCC applies for rehearing on these issues and asks the PUCO to grant rehearing so that customers are afforded reasonably priced retail electric service, consistent with the state policy under R.C. 4928.02(A).

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing with respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on June 6, 2014, which was granted by Entry dated August 5, 2014. OCC also filed testimony regarding Duke's May 29, 2014 Application ("Application") and participated in the evidentiary hearing on the Application.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed."

The statutory standard for abrogating some portions of the Order and modifying other portions is met here. The Commission should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of April 2, 2015.

III. ARGUMENT

ASSIGNMENT OF ERROR NO. 1: When the PUCO did not rule on the federal preemption argument, it violated R.C. 4903.09. It should have found Duke's price stabilization rider is preempted under the Federal Power Act.

The PUCO should reconsider and reverse its rulings approving Duke's proposed Price Stabilization Rider ("PSR") as a placeholder because the proposal is preempted by the Federal Power Act. The exercise of state authority in violation of the Federal Power Act is a violation of the Supremacy Clause of the U.S. Constitution, Article 6, c. 2. The PUCO's exercise of jurisdiction raises the same concerns that led the Third Circuit Court of Appeals in *PPL EnergyPlus, LLC, et al*. *v. Solomon,* 766 F.3d 241 (3rd Cir. 2014) ("*Solomon*") and the Fourth Circuit Court of Appeals in *PPL EnergyPlus, LLC, et al. v. Nazarian,* 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*") to strike down the New Jersey and Maryland contracts for differences programs under the doctrine of field preemption.

In its April 2, 2015 Opinion and Order in this proceeding ("Opinion and Order"), the PUCO authorized Duke to establish a placeholder PSR. It approved the rider at an initial rate of zero, for the term of the ESP. It did so, finding that there "may be value for consumers in a reasonable PSR proposal that provides for a significant financial hedge that truly stabilizes rates, particularly during periods of extreme weather."[3] The PUCO left the door open for Duke to submit a revised proposal in a future proceeding.[4] The PUCO then noted that several parties raised federal preemption concerns, but declined "to address constitutional issues raised by the parties in these proceedings, as, under the specific facts and circumstances of these cases, such issues are best reserved for judicial determination."[5]

The threshold question that any agency must ask is whether it has the legal authority to act on the matter before it. The United States Court of Appeals for the Sixth Circuit found that:

> The APA establishes a scheme of "reasoned decision making." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). "*Not only must an agency's decreed result be within the scope of its lawful authority,* but the process by which it reaches that result must be logical and rational." *Allentown Mack Sales and Service, Inc. v. National Labor Relations Bd.*, 522 U.S. 359, 374, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998).[6]

The federal preemption concerns raised by OCC, IEU-Ohio, and others present this very threshold question with respect to the PSR in this proceeding. But the PUCO sidestepped this important issue. Nonetheless, the PUCO asserted jurisdiction over the PSR. OCC and others are left to sort out the seminal question, with no ruling from the

[3] Opinion and Order at 47.

[4] *Id.*

[5] *Id.* at 48.

[6] *Coalition for Government Procurement, et al. v. Federal Prison Industries, Inc.*, 365 F.3d 435, 475 (6th Cir. 2004) (Emphasis added).

PUCO: is the PUCO's exercise of jurisdiction preempted, inter alia, by the Federal Power Act, through the Supremacy Clause of the U. S. Constitution?

The PUCO's failure to address this question is contrary to R.C. 4903.09. That statute prohibits the PUCO from issuing summary rulings and conclusions that do not develop the supporting rationale or record.[7] Where contested cases are heard, R.C. 4903.09 requires the PUCO to address material issues raised by parties, including jurisdictional allegations.[8]

This jurisdictional issue was a material matter in this case. It is reversible error for the PUCO to not address whether its exercise of jurisdiction is precluded by federal acts or the U.S. Constitution. Because the federal preemption issues go to the heart of the PUCO's authority to approve the PSR; the PUCO should reconsider its decision not to address those questions and grant rehearing.

On reconsideration, the PUCO should find that Duke's proposed PSR is preempted under the Federal Power Act, 16 U.S.C. § 824d (2006) ("FPA"). This is because both the field and conflict federal preemption doctrines preclude the PUCO's exercise of jurisdiction. This would be consistent with the Third and Fourth Circuit Court rulings in *Solomon* and *Nazarian* respectively.

Field preemption applies when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal

[7] *MCI Telecommunications Corp. v. Pub. Util. Comm*, (1987), 32 Ohio St.3d 306, 312, 313 N.E.2d. 803; *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶30.

[8] *See e.g., In the Matter of the Complaint of Westside Cellular, Inc., v. GTE Mobilnet Inc.*, Case No. 93-1758, Entry on Rehearing at ¶7 (Apr. 13, 1995); accord, *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶71.

law."[9] The Fourth Circuit Court determined that the regulatory scheme for wholesale energy transactions set forth in the FPA "leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result."[10] Conflict preemption applies "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[11]

Although the *Solomon* Court did not address the conflict preemption issue raised in the challenges to the New Jersey contract for differences program,[12] the Fourth Circuit did address that issue in *Nazarian*. There it found the contract for differences program in Maryland to be conflict preempted as well as field preempted under the FPA.[13] The Fourth Circuit reasoned that a state law may pose an obstacle to federal purposes "by interfering with the accomplishment of Congress' actual objectives, or by interfering with the methods that Congress selected for meeting those legislative goals."[14] It also determined that the Maryland program sought to directly override FERC's explicit policy choice regarding the provision of incentives for new entry under long-term contracts.[15]

[9] *Nazarian* at 474.

[10] *Id.* at 475*, citing N. Natural Gas Co. v. State Corporation Comm'n*, 372 U.S. 84, 91 (1963).

[11] *Nazarian* at 478, *citing Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

[12] *Solomon* at 254-55.

[13] *Nazarian* at 479.

[14] *Id.* at 478*, citing College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005).

[15] *Id.*

The PSR proposed by Duke seeks to accomplish similar objectives. It functions to override federal policy objectives: seeking to set the price for wholesale market transactions and to retain only economic generation in those markets. The PUCO's action is preempted under both the field and conflict preemption doctrines.

A. Duke's proposed PSR is field preempted under the FPA because it would establish the wholesale market price Duke would receive for its sales into the PJM wholesale markets of energy, ancillary services, and capacity.

The Courts in *Solomon* and *Nazarian* determined that the New Jersey and Maryland contract for differences programs "functionally set" wholesale capacity prices by determining the wholesale price to be paid under the contracts for differences. Thus the Courts determined that those programs were field preempted under the FPA.[16] The Fourth Circuit court found that the Maryland contract for differences program "supplant[s] the rate generated by the auction with an alternative rate preferred by the state."[17] The New Jersey and Maryland state programs required their electric public utilities to enter into 15 to 20-year contracts with a selected generator that would guarantee a fixed price for construction of a new generating plant.[18] The generator was obligated to bid the capacity into the PJM capacity auctions so that the resource cleared the auction.[19]

[16] *Solomon* at 250, *Nazarian* at 476.

[17] *Nazarian* at 476.

[18] *Solomon* at 248, *Nazarian* at 473-74.

[19] *Solomon* at 252; *Nazarian* at 473-74.

The contract for differences between the utilities and the generator required make-whole payments or credits for the capacity. [20] If the guaranteed contract price fell below the PJM capacity auction clearing price, the generator would provide the utilities with a make-whole credit to ensure that the generator received only the guaranteed contract price.[21] If the guaranteed contract price exceeded the PJM capacity auction clearing price, the utilities provided the generator with a make-whole payment to ensure that the generator received the guaranteed contract price.[22] The state programs then required the utilities to collect from their retail customers the make-whole payments made to the generator. Alternatively the state programs required the utilities to flow through to their retail customers the credits received from the generator to ensure that the utilities incurred no additional costs and no profit under the contracts for differences.[23]

The proposed Duke PSR program works in substantially the same way. The PUCO's approval of the PSR placeholder contemplates Duke bidding the products purchased under the PSR into the PJM auctions. Duke would receive make-whole payments (subsidies) to ensure that OVEC (or the generator) receives the guaranteed contract price. This program would accomplish the same objective found preempted in the contracts for differences programs in *Solomon* and *Nazarian:* supplementing the PJM wholesale auction clearing prices with the revenues secured through out-of-market state subsidies.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

The only difference between the Duke PSR program and the state contract for differences programs found field preempted in *Solomon* and *Nazarian* is the identity of the entity that would bid the product into the PJM auction. In *Solomon* and *Nazarian*, that entity was the generator. Under the PSR, the entity bidding the product is the state-jurisdictional utility. That difference is irrelevant. The Duke PSR, like the contract for differences in *Solomon* and *Nazarian*, ensures that the market participant (Duke) would receive a customer-funded fixed payment for its sale into the PJM markets regardless of the PJM capacity auction clearing prices. Here the PUCO is supplanting the rate generated by the PJM auction with an alternative rate preferred by the state—a make whole rate subsidized by customers.

There is no merit to Duke's effort to shift the focus from its sales of the PSR products into the PJM wholesale markets, to the wholesale price set in the PSR for the sale by OVEC to Duke. It is not the PSR wholesale price that runs afoul of the FPA. Instead the issue is the effect of the retail rate rider program (PSR) on the PJM wholesale auction clearing prices for the energy, ancillary services and capacity products. Thus, there is no merit in arguments that the PSR simply reflects appropriate state regulation.[24] It exists solely to supplement the revenues Duke will receive from bidding the products purchased under the PSR into the PJM markets.

Nor is there merit to arguments that the PSR program, unlike the state programs in *Solomon* and *Nazarian*, is a voluntary program that does not compel a sale into the PJM markets.[25] The issue of whether the state compels the utility to enter into a contract,

[24] Duke Reply Brief at 49.

[25] Duke Reply Brief at 54-55.

or simply sanctions a program proposed by the jurisdictional utility that supplements PJM market revenues with state commission-approved retail subsidies, is irrelevant. Regardless of whether the state compels the sale, or simply sanctions a retail subsidy for that sale, the effect on the PJM clearing prices is the same. The PUCO's Opinion and Order interferes with the wholesale market derived price under PJM. The PUCO's sanctioning of the PSR program is preempted here.

It is by no means clear that Duke would have accepted the risk for the resale into the PJM wholesale markets of the energy, ancillary services and capacity purchased under the PSR had it been at risk for all or a portion of the associated costs. The PSR would supplant the outcome of the PJM auctions with the revenues collected from customers under the rider in order to guarantee that Duke would fully collect its costs under the PSR. Just as the Fourth Circuit found in *Nazarian*, this state-sanctioned program "ensures that CPV [the market participant bidding the capacity into the PJM market under the Maryland program] receives a fixed price for every unit of energy and capacity it sells into the PJM auction, regardless of the market price."[26] It would supersede the PJM rates that the market participant would otherwise receive. The Duke PSR is an attempt to set wholesale market prices. Who receives the subsidized payment (the utility or the generator) is not a distinguishing or determinative factor.

B. The PSR is preempted by the FPA under the doctrine of conflict preemption because it would have anti-competitive effects on wholesale markets.

The proposed PSR is preempted under the conflict preemption doctrine. This is because the rider would affect PJM wholesale market clearing prices by allowing

[26] *Nazarian* at 476-77.

uneconomic generation (that would otherwise retire) to participate in the PJM auctions. This would undermine the competitive incentives FERC sought to facilitate in its wholesale market regime.[27]

OCC's witness James Wilson testified that Duke's projected $22 million net cost calls into question whether the OVEC plants are economic and suggests that they should instead be retired or repowered."[28] Mr. Wilson also testified that the generation cost of one of the OVEC plants is in excess of AD Hub forward prices for off-peak hours in most months of the ESP Period.[29] He testified that these plants might be uneconomic, and called to run only infrequently, during off-peak hours in the coming years.[30] The IEU-Ohio likewise argued that the PSR would insulate Duke from market price risks, and place unregulated generation providers at a competitive disadvantage.[31]

The PSR simply is not consistent with competition in the PJM wholesale power markets. It would constitute a subsidy analogous to the subsidies found to be preempted in New Jersey and Maryland. It would make it difficult or impossible for generating units without subsidies to compete in the market. It would suppress prices in the PJM energy markets and negatively affect incentives for non-subsidized resources to build new generation in the region.

[27] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719 at P 1, FERC Stats. & Regs. ¶ 31,281 (2008) ("National policy has been, and continues to be, to foster competition in wholesale electric power markets."), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[28] OCC Ex. 43 at 25 (footnote omitted).

[29] *Id.*

[30] *Id.*

[31] IEU Brief at 20-21.

The proposed narrow PSR in Duke's case to collect only the costs associated with the relatively small OVEC entitlement is the tip of the iceberg as the industry struggles to retain base load resources (coal and nuclear) in an environment where future investment is steered toward lower-cost natural gas-fired resources. FirstEnergy's more expansive filing in Case No. 14-1297-EL-SSO seeking the costs associated with affiliated nuclear and coal generating facilities, if approved, would open the door to additional filings in Ohio (and perhaps other states).

But the concept should be rejected. The costs associated with uneconomic generation are a risk that was intended to be borne by market participants, not retail consumers.[32] Duke's PSR, like the Maryland program in *Nazarian*, would "erode the effect of FERC determination and undermine FERC's exclusive jurisdiction."[33]

The PSR program will adversely affect bidding behavior in the wholesale competitive markets. The generators challenging the New Jersey and Maryland programs in *Solomon* and *Nazarian* were concerned that those programs would allow the subsidized generator to bid into PJM's capacity auctions at a price below the generator's actual cost. This would upset the intent of PJM's FERC-approved market rules to encourage new entry to bid at its cost of new entry. The generating facilities at issue in the Duke proposal are not new, but are existing facilities that are allowed to bid into PJM's capacity and energy markets at zero. There is no doubt that the out-of-market PSR will disrupt PJM's wholesale markets and price formation rules which are designed to

[32] See, e.g., Order No. 719 at P 1 ("Effective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.").

[33] *Nazarian* at 477, *citing Appalachian Power Co. v. Pub. Serv. Comm'n.*, 812 F.2d 898, 904 (4th Cir. 1987).

encourage bids at marginal costs and to deter uneconomic generation from participating in those markets. Allowing subsidized uneconomic generation to remain in the market will directly affect both the wholesale market clearing prices and the incentives for unsubsidized generators to invest in new generation in the region.

Duke proposes not to use the PSR purchases to supply Ohio retail customers in the state SSO competitive solicitation auctions, presumably so as to ensure a fully competitive auction process for SSO supply.[34] However, Duke does not explain why or how this purchased power would not adversely affect wholesale competitors and prices. The PSR program is in every respect the type of subsidy that merchant generators and the Market Monitor in PJM have often railed against – subsidies antithetical to the FERC wholesale market regime.

C. The PSR cannot be distinguished from the state programs that the Courts found to be preempted under the Federal Power Act.

There is no merit in attempts to distinguish the proposed PSR program from the state programs found preempted in *Solomon* and *Nazarian.* Duke claims "Rider PSR bears no similarity to the state statutory schemes at issue in either *Solomon* or *Nazarian."*[35] Duke argues that unlike the New Jersey and Maryland programs, the PSR Rider applies to plants that are not new assets but have been in existence for years.[36] Duke comments that this differs from the New Jersey and Maryland programs in *Solomon* and *Nazarian* because those programs sought to encourage construction of new power plants through subsidized retail payments for capacity.

[34] Duke Ex. 1 at 13; Duke Ex. 6 at 11.

[35] Duke Reply Brief at 46.

[36] Duke Reply Brief at 50-51.

But the distinction between new and existing plants is irrelevant. To the extent that Duke's PSR seeks to encourage retention of inefficient and uncompetitive existing facilities by supplementing the wholesale market prices with state retail revenues, it directly conflicts with the same federal wholesale market objectives recognized in the Maryland program. And the Fourth Circuit found the Maryland program was conflict preempted.

Duke also argues that *Solomon* and *Nazarian* are distinguishable because, unlike the programs in *Solomon* and *Nazarian*, Rider PSR does not create a "fixed revenue stream" for Duke.[37] This argument ignores the fact that there is a guaranteed revenue stream for Duke, even though it may not be fixed. The revenue stream exists and will vary depending upon the market price of energy and capacity in PJM. The fact that a revenue stream will exist is the significant factor. It is the guaranteed revenue stream, whether fixed or variable, that supplements the wholesale market price, interfering with wholesale market pricing.

Duke's argument that neither *Solomon* nor *Nazarian* prohibit all forms of state subsidies[38] to encourage investment in generation is also mistaken. The Fourth Circuit determined that while states retain the right to encourage investment through subsidies, Maryland had chosen an "impermissible" approach of incentivizing generation "by setting interstate wholesale rates."[39] The Duke PSR similarly would encourage retention of existing generation by functionally setting the wholesale rate for capacity, energy and ancillary services received by the utility bidding into the PJM wholesale markets. The

[37] Duke Reply Brief at 50.

[38] Duke Reply Brief at 55.

[39] *Nazarian* at 477-78.

PSR is no less disruptive and antithetical to the PJM wholesale markets than were the Maryland and New Jersey programs found preempted in *Solomon* and *Nazarian*. The PSR would allow uneconomic generation to participate in those markets contrary to FERC's policy objectives.

The Third Circuit also rejected in *Solomon* an argument similar to that raised by Duke--that the PSR is merely a mechanism to provide stability and predictability with regard to retail rates.[40] The Third Circuit focused instead on the fact that the contracts set wholesale capacity prices.[41]

The PUCO should have addressed concerns that approval of the PSR will run afoul of FERC's policy objectives rendering the program preempted under the FPA. The Commission erred in failing to consider arguments challenging its legal authority to approve the PSR. That rider, like the programs before the Third and Fourth Circuit Courts of Appeal in *Solomon* and *Nazarian*, seek to supplement the Utility's PJM market clearing revenues with subsidies garnered from a state-sanctioned program funded by customers. This means setting wholesale market prices and subverting FERC's policy objectives of encouraging investment in efficient and economic generation in wholesale markets. The Commission should find that its authority to approve the PSR is preempted by the FPA under both the field and conflict preemption doctrines, through the supremacy clause of the U.S. Constitution. Rehearing should be granted and the PUCO's order abrogated.

[40] *Id.*

[41] *Solomon* at 252.

ASSIGNMENT OF ERROR 2: The PUCO's approval of a theoretical placeholder price stability rider is unreasonable and unlawful.

A. Introduction

The most controversial portion of this proceeding was Duke's proposal to include, as a part of its ESP, a rider to require its customers to pay a return of and on its investment in the Ohio Valley Electric Corporation ("OVEC"). Specifically, Duke proposed that under a power purchase agreement with OVEC, it would purchase its share of OVEC power produced (the "OVEC Entitlement") and sell it into PJM Interconnection, LLC ("PJM").[42] Duke then would charge all of its distribution customers, through the PSR, the difference between the PJM market value of its OVEC entitlement and its share of OVEC costs.

Duke itself projected the PSR could cost Ohio consumers up to $22 million[43] during the three-year ESP. This cost is in addition to the cost paid by customers for electric generation supply secured from competitive retail electric service ("CRES") providers, or the standard service offer ("SSO"). OCC Witness Wilson testified that the PSR cost could be considerably greater because important assumptions made in Duke's analysis are plainly unreasonable.[44]

Confronted with overwhelming evidence that the PSR would result in a net cost to consumers during the three year period of the ESP with little offsetting benefit, the Commission rejected the PSR for OVEC generation.[45] Specifically, the Commission

[42] OCC Ex. 43 at 5.

[43] OCC Ex. 43 at 7.

[44] OCC Ex. 43 at 24.

[45] Opinion and Order at 46.

found that the record did not support that the proposed rider would in fact promote rate stability or benefit the public.[46]

Nevertheless, the Commission found that "the proposed PSR would, ***in theory***, have the effect of stabilizing or providing certainty regarding retail electric service."[47] On this basis, it approved a "placeholder PSR, at an initial rate of zero, for the term of the ESP."[48] The Commission instructed Duke to make a future filing "to justify any requested cost recovery,"[49] and offered advice on what that "future filing" should address.[50]

The PUCO supported its determination by finding that a PSR could theoretically meet the criteria of R.C. 4928.143(B)(2)(d). That provision allows a utility to include in its electric security plan:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

Specifically the PUCO found that, in theory, a PSR could meet these specific statutory requirements, in that the proposed PSR would be:[51]

(1) a charge,

(2) relating to limitations on customer shopping,

[46] Opinion and Order at 44.

[47] Opinion and Order at 44 (Emphasis added).

[48] Opinion and Order at 47.

[49] *Id.*

[50] *Id.*

[51] Opinion and Order at 44-46.

(3) as would have the effect of stabilizing or providing certainty regarding retail electric service.

OCC does not contest that the proposed PSR would be a "charge" to consumers. However, OCC seeks rehearing of the PUCO's determinations that the proposed PSR relates to "limitations on customer shopping," and that the proposed PSR would stabilize or provide certainty regarding retail electric service to customers.

B. The PUCO's determination that the proposed PSR may be included in an ESP and charged to all distribution as a "financial limitation on customer shopping" lacks record support, violating R.C. 4903.09.

Although the General Assembly permits items other than the supply of electric generation service under R.C. 4928.143(B)(1) to be included in an ESP, the Ohio Supreme Court limits such additional items to those expressly listed in R.C. 4928.143(B)(2)(a)-(i).[52] Notably, Duke failed to articulate in its Application and direct testimony the express provisions of R.C. 4928.143(B)(2) under which it sought approval of the PSR. Only on brief, did Duke offer that its PSR was permitted in its ESP as a charge related to bypassability.

Duke asserted that its PSR addresses bypassability[53] but the PUCO correctly concluded that "since nearly any charge may be bypassable or nonbypassable, 'bypassability' alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d)."[54] But then the PUCO makes a leap of logic and finds that the PSR is

[52] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ("Columbus Southern").

[53] Duke Brief at 18-19; Duke Reply Brief at 56.

[54] Opinion and Order at 45.

authorized under R.C. 4928.143(B)(2)(d) under the fiction that it constitutes a "financial limitation on customer shopping."[55]

The PUCO in its order notes that it "agrees that the proposed PSR is a financial limitation on customer shopping for retail electric generation service."[56] The PUCO distinguished between a "physical" limitation on customer shopping (*i.e.*, a constraint on a customer's ability to switch generation service to a CRES provider), and a "financial" limitation. The PUCO reasoned that under the PSR, three percent of a customer's bill would be based on the cost of service of the OVEC units and 97 percent on the "retail market."[57] Thus, the PUCO considers a "financial limitation on customer shopping" to occur when customers' bills do not reflect pricing that relies 100 percent on the competitive retail market. The PUCO explained, "[e]ffectively * * * the proposed PSR would function as a "***financial restraint on complete reliance on the retail market"*** for the pricing of retail electric generation service.[58]

But the PUCO's conclusion is not supported by record evidence. The PUCO relies solely on a claim made by OEG in its post hearing brief[59] that the PSR represents a financial limitation on shopping.[60] But briefs are not evidence in PUCO proceedings[61]

[55] *Id.*

[56] Opinion and Order at 45.

[57] *Id.*

[58] *Id*. (Emphasis added).

[59] OEG Brief at 5.

[60] Opinion and Order at 45.

[61] *See, e.g.*, *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio*, Case NO. 02-220-GA-GCR, Opinion and Order at 9 (June 14, 2005).

and it is improper to rely on claims in briefs which are unsupported by evidence in the record.[62]

And the legal conclusion contained in OEG's brief, which the PUCO relies upon, is not supported by record evidence. OEG's citations to the record[63] do not support the claim that the PSR is a financial limitation on customer shopping.

OEG cites to Mr. Wathen's testimony (Company Ex. 6 at 15) which describes the PSR as 1) benefitting customers by mitigating the impact of high market prices; 2) as a competitively neutral proposal; and 3) as providing a source of reliable power that is "steel in the ground."[64] Mr. Wathen never concludes that the PSR is a financial limitation on shopping. Nor does Duke claim in its brief or reply brief that the PSR is a financial limitation on shopping.

OEG in its Brief[65] also cites to the testimony of its own witness, Mr. Taylor, who testifies that SB. 221 provides a hybrid market where customers are not totally dependent upon marginal cost pricing.[66] But Mr. Taylor's broad statement does not equate to evidence that the PSR is a financial limitation on shopping.

The PUCO adoption of OEG's lone theory—a theory that has no record support—is unjust and unreasonable. R.C. 4903.09 requires the PUCO to make findings of fact based on the record. The PUCO's conclusion that the PSR is a financial limitation on customer shopping is a finding that has no factual basis in the record. The Commission

[62] *In re*: *Ohio Power ESP*, Case No. 11-346-EL-SSO, Opinion and Order at 39 (Dec. 14, 2011) (striking portions of Staff's brief which were not supported by record evidence).

[63] Footnote 17, citing to Company Ex. 6 at 15; Tr. Vol. VII at 1875: 15-21.

[64] Company Ex. 6 at 15.

[65] OEG Brief at 5.

[66] Tr. Vol. VII at 1875: 15-21.

violated R.C. 4903.09 because its conclusion is clearly unsupported by probative evidence in the record. See *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403. Rehearing should be granted.

C. The determination that the proposed PSR may be included in an ESP and charged to all distribution customers as a "financial limitation on customer shopping" contravenes legislative intent and is unlawful.

1. Common usage of the term "customer shopping" is synonymous with the term "customer switching" and reveals the General Assembly's intent under R.C. 4928.143(B)(2)(d) only to permit provisions in an ESP that would physically limit customer switching.

Key to determining whether the PSR constitutes a "limitation on customer shopping" is interpreting this phrase and, specifically, whether the phrase contemplates a "physical" or a "financial" limitation on customer shopping. Resolution requires a determination of legislative intent. In this regard, R.C. 1.42 provides:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Initially, it must be observed that the Ohio Revised Code, as well as the PUCO's and Ohio Supreme Court's precedent, are replete with references that use the term "shopping" synonymously with the word "switching."[67] Common usage dictates that the term "customer shopping" refers to customers who physically "switch" to CRES providers.

[67] *See, e.g.*, R.C. 4928.40(A)(1); *In Re Ohio Consumers' Counsel*, 109 Ohio St.3d, 206-Ohio-2110, 847 N.E.2d 1184, ¶ 21; *In Re Elyria Foundry*, 114 Ohio St.3d 305, 2007-Ohio-4146, 871 N.E.2d 970, at ¶ 72.

To accept the PUCO's interpretation (derived from two sentences in OEG's brief) one would have to read the word "financially" into the statute. Indeed, in an attempt to make any sense of OEG's legal conclusion, the Commission was required to change the entire wording of the statute from permitting "limitations of customer shopping" to permitting a "***financial restraint on complete reliance on the retail market.***"[68]

Recently addressing the rules of statutory construction in Commission proceedings, the Ohio Supreme Court stated:

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[69] (Emphasis added.)

The PUCO added the word "financial" to the statute. This contravenes its plain meaning and the intent of the General Assembly to provide the PUCO with the authority only to limit customer switching to CRES providers. Thus, the proper interpretation of the phrase at issue is that an ESP may include a provision relating to limitations on customers switching to a CRES provider. The Commission's determination that the phrase permits a "financial" limitation on customer shopping contravenes legislative intent, as determined by R.C. 1.42, and is unlawful. Moreover, without its express inclusion in the items listed

[68] Opinion and Order at 45.

[69] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

in R.C. 4928.143(B)(2)(a)-(i), such a financial limitation is forbidden by *Columbus Southern*.

A general overview of the history of Ohio's attempts to deregulate its electric market confirms the legislative intent related to customer shopping. Am. Sub. Senate Bill 3 ("SB 3"), enacted in 1999, was Ohio's first attempt at deregulation. That legislation required electric distribution utilities ("EDUs") to file electric transition plans and after a market development period, customers were to receive electricity from the competitive market. As a part of the legislation, the General Assembly enacted R.C. 4928.40(A)(1), which permitted the Commission to include in an EDU's electric transition plans:

> …such ***shopping incentives*** by customer class as are considered necessary to induce, at the minimum, a twenty per cent load ***switching rate by customer class*** halfway through the utility's market development period but not later than December 31, 2003. (Emphasis added).

The Commission approved a stipulation adopting the FirstEnergy EDUs' electric transition plan, which provided for incentives to shoppers in the form of shopping credits and deferred the amount of the credits for subsequent collection by the EDUs. However, the stipulation also provided that, if more than a 20 percent shopping level were attained by the residential class of customers, the shopping credit incentives "may be adjusted in subsequent years as deemed appropriate to by the Commission to minimize deferrals." [70] In other words, the PUCO had the ability to reduce the level of the shopping credit to limit the number of customers switching to CRES providers and, thus, limit the level of deferrals.

[70] *See, e.g., In Re Ohio Consumers' Counsel*, 109 Ohio St.3d 328, 2006 –Ohio-2110, 847 N.E.2d 1184, ¶¶ 29-31.

On July, 1, 2003, the FirstEnergy EDUs filed an application with the PUCO to lower the shopping credits to limit customer shopping because of unexpectedly high deferrals. The Commission denied the request and instructed the FirstEnergy EDUs to file an application addressing the level of 2005 shopping credits for the post-market development period. It further encouraged the EDUs "to consider and develop plans for 2005 and beyond, which balance three objectives: rate certainty, financial stability for the electric distribution utilities and competitive market development."[71]

The FirstEnergy EDUs filed their post-market development plan, known as a Rate Stabilization Plan ("RSP") on October 21, 2003, to encompass the period from 2006 through 2008.[72] Other EDUs later followed suit. Subsequently, the Ohio Supreme Court, after reviewing a number of RSPs, recognized that the competitive marketplace had not developed as expected under SB 3. It gently reminded the PUCO of its duty to share its evaluations and reports on the effectiveness of competition with the General Assembly, so that it could evaluate the need for further legislation.[73]

Further legislation (SB 221) was enacted in 2008 that addressed changes to the competitive market, permitted EDUs to file ESPs and MROs, and permitted those ESPs to contain various provisions expressly listed in R.C. 4928.143(B). Not surprisingly, those provisions drew upon the regulatory experiences of the prior eight years and, germane to this proceeding, permitted "limitations on customer shopping…as would have the effect of stabilizing or providing certainty regarding retail electric service." In

[71] *See, e.g., In Re Ohio Consumers' Counsel*, 109 Ohio St.3d 328, 2006 –Ohio-2110, 847 N.E.2d 1184, ¶ 3. (Emphasis added).

[72] *In Re Ohio Edison Company, et al*., PUCO Case No. 03-2144-EL-ATA (Opinion and Order, June 9, 2004).

[73] *In Re Ohio Consumers' Counsel*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶41.

essence, R.C. 4928.143(B)(2)(d) merely codified the authority the Commission previously exercised in the post-market development period to limit customer switching to CRES providers.

This history, and the analysis under R.C. 1.42, clearly demonstrates the General Assembly's intent in permitting an ESP to limit customer switching to CRES providers. The Commission's interpretation in this Duke case, on the other hand, seeks to do something quite different by attempting to limit customers' exposure to the retail market, by including the OVEC cost of service as part of customers' bills. Had the General Assembly intended that R.C. 4928.143(B)(2)(d) have that effect it certainly knew how to fashion the language necessary to provide the PUCO such authority. For example, in designing the market rate offer ("MRO") contained in R.C. 4928.142, the General Assembly specifically provided for the blending of the competitive bid price for a portion for the EDU's load with the EDUs generation service price for the remaining SSO load.[74]

The Commission's determination that R.C. 4928.143(B)(2)(d) permits a "financial" limitation on customer shopping contravenes legislative intent, as determined by R.C. 1.42, and is unlawful. Moreover, without its express inclusion in the items listed in R.C. 4928.143(B)(2)(a)-(i), such a financial limitation on customer shopping is forbidden by *Columbus Southern*.

D. The PSR is unlawful because it does not provide rate stability or certainty to customers as required by R.C. 4928.143(B)(2)(d).

The PUCO's order is internally inconsistent as to its finding that the proposed PSR would have the effect of stabilizing or providing certainty regarding retail electric

[74] R.C. 4928.142(D).

service for customers. On the one hand, it found that the proposed rider "in theory" would have the effect of stabilizing or providing certainty regarding retail electric service. In doing so, it relied on the fact that the PSR would produce a credit or charge based on the difference between the wholesale market prices and OVEC's costs.[75]

On the other hand, the Commission found that it was "unclear, based on the record evidence…how much the proposed PSR would cost customers and whether customers would even benefit from the financial hedge."[76] It disallowed the proposed PSR, finding:

> The Commission must base our [sic] decision on the record before us [sic]. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999). With that in mind, we are not persuaded that the PSR proposal put forth by Duke in the present proceedings would, in fact, promote rate stability, as Duke claims, or that it is in the public interest. There is considerable uncertainty with respect to pending PJM market reform proposals, environmental regulations, and federal litigation, as Duke acknowledges, and, in light of this uncertainty, the Commission does not believe that it is appropriate to adopt the proposed PSR at this time.[77]
>
> * * *
>
> We 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).[78]

Yet, the Commission found that it:

> does believe 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.[79]

[75] Opinion and Order at 44.

[76] Opinion and Order at 45.

[77] Opinion and Order at 46.

[78] Id.

[79] Opinion and Order at 46.

As a result, the Commission authorized Duke to establish a "placeholder PSR at an initial rate of zero, for the term of the ESP."[80] The Commission directed Duke to justify its PSR proposal in a "future filing," and proceeded to advise Duke of numerous criteria the proposal must address.[81]

1. The Commission's order is unlawful because it approves a placeholder PSR that customers would fund that is not based upon facts of record, as required by R.C.4903.09.

The factual record in this proceeding shows, and the Commission explicitly found, that Duke failed in its burden to show that its proposed PSR would provide rate stability or certainty for customers as required by R.C. 4928.143(B)(2)(d).[82] Nevertheless, it approved a "placeholder PSR"[83] under the "theory"[84] that a "properly conceived"[85] PSR proposal in a "future filing"[86] could meet the statutory requirements. Obviously, this record does not disclose the facts to be derived in the "future filing." Because the placeholder PSR is supported only by theory, and not facts admitted into the record in this proceeding, it violates R.C. 4903.09. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999); *Ideal Transp. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 195, 326 N.E.2d 861 (1975), paragraph 2 of the syllabus ("The Public Utilities Commission must base its decision in each case upon the record before it."). Thus, it was

[80] *Id.*

[81] *Id.*

[82] Opinion and Order at 46 ("We conclude that Duke has not demonstrated that its PSR rider proposal, as put forth in these proceedings, should be approved under R.C. 4928.143(B)(2)(d).").

[83] Opinion and Order at 47.

[84] Opinion and Order at 44.

[85] Opinion and Order at 46.

[86] Opinion and Order at 47.

unlawful for the PUCO to adopt the placeholder PSR that is premised on “theory” not facts in evidence.

Ohio’s residential consumers are severely prejudiced by the PUCO’s approval of the placeholder PSR in this proceeding because they are denied the factual information upon which to contest approval of the rider under R.C. 4928.143(B)(2)(d), either upon rehearing or appeal. Moreover, the rider currently is set at zero and the Commission intends to permit cost recovery in a “future proceeding” during this ESP’s three-year term. As a result, Ohio’s residential consumers currently are precluded from considering the rider’s costs and other attributes in contesting, under R.C. 4928.143(C)(1), that the ESP is more favorable than a market rate offer (“MRO”). For this reason, as discussed subsequently, Duke cannot maintain its burden of proving its proposed ESP is more favorable than an MRO.

Accordingly, the placeholder PSR must be denied. Additionally, if any subsequent PSR is proposed, it must be filed and considered within the context of a subsequently filed ESP proceeding to permit the proper statutory evaluation under R.C. 4928.143(C)(1).

2. The theory upon which the Commission adopted the placeholder PSR that customers would fund is flawed and unreasonable.

The PUCO found that the proposed PSR, in theory, would have the effect of stabilizing or providing certainty regarding retail electric service provided to customers.[87] In reaching this decision, the PUCO erroneously concluded in theory, that the PSR would function as a countercyclical hedge that in rising price environments the benefits under

[87] Opinion and Order at 44.

the rider will be positive, thereby offsetting other rates derived from market prices.[88] The Commission concluded that the rider is intended to mitigate, by design, the effects of market volatility and provide customers with more stable pricing.[89]

Duke did not present any examples or estimates of the claimed price stability effect of the PSR as part of its ESP application. Nor did Duke provide such information through filed testimony. Witness Wathen admitted that Duke had not performed such an analysis.[90] And Duke did not perform any analysis suggesting that the PSR would provide customers with value as a hedge.[91]

The Commission's resulting theory, are expressly refuted by the evidence of record. The evidence shows that (1) the proposed PSR rider will not rise and fall in the opposite direction of the market, but is just as likely to move in the same direction of the market, resulting in even greater price volatility; and (2) that shopping and SSO customers already have available to them solutions to hedge against price volatility, rendering the PSR Rider needless and costly.

a. The PSR Rider will not rise and fall in the opposite direction of the market, thus stability and certainty of rates for customers has not been proven.

Duke in its brief claims that the PSR will function as a countercyclical hedge, such that, in rising market price environments, the benefits under the rider will be positive, thereby offsetting other rates derived from market prices.[92] However, OCC

[88] Opinion and Order at 44.

[89] Opinion and Order at 44.

[90] OCC Ex. 43 at 27 (Wilson).

[91] Id. at 28.

[92] Opinion and Order at 44, citing to Duke's Brief at 24.

witness Wilson explained that the one-year lag associated with PSR reconciliation component to true up actual historical costs and revenues is about as likely to move in the same direction of the forecasted PSR as to move in the opposite direction.[93] The likelihood that the rider will move in the same direction of market prices will only exacerbate price volatility for consumers, rather than produce rate stability.

Nevertheless, the Commission approved the placeholder PSR under the theory that the PSR is expected to move in the opposite direction of wholesale market prices.[94] The Commission's finding was not based upon any comprehensive analysis of market trends or pricing, but only on theory espoused by Duke in its filed brief. Additionally, the true-up mechanism will add to the volatility of the PSR. Thus, it is illogical to conclude that there is any trend in OVEC costs relative to market pricing, much less that they move in opposite directions.

E. Shopping and SSO customers already have available to them solutions to hedge against price volatility.

The Commission also found that the proposed PSR, in theory, would stabilize rates by smoothing out the market rates paid by shopping customers and the market-based rates paid by SSO customers. This premise ignores that SSO customers' rates are already stabilized by the laddering and staggering of the CBP.[95] Thus, the PSR is not needed because CRES providers can provide products by which customers can elect the amount of price risk they wish to undertake, and the PUCO can address price volatility through the terms of the SSO product approved.

[93] OCC Ex. 43 at 29 (Wilson).

[94] Opinion and Order at 44.

[95] Staff Ex. 1 at 12-13.

Considering all of the above, the PSR would not have the effect of stabilizing or providing certainty for customers. Instead it could produce greater instability and higher prices for all customers. It thus fails to satisfy the requirements under R.C. 4928.143(B)(2)(d), and cannot be authorized by the PUCO as part of Dukes' ESP.

F. The PSR is unlawful because it requires customers to fund an unlawful, anti-competitive subsidy under R.C. 4928.02(H).

On brief, OCC and other intervenors argued that the proposed PSR violated R.C. 4928.02(H). That law prohibits anti-competitive subsidies flowing between competitive and non-competitive services. Familiarity with the history of this statutory provision is necessary for the proper determination of this issue.

This provision initially was enacted in 1999 as R.C. 4928.02(G) as a part of SB 3 and provided that it was the policy of this state 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 or to a product or service other than retail electric service, and vice versa.

Under SB 3, all generation service, including the generation service offered under the SSO, was considered to be competitive[96] and was exempted from the Commission's regulation.[97]

SB 221 changed this regulatory paradigm. It provided EDUs with the option to provide their electric supply through a competitive bid process under a market rate offer,[98] or by an ESP.[99] If an ESP was requested, the utility must prove that the price of

[96] R.C. 4928.03.

[97] R.C. 4928.05(A)(1).

[98] R.C. 4928.142.

[99] R.C. 4928.143(B).

its energy supply[100] and other terms and conditions of the ESP[101] were more favorable in the aggregate than an MRO.[102]

Significantly, the General Assembly also revised R.C. 4928.05(A)(1). It removed generation from the services exempted from Commission regulation in the event the Commission exercised authority over the service under R.C. 4928.141 through 4928.144. It recognized that some generation service could be considered to be non-competitive. Accordingly, R.C. 4928.02(G) was amended (as R.C. 4928.02(H)), by adding the emphasized phrase below to make clear that it is unlawful (1) for a competitive generation service to subsidize a non-competitive generation service, or vice versa and (2) for "any" generation service rates – competitive or non-competitive – to be collected through distribution or transmission rates. R.C. 4928.02(H) now provides that it is the policy of this state 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 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.*** [Emphasis supplied.]

Thus, it is immaterial whether the PSR is classified as a generation rate or a distribution rate. No matter its classification, the PSR is unlawful under R.C. 4928.02(H), as an anti-competitive subsidy.

[100] R.C. 4928.143(B)(1).

[101] R.C. 4928.143(B)(2).

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

1. R.C. 4928.02(H) prohibits the recovery of non-competitive generation related cost through distribution rates paid for by utility customers.

Although the PUCO characterizes the PSR as a generation rate,[103] it actually is a distribution rate under the authority of *In Re Ohio Power Company*, Case No. 10-1454-EL-RDR Finding and Order (January 11, 2012) ("*Ohio Power*"). In *Ohio Power*, AEP Ohio sought to recover the closing costs associated with its Sporn Unit 5 generating facility through a stand-alone rider, the Plant Closure Cost Recovery Rider ("PCCRR"). The costs included the unamortized plant balance that remained on AEP Ohio's books (approximately $56.1 million). Thus, the PCCRR rider clearly was a rate to recover the costs of generation-related service. However, AEP Ohio sought to recover the charge from all distribution customers as a non-bypassable charge, and it characterized the PCCRR rider in its application as a "distribution" charge. As discussed in more detail below, the PUCO denied AEP Ohio's request.

Indeed, in *Ohio Power*, the Commission recognized that whether a charge is to be classified as a distribution rate is dependent upon the class of customers to which it is applied. If a charge is applied to all distribution customers, it is considered a distribution rate. In *Ohio Power*, the Commission disallowed the PCCRR, finding:

> Additionally, the Commission notes that [AEP Ohio's] recovery of the closure costs would be contrary to the state policy found in Section 4928.02, Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service**. *[AEP Ohio] seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR*.**[104]

[103] Opinion and Order at 48.

[104] *Ohio Power* at 19 (Emphasis added).

In this Duke proceeding, under the *Ohio Power* rationale, the nonbypassable PSR would also be charged to all distribution customers and, thus, be considered a distribution charge. The plain language of R.C. 4928.02(H) prevents the Commission from allowing recovery of ***any*** generation-related costs (be they competitive or non-competitive) through distribution rates. Because the PSR charges all distribution customers for the cost of OVEC generation, it is a distribution rate and is prohibited by R.C. 4928.02(H).[105]

2. The subsidy customers are being asked to pay is anti-competitive.

Whether the PSR is considered to be a generation rate or a distribution rate, it creates an anti-competitive subsidy by requiring Duke's customers to underwrite the costs of OVEC's generation. The PSR requires ratepayers to guarantee that OVEC generation earns a profit by covering the difference in the revenues from the sale of the power and the cost of generation. This guarantee is a benefit to OVEC and Duke because Duke owns a percentage of OVEC. In other words, it's a subsidy to Duke regardless of whether it produces a credit for retail customers in any particular year. It is a benefit that other competitive retail or wholesale generation providers do not enjoy, and thus is anti-competitive.

Moreover, Staff witness Choueiki and OCC witness Wilson recognize other anti-competitive consequences of the PSR. Each witness explains that the rider could incent Duke to cause lower-cost OVEC power to be withheld from the market to the benefit of Duke's affiliate's unregulated generation in PJM.[106]

[105] *See In Re Elyria Foundry Company*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176.

[106] OCC Ex. 43 at 41 (Wilson); Staff Ex. 1 at 11 (Choueiki).

Whether considered a generation rate or a distribution rate, the PSR is unlawful. It requires customers to provide an anti-competitive subsidy to OVEC and ultimately to Duke. OCC seeks rehearing to reject the PSR on this basis.

G. The PUCO approved the PSR that could require customers to pay an enormous amount of money for lost revenues when the cost of generation purchased from affiliate (or OVEC) is too high to compete in the PJM market. As such the PSR is an unlawful transition charge and must be disallowed under R.C. 4928.38.

In addition to providing Duke with an unlawful, anti-competitive subsidy, the PSR guarantees that Duke will collect from its customers a return of and on its investment associated with affiliate-owned generation (and OVEC). As OCC witness Wilson explained, these costs are considerable and could amount to approximately $22 million during the term of a three-year ESP. This guarantee, which is meant to shelter Duke's generation investment from the realities of the competitive marketplace, constitutes an unlawful transition charge under R.C. 4928.38. In essence, it is a crutch for Duke to use at a time when Ohio law explicitly requires Duke to be "on its own in the competitive market."[107]

Unfortunately, the Commission's order devoted only a single sentence to this issue. It merely stated, "[n]either do we agree with the assertion that the PSR would permit Duke to collect untimely transition costs in violation of R.C. 4928.38."[108] The PUCO's failure to set forth the reasons prompting its decision on this issue, based upon findings of fact, violates R.C. 4903.09. Moreover, it prejudices consumers' ability to

[107] R.C. 4928.38.

[108] Opinion and Order at 48.

prosecute this application for rehearing and appeal, because they are unable to decipher the reasons behind the Commission's finding.

Nevertheless, the PSR clearly is a transition charge because it requires Duke's consumers to pay for Duke's (and its generation affiliate's) lost revenues. The lost revenues are created when the cost of OVEC generation is higher than what it can be sold for in the PJM market.

When SB 3 was enacted in 1999, it permitted Ohio's electric utilities the opportunity to collect generation "transition revenues"[109] to "assist it in making the transition to a fully competitive retail electric generation market."[110] However, the recovery of generation transition charges was permitted for only a limited period of time.[111] Utilities could collect certain generation transition costs until the end of the market development period, which ended December 31, 2005.[112]

Moreover, the General Assembly emphatically provided that the Ohio electric utility was "wholly responsible for whether it is in a competitive position after the market development period," and further proclaimed that after the market development period concluded, the utility "shall be fully on its own in the competitive market."[113] In fact, R.C. 4928.38 prohibits the PUCO from authorizing transition revenues or "any equivalent revenues" except as provided by statute. And if this authority is not clear enough, R. C. 4928.141 also explicitly declares that a standard service offer, such as that which Duke

[109] "Transition revenues" are defined under R.C. 4928.39.

[110] R.C. 4928.37.

[111] R.C. 4928.38.

[112] R.C. 4928.38.

[113] R.C. 4928.38.

seeks approval in this proceeding, “shall exclude any previously authorized allowances for transition costs.”

The millions of dollars that Duke could collect under the PSR are transition revenues (or the equivalent of transition revenues) that the PUCO cannot impose on customers after the end of the statutory market development period, December 31, 2005.

Duke has had over 15 years, since the enactment of SB 3, to accept its responsibility to prepare for market. After this prolonged transition, it is more than time for Duke “to be on its own” with respect to the risks and rewards of all of its generating units as the General Assembly intended in the 1999 law. Accordingly, OCC seeks rehearing of the Commission’s Opinion and Order that permits the PSR to function as an unlawful transition charge.

H. The PUCO erred in approving a “severability provision” without requiring that the PSR be collected subject to refund to avoid prejudice to Duke’s customers.

Under the PUCO’s Order, Duke is required to commit in a future filing that, if a court invalidates the PSR in a subsequent proceeding, all other provisions of the ESP will remain in effect.[114] With this provision, the Commission (as well as many intervenors at hearing and on brief) recognizes that the proposed PSR is controversial and, if approved, will be challenged and is subject to reversal at the state and federal levels. Indeed, the Commission refused to address the considerable federal preemption and constitutional issues presented, in favor of subsequent judicial determination.[115]

This places Duke’s consumers in an untenable position if cost recovery is approved through the “future filing” and consumers are required to pay the PSR. If the

[114] Opinion and Order at 47.

[115] Opinion and Order at 48.

rider is subsequently invalidated, customers may have no means to collect a refund, due to the Ohio Supreme Court's prohibition against retroactive ratemaking.[116] Accordingly, fairness to Duke's consumers requires that if PSR is approved, the rider should be collected subject to refund. Such a condition should not be objectionable to Duke who believes that it is possible for the PSR to produce a credit, and undoubtedly would be looking for a means to take back from its customers unlawful credits. OCC seeks rehearing on this issue.

I. The factors the Commission ordered Duke to include in its "future filing" are unreasonable to the extent that they are biased toward supporting the Utility-proposed PSR. The Commission must order Duke to include factors in a future filing that also assess the rider's benefits (or detriments) to Duke's consumers.

As stated previously, in approving the placeholder PSR, the Commission advised Duke as to additional factors to include in a "future filing" for a PSR. The factors include:[117]

1) Financial need of the generating plant;

2) Necessity of the generating facility, in light of future reliability concerns and, including supply diversity;

3) Description of how the generation plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;

4) The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development.

The factors that the Commission ordered Duke to include in a future filing appear to be biased toward building a case that would support approval for the Utility-proposed

[116] *See, e.g., Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957)* and its progeny.

[117] Opinion and Order at 47.

PSR. Although the PUCO indicated that the PSR must be shown to be reasonable and of benefit to customers,[118] it failed to require the Utility to address factors that would enable it to assess the benefits (or detriment) to customers. The Commission's list of factors is thus incomplete and unreasonable. It is skewed in favor of approving the PSR without fully considering its impact on customers. Accordingly, OCC seeks rehearing in order that the PUCO, in fairness to consumers, order Duke to include the following factors in any "future filing:"

> 1) The total costs of the PSR to customers who are being asked to pay it (including bill impact statements through the entire period the PSR is in effect).

The Commission should consider the PSR's impact on customers' bills before making a decision that imposes the costs of the PSR on customers. Additionally, the Commission should require Duke to provide alternatives to the PSR that could be less costly or more beneficial (*i.e.*, less harmful) to customers than the PSR.

> 2) The PSR's impact on PJM's competitive markets, including short-term markets, day-ahead and real-time markets, long-term markets, and the capacity market, as well as generation facility investment decisions.

As the record reflects, when plants are subsidized in a competitive market, the market can be detrimentally affected.[119] If the competitive market does not function properly, customers may lose the benefits they are entitled to under the law, including the benefit of reasonably priced retail electric service.[120] Duke should be required to address market effects of subsidized plants, including the impact on the plants' various bidding

[118] Opinion and Order at 45.

[119] OCC Ex. 43 at 40-41 (Wilson); Staff Ex. 1 at 11 (Choueiki).

[120] R.C. 4928.02(A).

commitments and/or strategies on existing resources and the impact on investors' willingness to invest in new generation. Duke should present an independent analysis of these impacts on the generation rates customers will pay

3) The magnitude and value of the hedge to customers and its expected impact on the stability of customers' rates.

Before approving a PSR, Duke must provide the Commission with this information in order to ensure that the PSR will in **fact**, not just in "theory," meet the statutory criteria of R.C. 4928.143(B)(2)(d), *i.e*., that it has the effect of stabilizing rates (in more than a de minimus amount) or providing certainty regarding retail electric service. Additionally, the Utility must show that the PSR is reasonable and benefits customers.

4) Evidence that Duke's customers would be willing to pay higher rates in return for a modest increase in rate stability.

In evaluating electric security plans, the Commission has required that proponents of a provision demonstrate that it benefits consumers and is in the public interest.[121] Determining customers' willingness to pay higher rates for modest increases in rate stability would assist the Commission in ensuring that the PSR benefits consumers and is the public interest. Moreover, assessment of customers' willingness would help satisfy the state policy that "provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs."[122]

[121] *See In the matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO et al., Entry on Rehearing at ¶19 (Jan. 23, 2012).

[122] R.C. 4928.02(B).

5) When presenting the economic development impact of plant closure, the economic impact on customers of increased electric rates to support the PSR also should be presented.

This information would assist the PUCO in determining whether the PSR benefits consumers and the public interest. Consistent with these filing requirements, the Commission should conduct its own a study to examine the economic impacts on the state of Ohio and its electric utility customers. Such a study should evaluate the impacts of potential long-term subsidization of financially challenged generation facilities in contrast to deploying natural gas fueled generation units along with expanded distributed generation and energy storage in the state.

6) Environmental impacts of subsidizing select generation plants.

The subsidization of a generation plants included under a PSR could affect a decision to run plants that should otherwise not be dispatched. Such a decision has economic as well as environmental implications. Those implications must be fully disclosed and analyzed in order to show that the PSR is reasonable.

7) Incentives to control costs.

Because the PSR permits a 100 percent pass through of actual plant fixed and variable (fuel) cost (net of revenues) there is no incentive to control these costs. This information should be part of Duke's future filing to assist the PUCO in fulfilling state policy to ensure reasonably priced service is available to all customers in Ohio.[123]

[123] R.C. 4928.02(A).

8) Incentives to maximize market value/wholesale generation revenues.

Similarly to 7) above, with 100 percent pass through of all earned revenues there is no incentive to keep the plants operating, minimize outage time, offer the plants at efficient prices, etc. In order to assist the Commission in fulfilling state policy,[124] this information should be part of Duke's future filing.

9) Incentives to make rational end-of-life decisions.

When a generation plant no longer appears likely to cover its going forward costs over any future time frame (short or long), the owner should retire or repower it. Any proposed PSR should be evaluated based on whether it provides incentives for owners to make sensible retirement decisions. As stated above, a 100 percent pass through provides no incentive for rational decision-making. And with no "skin in the game" there is no impetus for the utility to actively control costs. Sharing mechanisms should be explored as part of the future PPA proceeding.

Incorporating these factors into a future PSR filing will help ensure that the PUCO has before it all the information it needs to determine whether the PSR is reasonable, benefits customers, and is in the public interest. The PUCO should abrogate its Opinion and Order and require utilities to address these additional factors.

[124] R.C. 4928.02(A).

ASSIGNMENT OF ERROR 3: The PUCO unreasonably and unlawfully found that Duke's electric security plan ("ESP"), as modified, is more favorable in the aggregate to customers than a market rate offer ("MRO").

A. Duke's proposed ESP is not more favorable than an MRO under the PUCO's traditional application of the statutory test.

In this proceeding, the PUCO performed its traditional analysis of the ESP v. MRO test,[125] which considers three elements: (1) the standard service offer ("SSO") price of generation to customers,[126] (2) other quantifiable provisions,[127] and (3) qualitative provisions.[128] These three elements, combined, are compared to the results that would be obtained under R.C. 4928.142, if the SSO were proposed in the form of an MRO. From this comparison, the PUCO makes its determination whether the proposed ESP, in the aggregate, is more favorable than an SSO offered through an MRO.

In addressing the test's first element, the PUCO found that the SSO price of generation to customers under R.C. 4928.143(B)(1) would be established through the competitive bid process and would be equivalent to the results that would be obtained under the MRO provided in R.C. 4928.142.[129] OCC does not dispute this finding.

The second element requires the PUCO to quantify the costs associated with the provisions of the ESP identified in R.C. 4928.143(B)(2). *Columbus Southern II*. At issue in this proceeding were the quantification of the Price Stabilization Rider ("PSR") and the Distribution Capital Investment Rider ("Rider DCI"). The record reflects that the

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

[126] R.C. 4928.143(B)(1).

[127] R.C. 4928.143(B)(2).

[128] As explained subsequently, no provision of the Ohio Revised Code permits the PUCO to consider "qualitative" benefits in making its determination under R.C. 4928.143(C)(1). Rather, its determination is limited to quantifiable "categories of cost recovery." *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 945 N.E.2d 655 (hereinafter, "*Columbus Southern II*").

[129] Opinion and Order at 96.

PSR should have been quantified at a cost of $22 million during the three year ESP.[130] The record also demonstrated that Rider DCI should have been quantified at a cost of approximately $272 million over three years.[131] However, the PUCO approved the PSR as a "placeholder" and quantified it at zero for purposes of the ESP v. MRO analysis. It then invited Duke to seek recovery of PSR costs in a future filing during the term of this ESP.[132] In addition, the PUCO quantified Rider DCI and other distribution riders at zero, finding that they "could be recovered in either an ESP or through a distribution rate case conducted in conjunction with an MRO."[133] Reason dictates that, because the costs of the approved ESP and an MRO were found to be the same, the ESP cannot be ***quantitatively*** "more favorable" than an MRO. Nevertheless, the PUCO so found, relying on the alleged ***qualitative*** benefits associated with Rider DCI and various rate design modifications![134]

OCC seeks rehearing of the PUCO's determination that the ESP is quantitatively more favorable than an MRO. First, as a threshold matter, the PUCO erred by relying on what clearly were offered into evidence as alleged ***qualitative*** benefits[135] in determining that the ESP was ***quantitatively*** more favorable than an MRO. Alternatively, if the PUCO truly considers these benefits to be quantitative in nature (which they are not), it erred by failing to quantify them. Second, the PUCO erred in its treatment of the PSR. The PSR should be denied in its entirety because it is not an item expressly listed in R.C.

[130] OCC Ex. 48 at 4 (Hixon Direct); OCC Ex. 43 at 7, 17 (Wilson Direct).

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

[132] Opinion and Order at 47, 96.

[133] Opinion and Order at 96.

[134] Opinion and Order at 96-97.

[135] See Staff Ex. 2 at 3 (Turkenton Direct), Staff Initial Br. at 57; Duke Ex. 6 at 25 (Wathen Direct), Duke Initial Br. at 26-32.

4928.143(B)(2). *Columbus Southern II*. However, if the placeholder is approved and costs are expected to be recovered during the ESP in a future proceeding, a determination cannot be made on this record whether the ESP is more favorable than an MRO. Absent costs being assigned, Duke cannot sustain its burden that the ESP is more favorable. Third, the PUCO erred in failing to recognize the costs associated with Rider DCI. OCC requests the PUCO to find that the ESP is not quantitatively more favorable than an MRO.

As to the third element, qualitative benefits should not be included and considered a part of the ESP v. MRO test. The Ohio Supreme Court has limited the items that can be included in an ESP to those expressly listed in R.C. 4928.143(B), and has identified each of those items as "categories of cost recovery."[136] The categories of cost recovery, by definition, do not include qualitative factors. The question whether it is lawful to include and consider qualitative provisions in the statutory test currently is pending before the Ohio Supreme Court.[137] Assuming arguendo that qualitative factors can properly be considered in this proceeding as a part of the ESP v. MRO test, OCC seeks rehearing because none of the factors identified provide Ohio consumers a benefit.

OCC asks the PUCO to find that the proposed ESP is not more favorable than an MRO and deny Duke's application. Alternatively, the PUCO should further modify the ESP consistent with this application for rehearing.

The following analysis addresses in more detail the elements of the statutory test and the issues on which OCC seeks rehearing.

[136] *Columbus Southern II.*

[137] See *In the Matter of Northeast Ohio Public Energy Council*, Appeal No. 2013-0513.

1. The Test's first element: determination of the SSO generation price.

As stated above, the SSO generation price under R.C. 4928.143(B)(1) would be determined by essentially the same competitive bid process under either the proposed ESP or an MRO. Thus, the SSO generation price would be quantitatively equal under either form of SSO.

2. The Test's Second Element: Cost Quantification of ESP provisions.

OCC seeks rehearing of the PUCO's use of alleged qualitative benefits to find that the approved ESP is quantitatively more favorable than an MRO, its failure to quantify the costs of Rider DCI, and its approval of the placeholder PSR with an initial rate of zero.

a. The PUCO unreasonably and unlawfully found that the approved ESP was ***quantitativel***y more favorable than an MRO based upon alleged ***qualitative*** factors. Alternatively, the PUCO erred by failing to quantify the alleged benefits provided to consumers under the ESP as required by R.C. 4928.143(B)(2), ***CSP II,*** and the PUCO's own precedent.

As background, OCC notes that Duke's position throughout this proceeding has been that no provision of its ESP is quantifiable under R.C. 4928.143(B)(1) and (2), *i.e.*, the costs/benefits of the ESP and an MRO are the same.[138] Although OCC, as well as other parties, contended that the PSR and DCI Rider are quantifiable at considerable costs to consumers, Staff disagreed. It quantified neither. Instead, Duke and Staff asserted that the proposed ESP was more favorable than an MRO based solely upon the proposed

[138] Duke Initial Br. at 27, Duke Ex. 6 at 25 (Wathen Direct).

ESP's ***qualitative*** benefits.[139] These alleged qualitative benefits included, among others, that Rider DCI provided an efficient method to improve Duke's distribution infrastructure[140] and that various rate modifications could be made under an ESP, but not an MRO.[141] These qualitative factors never were quantified on the record. Indeed, by their very nature, qualitative measures cannot be quantified.

In its Order, the PUCO also assigned no cost to the PSR or Rider DCI, as Duke and Staff requested. Nevertheless, the PUCO found that the proposed ESP was ***quantitatively*** more favorable than an MRO based upon the alleged ***qualitative*** benefits related to Rider DCI and various rate modifications, as discussed above. This is plain error. Because the PUCO found that the costs of the approved ESP and an MRO are the same, the net quantitative benefit of the ESP over an MRO (at a minimum) is zero, as admitted by Duke and Staff. Accordingly, the PUCO must find that the proposed ESP is not quantitatively more favorable than an MRO. Moreover, as discussed below, the substantial costs that consumers would have to pay for the PSR and DCI Rider make the ESP significantly less favorable than an MRO.

If the PUCO truly considers the alleged efficiency of Rider DCI and the various rate modifications discussed above to be ***quantitative*** benefits, the PUCO's Order is unreasonable and unlawful because it fails to quantify the costs of the factors listed in

[139] See Staff Ex. 2 at 3 (Turkenton Direct), Staff Initial Br. at 57; Duke Ex. 6 at 25 (Wathen Direct), Duke Initial Br. at 26-32.

[140] Duke Initial Br. at 31, Duke Ex. 6 at 27 (Wathen Direct); Staff Initial Br. at 57, Staff Ex. 2 at 4 (Turkenton Direct).

[141] Staff Ex. 2 at 4 (Turkenton Direct); Duke Initial Br. at 28; Duke Ex. 6 at 26 (Wathen Direct).

R.C. 4928.143(B)(2), as required by *Columbus Southern II* and this PUCO's own precedent.[142]

b. The PUCO erred by approving a placeholder PSR and further erred by attributing no cost to the PSR when customers could end up paying millions of dollars.

As stated previously, only those items that are expressly listed in R.C. 4928.143(B) may be included in an ESP. The PUCO approved the placeholder PSR, in theory, based upon R.C. 4928.143(B)(2)(d), finding that it was a charge relating to "limitations on customer shopping" and that it would have the effect of "stabilizing or providing certainty regarding retail electric service." OCC has demonstrated in this application for rehearing that the proposed PSR does not meet the elements of R.C. 4928.143(B)(2)(d). Thus, it should be disallowed. No value can be assigned to it for purposes of this ESP v. MRO test.

However, the PUCO has approved the rider as placeholder, with an initial value of zero, and has invited Duke to seek subsequent recovery of PSR costs during the term of this ESP. These costs can be reasonably expected to reach $22 million.[143] Because the rider currently is set at zero and the PUCO intends to permit cost recovery in a "future proceeding" during this ESP's three-year term, there is no way on this record to determine the costs Duke's consumers will be required to pay for the PSR. Thus, by approving a placeholder rider, the PUCO has unreasonably and unlawfully sheltered review of the PSR costs to customers during the ESP's term for purposes of the statutory test. Moreover, the PUCO's approval of the placeholder rider prevents Duke from

[142] See, *e.g.*, *In Re Columbus Southern Power Company, et al*, Case No. 11-346-EL-SSO, Opinion and Order (August 8, 2012), at 75.

[143] OCC Ex. 48 at 4 (Hixon Direct); OCC Ex. 43 at 7, 17 (Wilson Direct).

sustaining its burden of proof in this proceeding that the ESP is more favorable than an MRO under R.C. 4928.143(C)(1). Accordingly, the PSR should be rejected in its entirety.

Alternatively, the PUCO may modify the ESP such that Duke cannot collect PSR revenues for the term of the ESP.

c. The PUCO unreasonably failed to consider the Rider DCI revenues as quantifiable costs to customers under the ESP.

OCC witnesses Hixon and Wilson demonstrated that revenues associated with an uncapped Rider DCI as proposed by Duke were $272 million over three calendar years.[144] In its Order, the PUCO agreed with Staff, OCC and others that Duke's Rider DCR should be subject to yearly caps that would result in a $169 million cost to customers during the ESP.[145] However, the PUCO refused to use this quantifiable Rider DCI cost as a part of the ESP v. MRO test, finding that "the revenue requirements associated with the recovery of incremental distribution investments should be considered to be the same whether recovered through the ESP or ***through a distribution rate case conducted in conjunction with*** an MRO."[146]

As a threshold matter, the PUCO's finding misstates the statutory test found in R.C. 4928.143(C)(1), which requires the PUCO to compare "the electric security plan so approved…to the expected ***results that would otherwise apply under section 4928.142 of the Revised Code***." Emphasis added. The plain meaning of the statute clearly limits the

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

[145] Opinion and Order at 72.

[146] Opinion and Order at 96 (Emphasis added).

PUCO's analysis to the "expected results" of R.C. 4928.142, and does not contemplate consideration of the results of a distribution rate case.[147]

Moreover, the PUCO's interpretation requires one to read into the statute words to the effect that the approved ESP should be compared to the expected results under R.C. 4928.142 **and a distribution rate case**. In considering the rules of statutory construction, the Ohio Supreme Court has found:

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[148] (Emphasis added).

Clearly, the PUCO's interpretation of the statute adds to the words chosen by the General Assembly. Had the General Assembly intended to include the expected results of a distribution rate case in the statutory test, it would have. It did not.

In addition, the PUCO's finding is based on its prior determination in the *FirstEnergy ESP III* case.[149] In that case, FirstEnergy quantified (for purposes of the statutory test) the accelerated recovery of revenues under the ESP's distribution rider, *i.e.*, because the ESP provides for accelerated recovery of distribution costs, customers

[147] R.C. 1.42.

[148] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

[149] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO Opinion and Order (July 18, 2012) ("*FirstEnergy ESP III*").

would pay more distribution charges during the ESP's term than they would under a traditional rate case because of regulatory lag. Nevertheless, the PUCO refused to quantify these accelerated revenues, finding that, over a period of time extending beyond the ESP's term, the revenues collected under the ESP and rate case would be a "wash."[150]

FirstEnergy ESP III misstates the statutory test that requires that the ESP "so approved" be compared to the expected results of an MRO.[151] In *FirstEnergy ESP III,* the ESP approved was for a period of three years and the PUCO erred by extending its consideration to the longer, indefinite period of time. Thus, in this proceeding, the PUCO may not lawfully extend its consideration of distribution revenues collected beyond the ESP's three-year term. Accordingly, if the PUCO determines that it lawfully may consider the results of a distribution rate case as a part of the statutory test (which it cannot, as stated above), then the PUCO at least must include in its comparison the additional revenues collected by Rider DCI as compared to collections it would have received under a distribution rate case.

Indeed, Staff witness Turkenton agreed that Duke would recover these distribution-related costs sooner under an ESP than if an MRO were implemented.[152] Because Duke failed to quantify the additional costs its customers would pay for Rider DCI under this ESP, as opposed to an MRO, it has failed to sustain its burden of proof under R.C. 4928.143(C)(1). Accordingly, Duke's application must be denied.

[150] *FirstEnergy ESP III* at 55.

[151] R.C. 14928.143(C)(1).

[152] Tr. XIII at 3764 (Turkenton Cross Examination).

3. The PUCO erred by unlawfully considering qualitative benefits as part of the ESP v. MRO test.

The PUCO's analysis of the authority to include "qualitative" benefits in an ESP is confused. On the one hand, the PUCO recognizes that for inclusion in the ESP, a cost must fall within one of the nine categories listed in R.C. 4928.143(B)(2), as required by *Columbus Southern II.*[153] On the other hand, the PUCO found that other provisions of the ESP can be considered under the statutory test merely if they are consistent with state policy under R.C. 4928.02 -- contrary to *Columbus Southern II.*[154] To support its position, the PUCO relies on *In Re Columbus Southern Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958 ("*Columbus Southern I*"), in which the PUCO modified the electric distribution utility's ("EDU") proposed SSO generation price submitted under R.C. 4928.143(B)(1). On appeal, the EDU claimed that as long as this price was less than that determined under R.C. 4928.142 for an MRO, the PUCO was without authority to modify it. It is in this context that the Court held:

> Moreover, while it is true that the commission must approve an electric security plan if it is "more favorable in the aggregate" than an expected market-rate offer, id., that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider "pricing *and all other terms and conditions*." (Emphasis added.) Id. Thus, the commission must consider more than price in determining whether an electric security plan should be modified. [*Columbus Southern I*, ¶ 27.]

The Court's language merely recognizes that R.C. Chapter 4928 does not restrict the PUCO's discretion to **modify** the provisions of an ESP that are properly included under

[153] Opinion and Order at 43.

[154] Opinion and Order at 97.

R.C. 4928.143(B), particularly if they violate a state policy in R.C. 4928.02.[155] It does not permit an EDU to include other provisions in its ESP that do not fall within the nine listed "categories of cost recovery" in R.C. 4928.143(B)(2). The later-decided *Columbus Southern II* is controlling. It was error to include in the ESP v. MRO test factors based solely on the public policy factors contained in R.C. 4928.02, or otherwise not listed in R.C. 4928.143(B). Moreover, the PUCO violated R.C. 4903.09 by failing to explain why *Columbus Southern II* is not controlling.

Nevertheless, in this proceeding, the PUCO has found that several qualitative factors provide a benefit under the ESP. OCC seeks rehearing as to each on the basis that they may not lawfully be considered by the PUCO and that they provide no benefit at all.

a. The PUCO erred in identifying factors under R.C. 4928.02 as qualitative benefits provided to customers under the ESP.

Although the PUCO relies on R.C. 4928.02 as independent authority to consider qualitative benefits under the ESP v. MRO test, it fails to identify which ESP provisions advance what policy,[156] contrary to R.C. 4903.09. Absent the PUCO's identification of the qualitative benefits it considered under R.C. 4928.02 in performing the ESP v. MRO test, OCC assumes it adopted those identified by Duke in direct testimony and on brief:[157]

- Capacity Rider (Rider RC) and Energy Rider (Rider RE). Duke proposes modifications to rate design that allegedly make the riders comparable to CRES rates. Duke relies on R.C. 4928.02(A) and (B).[158]

[155] Accord: *Elyria Foundry v. Pub. Util. Comm.*114 Ohio St.3d 305, 2007-Ohio-4146, in which the Court found that the PUCO may not approve an application that violates the state policies contained in R.C. 4928.02.

[156] Opinion and Order at 97.

[157] Duke Initial Brief at 27-31.

[158] Duke Initial Br. at 28.

- Capacity Rider (Rider RC). Duke proposes modification to rate design related to cost allocations. Duke relies on R.C. 4928.02(A).[159]

- Capacity Rider (Rider RC). Duke proposes modifications to rate design to base rates on usage and to eliminate demand aspects. Duke relies on R.C. 4928.02(A).[160]

- Load Factor Adjustment (Rider LFA). Duke proposes modifications to rate design to eliminate the rider. Duke cites no state policy other than to indicate that Rider LFA's continued existence undermines the state's objective to have market influences alone determine the cost of competitive generation service).[161]

- Rider DR-ECF. Duke proposes modifications to rate design to eliminate a demand response program provided in the rider. Duke cites no state policy other than to state that the program's elimination is a move toward pure market pricing.[162]

- Purchase of Receivables Rider (Rider POR). Duke will retain the existing POR program. Duke cites no policy.[163]

- Net Metering Rider (Rider NM). Duke proposes changes to clarify language in its tariff. Duke cites no state policy other than to state that the language change will enhance reasonable rates.[164]

Because the modifications to the above riders[165] (and the retention of Rider POR) do not fall within the nine items listed in R.C. 4918.143(B)(2), they cannot be considered

[159] Duke Initial Br. at 28.

[160] Duke Initial Br. at 29.

[161] Duke Initial Br. at 29.

[162] Duke Initial Br. at 29-30.

[163] Duke Initial Br. at 30.

[164] Duke Initial Br. at 30.

[165] OCC notes that these listed rate design modifications are those that the PUCO erroneously relied upon as quantitative factors in the ESP v. MRO test. They have not been quantified and, indeed, are not lawfully permitted as a part of the ESP v. MRO analysis.

in performing the ESP v. MRO test under 4928.143(C)(1). The PUCO recognizes as much elsewhere in its Order.[166]

Even if these alleged qualitative benefits did fall within R.C. 4928.143(B)(2), they would be excluded from consideration in the test because they also can be offered under an MRO. OCC witness Hixon testified that changes to the rate design riders are also available in an MRO. R.C. 4928.142 requires an MRO applicant to file a proposed rate design and the PUCO's rules require it to provide proposed SSO generation rates derived from the competitive bid process.[167] Specifically, the rules require the applicant to file (1) a proposed retail rate design, (2) an indication of how bid prices were used for deriving rates, and (3) a description of the rate structure chosen by the utility with the method used to convert bides prices to retail rates.[168] Indeed, Duke filed a proposed retail rate design when it filed an application for an MRO in 2010.[169] Moreover, Staff agrees that an MRO applicant must provide a proposed rate design to the PUCO, that the PUCO has the discretion to approve the design submitted, and that the EDU may submit subsequent MRO applications and change its current rate design.[170] Thus, the changes to SSO generation-related rates proposed in this ESP for the rate design riders are equally

[166] Opinion and Order at 43.

[167] OCC Ex. 48 at 15 (Hixon Direct).

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

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

[170] Tr. XIII at 3775-3779 (Turkenton Cross Examination).

available in an MRO. Because they are available in an MRO, the changes cannot be considered a qualitative benefit reserved only for the ESP.[171]

Duke did not list Rider POR as a benefit in its direct testimony, and it cannot be considered a benefit of this ESP, because it already is being offered.[172] Moreover, no reason exists that Duke couldn't continue the program under an MRO.

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

b. The PUCO erred in identifying the transition to market-based rates as a qualitative benefit to customers under the ESP.

The PUCO found that Duke's full transition to market-based pricing on June 1, 2015 "under this ESP" is a benefit of this ESP proceeding. However, pursuant to the stipulation approved in Duke's prior ESP proceeding, Duke completed its transition to market-based pricing through the competitive bid process ("CBP") as of January 1, 2012.[173] In addition, it agreed to continue to provide market-based pricing throughout the term of the prior ESP and further committed to procure its SSO supply through the CBP for the ESP in this proceeding, commencing June 1, 2015.[174]   As such, the commitment to transition cannot be considered a benefit of this proceeding because it was a benefit offered and approved in the prior proceeding and, indeed, already has occurred. The

[171] In addition, consideration of the modifications to various riders as a qualitative benefit misconstrues the ESP v. MRO test, which requires a comparison of the approved ESP to an MRO. The modifications to these riders are presented by Duke as improvements over the existing ESP. OCC Ex. 48 at 15 (Hixon Direct).

[172] See Duke Initial Br. at 30 ("The Company is also proposing to continue its successful program under which it purchases accounts receivable (POR) from CRES providers."). See, e.g., *FirstEnergy ESP III* at 55 (refusing to recognize a benefit to forego transmission costs that had been agreed to in a prior proceeding).

[173] *In Re Duke Energy Ohio*, Case No. 11-3549-EL-SSO, Opinion and Order (November 22, 2011) at 9, 11.

[174] *Id. at 11.*

PUCO has held that if a benefit is approved in a prior ESP proceeding, it cannot again be considered a benefit in a subsequent ESP case. See *FirstEnergy ESP III* at 55 (refusing to recognize a benefit to forego transmission costs that had been agreed to in a prior proceeding); *In Re Ohio Power*, Case No. 11-346-El-SSO, Opinion and Order, at 30 (December 14, 2011) (refusing to recognize the removal of provider of last resort charges, when removal was mandated by a prior proceeding).

Moreover, the PUCO cites the policies of R.C. 4928.02 to justify that the transition to market-based rates is a qualitative benefit. As discussed above, the PUCO's determination violates *Columbus Southern II*.

c. The PUCO erred in ascribing customer benefits of the distribution investment rider only to the ESP and not an MRO.

In its order, the PUCO found that Rider DCI and related distribution riders (collectively "DCI") provide a qualitative benefit over an MRO. Specifically, it found that approval of the DCI "***should*** enable the Company to hold base rates constant over the ESP period while making significant investments in the distribution infrastructure and improving system reliability."[175]

As to the first component of the PUCO's reasoning, the statement that the DCI "should" permit Duke to keep base rates constant is incorrect, or at least misleading. On cross-examination, Staff witness Turkenton admitted that Duke had made no commitment to freeze base rates during this ESP.[176] Absent a commitment to freeze base rates, the benefit of maintaining constant base rates is illusory. Moreover, considering

[175] Opinion and Order at 97 (Emphasis added).

[176] Tr. XIII at 3784 (Turkenton).

that Ohio's residential ratepayers will be required to pay for this infrastructure investment in any event, they receive no benefit whether paying it through the DCI or a base rate case. Indeed, as explained previously, consumers will suffer because they will be required to make these payments sooner under the "accelerated" DCI than they would have through base rates.

As to the second component of the PUCO's reasoning, there is no dispute among the parties that Duke could make significant investments in its distribution infrastructure under either the DCI or a base rate proceeding. The significance of the amount is immaterial considering that consumers will be required to support it under either an ESP or MRO. Indeed, the enormity of this investment (up to $169 million), granted outside of the comprehensive review of a base rate proceeding, must be considered a qualitative detriment to Ohio's residential consumers.

Considering that the first two components of the PUCO's analysis provide absolutely no benefit (and in fact are detriments) to consumers, the heart of the PUCO's rationale lies in Duke's and Staff's contentions that the DCI would "accelerate improvements to and modernization of the safety and reliability of the distribution system." [177] In other words, the DCI would provide these benefits more quickly than under an MRO in conjunction with a base rate proceeding. This analysis shows how unreasonable (and unfair) PUCO's analysis is to Duke's consumers. The analysis considers the qualitative benefit of consumers receiving infrastructure improvements more quickly under the DCI process, but (as explained above) refuses to recognize that consumers must also pay for these improvements sooner. Instead, the PUCO considers

[177] Duke Initial Brief at 31; Staff Initial Brief at 57, Staff Ex. 2 at 4-5 (Turkenton Direct).

this accelerated payment under the DCI as a “wash” with the payments under a base rate proceeding over an indefinite period of time.

Duke can’t have its cake and eat it too. Clearly, if the DCI provides accelerated benefits then customers incur accelerated costs. It is unreasonable for the PUCO to consider benefits while ignoring the costs that customers pay for them. If the PUCO is to consider the DCI to be a benefit because it accelerates infrastructure reliability, it must recognize the accelerated payments that provide for that benefit. Otherwise, the PUCO should find that the infrastructure improvements made through the DCI will “wash” over time, which they certainly will, if made pursuant to a base rate proceeding.

Perhaps aware of the unreasonableness of its position, Staff also claims that the DCI provides a qualitative benefit because it is “an economical and efficient process of enabling [Duke] to make investments in its distribution system.”[178] Staff witness Turkenton explained on cross examination that this “economical and efficient process” is nothing more that Duke’s ability to seek approval of the rider in this pending ESP proceeding, instead of waiting to seek approval of the same rider in a subsequent base rate proceeding. Staff’s argument is one of convenience. As OCC stated in its Initial Brief, Staff recognized that Duke could have obtained approval of such a rider in its last base rate proceeding, which concluded in 2013, but didn’t.[179] Staff simply cannot create a qualitative benefit based upon Duke’s choice of forums to seek the same relief.

Clearly, if the Rider DCI provides accelerated benefits then customers incur accelerated costs. It is unreasonable for the PUCO to find that these benefits outweigh the

[178] Staff Initial Br. at 57. Although Duke and Staff identify this as a qualitative benefit, the PUCO cited it as justification for finding the ESP to be quantitatively more favorable than an MRO.

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

cost that customers pay for them. It is equally unreasonable to find the DCI Rider is a qualitative benefit just because Duke sought recovery in an ESP proceeding, when it could have sought approval of the same rider in its last base rate case in 2013.

ASSIGNMENT OF ERROR 4: When the PUCO did not allocate the Distribution Storm Rider costs between and among customers, it violated R.C. 4903.09. The PUCO should have allocated costs to customers based on the most recent cost of service study conducted by Duke and presented in its last distribution rate case, Case No. 12-1682-EL-AIR.

In it Opinion and Order, the PUCO found that the Distribution Storm Rider ("DSR") proposed by Duke was reasonable and should be approved, subject to certain modifications.[180] However, in approving the DSR and in describing the modifications, the PUCO failed to address the issue of how the DSR should be allocated between and among Duke's customers. R.C. 4903.09 requires that:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

In not addressing the allocation issue, the PUCO failed to comply with the requirements of R.C. 4903.09 to set forth findings of fact and the reasons for its decision.

Duke proposed allocating both the DSR and DCI Riders based on total distribution revenues approved in its most recent distribution base rate case.[181] Under Duke's allocation 56.4% of the DSR costs would be collected from residential customers.

[180] Opinion and Order at 74.

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

Through the testimony of witness Tony Yankel the OCC opposed Duke's proposal.[182] OCC pointed out that such an allocation did not follow cost causation principles[183] and could be over-collected by hundreds of thousands of dollars from residential customers. Under OCC's recommendation 46.2%[184] of the DSR would be paid for by residential customers.

Specifically, Mr. Yankel testified that Duke's proposed allocator includes Customer Accounts Expenses associated with FERC Accounts 901-912, "which includes meter reading and billing."[185] Additionally, he testified that "there are a portion of A&G expenses that are associated with FERC Accounts Customer Accounts Expenses and Customer Service Expenses that should not be included in the development of an allocation factor."[186] Finally, Mr. Yankel emphasized that "[b]ecause DSR costs are all distribution O&M expenses related, the inclusion of distribution plant costs in the development of an allocation factor is equally inappropriate."

Neither Duke nor any other party submitted Rebuttal Testimony in response to Mr. Yankel's recommendations. Instead, as an alternative, Mr. Yankel recommended using the "Distribution O&M Expense Ratios" from Duke's cost-of-service study from its last distribution rate case, Case No. 12-1682-EL-AIR, to allocate any DSR Rider costs the PUCO may approve.[187] Mr. Yankel testified that this "makes far more sense and is better reflective of cost-causation than using only total distribution revenue and it is

[182] OCC Ex. 46 at 21-24 (Yankel Direct).

[183] OCC Initial Brief at 94, 96.

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

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

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

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

easily calculated." The impact of this change is significant for the residential class, as well as being appropriate. It reduces the allocation of Rider DSR to the residential class from 56.4 percent under the Utility's proposal to 46.2 percent.

The PUCO failed to address the allocation. It had a responsibility to do so under R.C. 4903.09. Therefore, rehearing should be granted.

ASSIGNMENT OF ERROR 5: When the PUCO did not rule on how property taxes should be treated in the Distribution Capital Investment Rider, it violated R.C. 4903.09. The PUCO should have found that property taxes should not be included in the Rider until the property is recognized as taxable by the applicable taxing authority.

Despite the objection of OCC and numerous other parties, the PUCO, in its Opinion and Order approved the Distribution Capital Investment Rider ("DCI") as being reasonable. [188] However, the PUCO made a number of modifications to the DCI that were presented or supported by OCC, PUCO Staff and other parties, including eliminating general plant, including a hard cap and calculating revenue requirements based on actual plant balances.[189] However, in making those modifications the PUCO failed to address the issue of how property taxes should be addressed in the DCI. The PUCO's failure to address arguments made on property taxes violated R.C. 4903.09. R.C. 4903.09 requires the PUCO to make findings of fact and issue written opinions.

Duke proposed that it be allowed to charge customers for property taxes before they are actually incurred. In the alternative, OCC witness Mierzwa testified that Duke is only assessed tangible personal property taxes when plant is actually placed in service.[190]

[188] Opinion and Order at 71.

[189] Opinion and Order at 72.

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

The property tax is assessed the following year and the associated tax is not paid until the year after that.[191]

For real property taxes the plant is assessed as of January 1st of each year, but not billed until the following year.[192] For example the tax assessed on plant by January 1, 2015 would not be paid until 2016, and the tax on any plant placed in service after January 1, 2015, would not require payment until 2017.[193]

Mr. Mierzwa testified that under the DCI Rider, Duke would include applicable property taxes in rates when the plant is placed in service, even though the property taxes would not be assessed until the following year.[194] It is not reasonable for customers to pay DCI Rider charges for taxes not yet incurred by Duke or reflected on Duke's books. Mr. Mierzwa recommended that if the PUCO were to approve the DCI Rider, then property taxes should not be included in the Rider until the property being taxed is recognized as taxable by the applicable taxing authority which is when the taxes will be recognized on Duke's books.[195]

The PUCO should address this issue on rehearing. It should find, consistent with OCC's arguments, that property taxes should not be included in the Rider until the property being taxed is taxable. Rehearing should be granted.

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

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

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

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

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

ASSIGNMENT OF ERROR 6: The Commission is a creature of statute and as such can exert no authority beyond that which it has been granted.

It is unrefuted that the PUCO is a creature of statute, and is not authorized to act except by and through the authority granted to it under Ohio statutes.[196] In this proceeding, the PUCO exceeded that authority in at least four ways in the Opinion and Order that is the subject of this rehearing request.

A. The PUCO erred in rewriting R.C. 4928.143(B)(2)(d) to permit a financial limitation on shopping.

As argued above, the PUCO added the word "financial" to the statute. This contravenes its plain meaning and the intent of the General Assembly to provide the Commission only with the authority to limit customer switching to CRES providers. This reworking of the statute to justify the PSR was unlawful. The PUCO should grant OCC's rehearing request.

B. The PUCO erred in allowing Duke to collect unlawful transition revenues in contravention of R.C. 4928.38.

While the PSR was set at zero, the PUCO provided Duke with the opportunity through a "future filing," to collect costs. This subsequent cost recovery, as argued above, must be considered a form of transition revenues. Notably, the Commission's order devoted only a single sentence to this issue. It merely stated, "[m]oreover we disagree with the assertion that the PSR would permit Duke to collect untimely transition costs in violation of R.C. 4928.38."[197] Nevertheless, the PSR clearly is a transition charge because it requires Duke's consumers to pay for its (and its generation affiliate's) lost

[196] See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 647 N.E.2d 136.

[197] Opinion and Order at 48.

revenues. The lost revenues are created when the cost of OVEC generation is greater than the market price derived through the PJM market. Rehearing should be granted.

C. The Commission exceeded its authority in performing the more favorable in the aggregate test, set forth in R.C. 4928.142.

The intention of the mandated test in R.C. *4928.142* is to assure that the results of the ESP are more favorable to customers in the aggregate that the results otherwise obtained through an MRO. As argued above, the plain meaning of the statute clearly limits the Commission's analysis to the "expected results" of R.C. 4928.142, and does not contemplate consideration of the results of a distribution rate case.[198]

Moreover, the Commission's interpretation requires one to read into the statute words to the effect that the approved ESP should be compared to the expected results under R.C. 4928.142 and a distribution rate case. Clearly, the Commission's interpretation of the statute adds to the words chosen by the General Assembly. Had the General Assembly intended to include the expected results of a distribution rate case in the statutory test, it would have so stated. It did not. This misapplication of the statute results in the PUCO exceeding its authority under the statute. OCC's rehearing request should be granted.

D. The PUCO unlawfully relies upon state policy to consider qualitative benefits under the ESP vs. MRO test.

As argued above, the PUCO relies on R.C. 4928.02 as independent authority to consider qualitative benefits under the ESP v. MRO test. Unfortunately, the Commission fails to identify which ESP provisions advance what policy,[199] Regardless, the

[198] R.C. 1.42.

[199] Opinion and Order at 97.

Commission itself, (as well as the Court)[200] has admitted that only items expressly listed in R.C. 4928.143(B) may lawfully be considered in an ESP.[201] While the Commission must review an ESP to ensure that its provisions do not violate the state policies contained in R.C. 4928.02, only those items expressly listed in R.C. 4928.143(B) can be considered a part of the ESP for purposes of the test performed under R.C. 4928.143(C)(1). The PUCO's willingness to stray outside the statutory lines to achieve the desired result is unlawful and unreasonable. The PUCO should grant OCC's rehearing request.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its April 2, 2015 Opinion and Order. Granting rehearing as requested by OCC is necessary to ensure that Duke's customers are not subject to unreasonable and unjust charges. Otherwise Ohio consumers could end up paying for a whole host of unreasonable and unlawful charges, including an ESP plan that does not produce lower prices than a market plan, and a government ordered subsidy of utility power plants that under the law should be on their own in the competitive generation market.

[200] CSP I.

[201] Opinion and Order at 43.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 4th day of May, 2015.

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