BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING
OF
DUKE ENERGY OHIO, INC.

May 4, 2015

On May 29, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission), seeking approval of a standard service offer (SSO), pursuant to R.C. 4928.141, in the form of an electric security plan (ESP), as set forth in R.C. 4928.143. Following a full hearing and the submission of briefs, the Commission issued its Opinion and Order (Order), on April 2, 2015.

Ohio law, in R.C. 4903.10, allows any party who has entered an appearance in a Commission proceeding to apply for rehearing in respect to any matters determined in the proceeding, within thirty days after the issuance of the order. Duke Energy Ohio is hereby filing its Application for rehearing, pursuant to R.C. 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35.

Duke Energy Ohio asserts that the Commission's Order is unlawful and/or unreasonable in the following respects:

1. The Commission's conclusion with regard to Rider PSR unreasonably prohibits the Company from offering its customers a hedge against volatile wholesale prices, even though the Commission agrees that the proposed rider would act as a hedge. (Assignment of Error 1).

2. The Commission's conclusion that Rider PSR should be approved, but that it should remain at zero until such time as the Company provides additional evidence, is unreasonable, in that sufficient evidence is currently available in the existing record. (Assignment of Error 2)

3. The Commission's direction, in *dicta*, that the Company must pursue divestiture of its stock in the Ohio Valley Electric Corporation (OVEC) is unreasonable, arbitrary, unconstitutional, beyond the scope of this proceeding, and outside the Commission's jurisdiction. (Assignment of Error 3)

4. The Commission's conclusion that general plant expenditures should not be included in Rider DCI is unreasonable, in light of the Commission's contrary authorizations in other utilities' proceedings. (Assignment of Error 4)

5. The Commission's conclusion that the Company's proposed ESP should be amended to add an economic development program, to be funded annually by $2 million of shareholder funds, is unreasonable in that it is not based on evidence or law and, in addition, it is unconstitutional, arbitrary, and inconsistent with the treatment of other electric utilities in Ohio. (Assignment of Error 5)

6. The Commission's conclusion that additional capacity from continuation of the large customer interruptible load program should be bid into base residual auctions should be modified or clarified, as the requirement is unachievable. (Assignment of Error 6)

7. The Commission's modification regarding the large customer interruptible load program, requiring the Company to apply for recovery of the associated costs, should be clarified or deleted, such that there is no uncertainty regarding the Company's right to recover such costs. (Assignment of Error 7)

8. The Commission's conclusion that costs eligible for inclusion in Rider DSR are only those that are "incremental" is unreasonable in that it does not include an explanation of what is included in the baseline. (Assignment of Error 8)

9. The Commission's conclusion that carrying costs must cease to accrue in Rider DSR once recovery begins is unreasonable in that there is no factual justification for disallowing recovery of such carrying costs and no comparable legal precedent for such disallowance. Furthermore, the rationale for such disallowance is not provided, contrary to R.C. 4903.09. (Assignment of Error 9)

10. The Commission's decisions with regard to the confidentiality agreement terms under which the Company was required to release its proprietary information were unreasonable, arbitrary, and contrary to established precedent. (Assignment of Error 10)

Duke Energy Ohio respectfully requests that the Commission modify its Order, as discussed herein.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) submits the following memorandum to the Public Utilities Commission of Ohio (Commission) in support of its Application for Rehearing of the Commission's Opinion and Order (Order) addressing the Company's proposed, third electric security plan (ESP 3) and related issues. The Company alleges nine errors for the Commission's consideration and urges the Commission to reverse the conclusions referenced herein in its entry on rehearing.

A. Assignments of Error 1 and 2:

The Commission's conclusion with regard to Rider PSR unreasonably prohibits the Company from offering its customers a hedge against volatile wholesale prices, even though the Commission agrees that the proposed rider would act as a hedge.

The Commission's conclusion that Rider PSR should be approved, but that it should remain at zero until such time as the Company provides additional evidence, is unreasonable, in that sufficient evidence is currently available in the existing record.

The wholesale market – on which Duke Energy Ohio customers for rely for their energy and capacity – is undeniably on the cusp of significant change. PJM Interconnection, L.L.C., (PJM) is proposing a new capacity product, with transition auctions for delivery years included in Duke Energy Ohio's ESP.[1] Proposed environmental regulations may result in the accelerated retirement of base load, reliable coal plants. Indeed, 24,932 megawatts of capacity are expected to be retired by 2019.[2] And pending federal litigation threatens to remove existing supply resources.[3] This uncertainty, coupled with the already existing volatility in the wholesale market,[4] renders retail rates unpredictable and unstable. To protect against some of the volatility of the cost of energy and capacity, the Company proposed to provide customers a financial hedge. More specifically, Duke Energy Ohio offered its customers the net benefit of all revenues accruing to the Company as a result of its partial investment in, and contractual rights with, OVEC, less all costs related to such contractual rights, for as long as such rights existed. Under the Company's proposal, those revenues and costs would be passed to customers through a Price Stabilization Rider (Rider PSR).

The Commission concluded that a stability rider is allowable under Ohio law, as a term, condition, or charge relating to bypassability and having the effect of stabilizing or providing certainty regarding retail electric service.[5] In reaching that conclusion, the Commission specifically addressed the fact that Rider PSR, as proposed by the Company, would stabilize rates:

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[1] *See* Tr. Vol. V, pg. 1164; Tr. Vol.VII, pp. 1993-1994, 256-259; Tr. Vol. VIII, pg. 2363; Tr. Vol. XI, pp. 3159-3160; Tr. Vol. XII, pp. 3386-3389.
[2] Duke Energy Ohio Exhibit 2 (Direct Testimony of James P. Henning), pg. 4.
[3] *Electric Power Supply Ass'n v. FERC*, D.C. Cir. No. 11-1486, 753, F.3d 216 (2014). On May 4, 2015, the United States Supreme Court granted certiorari, further extending the period of uncertainty. *See FERC v. Electric Power Supply, et al.*, Case No. 14-840.
[4] *See, e.g.*, Tr. Vol. V, pg. 1164.
[5] Order, pp. 42-45; R.C. 4928.143(B)(2)(d).

> The impact of the PSR would be reflected as a charge or credit for a generation-related hedging service that stabilizes retail electric service, by smoothing out the market-based rates paid by shopping customers to their CRES providers, as well as the market-based rates paid by SSO customers, which are determined by a series of auctions that reflect the prevailing whole sale prices for energy and capacity in the PJM markets.[6]

The Commission expressed no doubt about the impact of Rider PSR: "Duke has demonstrated that the proposed PSR would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service . . . .."[7] The Commission has also agreed that Rider PSR could theoretically function as a hedge.

Nevertheless, the Commission rejected the Company's proposal, allowing the rider itself to be placed into existence but disallowing the program that would give the rider effect. But its decision cannot be substantiated by the evidence in these proceedings. Again, no witness denied that the wholesale market is volatile and that significant material changes are likely. No witness challenged the view that environmental legislation is likely to result in dramatic upheavals within the electric industry. And no witness questioned whether ongoing litigation will have further impacts on the wholesale market. Although the final impacts to the market cannot be known until such time as these issues are fully and finally resolved, it is clear that there exists uncertainty today – uncertainty that yields unpredictability and increased volatility. These uncertainties will carry through to retail rates, which are predicated on the prices in the volatile wholesale market.

The Commission has agreed that protecting ratepayers from this volatility is meritorious.[8] Yet the Commission rejected the proposed Rider PSR, based primarily on two factors:

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[6] Order, pg. 44.
[7] *Id.*
[8] *Id.*, pp. 46-47.

- Uncertainty and speculation in projecting the net impact of the proposal
- Availability of other means to hedge volatility

The Commission's reliance on each of these factors is misplaced.

1. Uncertainty concerning the rate impact of a proposed rider is common and unavoidable.

The Commission first discussed what it described as "uncertainty and speculation inherent in the process of projecting the net impact" of the proposal.[9] And as the Commission concluded, it is "unable to reasonably determine the rate impact of the rider."[10] Such a conclusion, however, runs afoul of established regulatory practice, disregards the duration of the proposal, and, as discussed in greater detail below, ignores the purpose for the rider.

As an initial matter, the Commission routinely approves riders based upon forecasts or projections, directing that such riders be trued up for actual costs. Historic fuel clauses are a classic example, while more recent examples include the Company's Rider RE. At this time, the Commission cannot determine the ultimate rate impact of Rider RE, as it is based entirely on the results of auctions that have not yet occurred. Yet this inability to foretell the future has not been a justification to refuse to act. Just as the Commission approved Rider RE on the basis of future events and has authorized its adjustment after the fact, it could do so here in respect of Rider PSR. The initial rate for Rider PSR can be set on the basis of forecasted information and then, subsequently, be trued up for actual results.

The Commission, in rejecting the Company's proposal, further focused solely on the term of this ESP and agreed with certain intervenors that Rider PSR would result in a cost during the ESP 3 term and a benefit only in later years. This benefit, however, cannot be ignored. Rider PSR was structured to last as long as the Company is taking power from OVEC. The

[9] *Id.*, at pg. 46..
[10] *Id.*

Commission acknowledged this fact, as well as the Company's commitment to dedicating the net benefits of its contractual entitlement in OVEC to customers.[11] Importantly, the Commission also acknowledged that it must base its decision on the evidence. Yet the Commission appears to have overlooked the uncontroverted evidence, claiming that the proposed Rider PSR would not provide customers with benefits.[12]

Finally, and as explained in greater detail below, Rider PSR is structured as a hedging mechanism, intended to provide stability in retail rates. The fact that there is uncertainty about the future is not a reason to reject a hedge; it is the very reason why a hedge is critically important.

2. Other available mechanisms are not equivalent to a financial hedge.

It is also noteworthy that the Commission found the existence of laddering and staggering of SSO auction products, as well as fixed-price CRES contracts, as also providing "a significant hedge against price volatility."[13] But that conclusion appears to reflect a misunderstanding of the difference between a financial hedge and a general smoothing of price changes.

In the investment community, a hedge is a market position taken to offset, or balance against, a risk in another investment. In a very real sense, a hedge is financial insurance. Its purpose is stability – an outcome that is highly desirable for most customers. A simple example relates to modern farming practices. In the un-hedged situation, a farmer would evaluate the current market and then, on the basis of that evaluation, spend money on seed, chemicals, and fuel, hoping for a sufficiently high price for the ultimate product at the time the product was harvested. Instead, however, that farmer could "hedge his bets" and lock in the ultimate price for the product, even before planting. To do this, the farmer could purchase a hedge by agreeing to

[11] *Id.*
[12] *Id.*
[13] *Id.*

sell a certain amount of the product (corresponding to what he reasonably expects to produce) on a given date in the future, at a specified price. He has thus locked in his price; it no longer matters whether the actual market price rises or falls. Alternatively, he could purchase a hedge against only part of his financial exposure, thus not spending the money on as large a hedge but being protected against some of the risk of loss. Much like buying insurance, it costs the farmer money to buy it, but his risk relating to pricing is diminished.

Duke Energy Ohio's proposal, under Rider PSR, would work exactly like the example of the farmer who wishes to hedge against some of his risk. The customers would likely see a charge on their bills in the early years, as the Commission correctly stated. But they would be, through Rider PSR, protecting themselves from some of the risk that capacity or energy prices – or both – will rise dramatically during the period when the program is in effect. The Commission correctly concluded that Duke Energy Ohio demonstrated that the theory behind the proposal would "have the effect of stabilizing or providing certainty regarding retail electric service . . . ." [14]

In sharp contrast to Rider PSR's effect as a financial hedge, protecting customers against a portion of the risk of rising prices, laddering or staggering of auctions can only smooth price changes – and only even smooth the price changes for the period over which the laddering and staggering occur. Laddering or staggering auctions can do nothing to prevent customers from ultimately feeling the full effect of increasing market prices. Similarly, the availability of competitive retail offers at fixed prices only holds the price for the period of that contract, none of which last for anything like the 25 years proposed by the Company through Rider PSR. And at least some suppliers' contracts convert to market-based pricing on expiration.[15] Again, they

[14] *Id.*, pg. 44.
[15] Duke Energy Ohio Exhibit 24.

do not function as a hedge. Thus, Commission's rejection of the Company's Rider PSR proposal on the ground that laddering and staggering of auction products and the availability of fixed-price retail contracts already provide a "significant hedge against price volatility" is fallacious.

Rider PSR, as structured and proposed by the Company, would not only smooth out volatility, but would also constitute a hedge of value to customers given such volatility and given the likelihood of increases in the later years of the proposal. The evidence in the record is sufficient. It should be approved.

B. Assignment of Error 3:

The Commission's direction, in *dicta*, that the Company must pursue divestiture of its stock in OVEC is unreasonable, arbitrary, unconstitutional, beyond the scope of this proceeding, and outside the scope of the Commission's jurisdiction.

The Commission, in the Order, has "directed" Duke Energy Ohio "to pursue transfer of the OVEC contractual entitlement or to otherwise pursue divesture of the OVEC asset. The Commission did not explain the basis for its previously undisclosed intention, contrary to the requirements of R.C. 4903.09. But to the extent such intention is derived from the voluntary submissions of other Ohio utilities, it is misplaced. And, as discussed here, the Commission's directive is unlawful."[16]

[16] Order, pg. 48. Duke Energy Ohio recognizes that AEP Ohio, also an investor in OVEC, is subject to the same requirement to seek to divest its contractual entitlement (*see In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan,* Case No. 13-2385-EL-SSO, *et al.*, Opinion and Order, pp. 26-27). But AEP Ohio and Duke Energy Ohio are situated much differently insofar as jurisdiction is concerned. Significantly, AEP Ohio expressly included purchased power contracts, such as it has with OVEC, in its request for Commission approval to transfer its generating assets. Duke Energy Ohio has not done so.

The Company's application for its current ESP (ESP 2)[17] was resolved through a stipulation (ESP 2 Stipulation), which stipulation was not opposed by any party to that proceeding and was approved, with minor modifications, by the Commission. One of the terms of the ESP 2 Stipulation provided that: "The Parties agree that Duke Energy Ohio will transfer title, at net book value, to all of its **Generation Assets** out of Duke Energy Ohio."[18] "Generation Assets" was a defined term in that document: "For purposes of this Stipulation, "Generation Assets" shall refer to all generation assets currently, directly owned by Duke Energy Ohio, whether operating or retired, but shall not include any generation assets currently owned by an affiliate or subsidiary of Duke Energy Ohio."[19] Although the ESP 2 Stipulation left no ambiguity as to how "Generation Assets" should be read, the Company filed supplemental testimony to support the ESP 2 Stipulation and specifically identify the Generation Assets referenced in that document.[20] Regardless of the definition in the ESP 2 Stipulation itself and the explanation in supporting testimony, the Commission, with no explanation of any justification, determined that it[21] had intended to require the Company to transfer its interest in OVEC.

The Commission's new interpretation of the ESP 2 Stipulation, and its new assertion with regard to the intent that it says it had three years ago, constitutes a flagrant violation of Duke Energy Ohio's due process rights under the Ohio and United States Constitutions. If, three years ago, the Commission had expressed an intent to require the Company to transfer its ownership

[17] *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. 11-3549-EL-SSO, *et al.*
[18] ESP 2 Stipulation, Sec. VIII.A. (emphasis added).
[19] *Id.*, Sec. II.F (fn. 4).
[20] ESP 2, Duke Energy Ohio Exhibit 24 (Supplemental Testimony of Charles R. Whitlock), pp. 3-5 and Attachment CRW-1 (identifying all of Duke Energy Ohio's Operating Generation Assets).
[21] It is noteworthy that only one of the Commissioners who signed the Opinion and Order in ESP 2 was also a Commissioner at the time that the Order in the present proceedings was decided and signed. Thus, it is mysterious how the current Commissioners could simply know what the prior Commissioners' undocumented "intent" was in adopting the ESP 2 Stipulation.

interest in OVEC – or its contractual entitlement to OVEC's capacity and energy – the Company could have, and would have, applied for rehearing on that ground. And it would have had the opportunity to appeal that determination to the Ohio Supreme Court. Or, under the terms of the ESP Stipulation, it could have withdrawn from that agreement and moved to a full hearing on all of the issues. Now, however, the Company cannot take those actions, other than with regard to an unsupported comment about the Commission's prior intent.

The result of the Commission's rewriting of history is a 180-degree turn in the requirement applicable to Duke Energy Ohio. Under the clear terms of the ESP 2 Stipulation, the Company had no obligation to transfer its interest in OVEC or its contractual entitlement. Now, apparently, it does. The law in Ohio requires an electric distribution utility to ensure that any generation assets are not being impermissibly supported by distribution rates. It also requires that utility to obtain the Commission's permission prior to transferring any generation assets. The law does not require the utility to divest generation assets or contractual entitlements in entities that own and operate generation assets. And neither did the ESP 2 Stipulation.

But even if due process were not an issue, the Commission's new reading of that stipulation is illogical and thus, under standard principles of contractual interpretation, arbitrary and unreasonable. As discussed above, the terms of the ESP 2 Stipulation excepted, from the divestiture requirement, any generation assets currently owned by a subsidiary or an affiliate of Duke Energy Ohio. If the Commission is saying that it believes that the ESP Stipulation was meant to require the transfer of the stock that the Company owns in OVEC, then what about other, comparable ownership interests, either in the form of a subsidiary or in the form of an affiliate?

As the Commission is aware, Duke Energy Kentucky, Inc., (Duke Energy Kentucky) is a wholly owned subsidiary of Duke Energy Ohio. Duke Energy Kentucky directly owns generating assets, which it uses to supply the load of its customers in the Commonwealth of Kentucky. This is directly comparable to OVEC, in which Duke Energy Ohio owns stock (a minority interest) and which itself owns generating assets. The ESP 2 Stipulation made it abundantly clear that its terms did not require Duke Energy Ohio to cause Duke Energy Kentucky to transfer its generating facilities. Those facilities, being owned by Duke Energy Kentucky, could not be transferred "out of Duke Energy Ohio." The definition of "Generation Assets" specifically stated that generating assets owned by a subsidiary were not included. And neither the ESP 2 Stipulation nor the Commission's order approving that stipulation ordered Duke Energy Ohio to sell the stock it owns in Duke Energy Kentucky. Why should OVEC be any different?

The other category excluded from the definition in the ESP 2 Stipulation was generating assets owned by an affiliate of Duke Energy Ohio; not being "in" Duke Energy Ohio, such assets could not be transferred "out of Duke Energy Ohio." A good example of an affiliate of Duke Energy Ohio is Duke Energy Indiana, Inc., (Duke Energy Indiana). The Company was not required, under the stipulation, to break its affiliation with Duke Energy Indiana on the ground that Duke Energy Indiana owned generating assets. Even if, contrary to the Commission's applicable rule,[22] OVEC were deemed an affiliate of Duke Energy Ohio by virtue of its nine percent interest, the "affiliation with" OVEC still should not be treated differently than the Company's "affiliation with" Duke Energy Indiana.

[22] O.A.C. 4901:1-37-01(A).

If Duke Energy Ohio was allowed under the terms of the ESP 2 Stipulation to retain ownership of 100 percent of an entity that directly owns generation facilities, how could those same terms rationally be read to require it to transfer ownership of 9 percent of an entity that directly owns generation facilities? And if Duke Energy Ohio was allowed under the terms of the ESP 2 Stipulation to remain affiliated with one entity that owns generation facilities, how could those same terms be read to require it to break off any affiliation with another entity that owns generation facilities? The ESP 2 Stipulation certainly **could** have addressed OVEC stock and have required Duke Energy Ohio to treat it differently than those other situations, but it **did not**. OVEC was never mentioned in that document, just as Duke Energy Kentucky was not mentioned. It is therefore an arbitrary conclusion to suggest that the ESP 2 Stipulation required the Company to "pursue the divestiture or transfer of the OVEC contractual entitlement."[23] While a limited number of parties in this proceeding may now wish they had agreed otherwise, they did not do so. The ESP 2 Stipulation speaks for itself. It is entirely unreasonable and arbitrary to alter and rewrite the terms of the ESP 2 Stipulation. The Commission should not do so here.

The Commission's effort to mandate the disposal of the Company's ownership interest in OVEC, without any justification or due process, is also a governmental taking of private property that violates both the letter and the spirit of the Ohio Constitution and the United States Constitution. The Commission has proposed no payment for this property; it has proposed no mechanism for assuring Duke Energy Ohio that it will have the opportunity to hold the OVEC interest until it finds an acceptable buyer at an acceptable price. Duke Energy Ohio has received no *quid pro quo* in exchange for a mandated transfer. Although constitutionality issues are not within the Commission's jurisdiction, Duke Energy Ohio would be remiss in failing to so argue

[23] Order, pg. 48.

at this juncture. And it bears mentioning that the Duke Energy Ohio was only 'required' to transfer its directly owned generation as part of its ESP 2 Stipulation because it **voluntarily agreed** to do so. The Commission could not then and cannot now order Duke Energy Ohio to divest of any of its property.

The Commission's choice of language, in this requirement, is also worth noting. In the Order, the Commission stated that the prior Commission's intent had not been to "exempt" the Company from transferring OVEC. To "exempt" a company from a requirement must mean that it was, in the first place, subject to that requirement. But, as just discussed, nothing in the ESP 2 Stipulation created any obligation for the Company to a transfer of its interest in OVEC. And nothing under Ohio law required that transfer. There was simply nothing to "exempt" the Company from.

Furthermore, the Commission referred to the OVEC interest as a "contractual entitlement." Here, the connection to the actual words in the ESP 2 Stipulation becomes even more tenuous. Although the ESP 2 Stipulation did address ongoing and subsequent contractual obligations directly relating to the generating assets (such as coal contracts), there was no reference whatsoever in that stipulation to transferring contractual **entitlements**. Nor is there any such requirement under Ohio law. Indeed, taking this concept to its logical conclusion, does the Commission believe that it has the jurisdiction or authority to demand that an electric distribution utility divest its interest in labor contracts or supplier contracts? This very concept is unconstitutional.

The issues before the Commission in these proceedings relate solely to the Company's proposal for terms of its next ESP, along with matters directly related with such proposal. The Company raised nothing in its application regarding transfer or retention of its interest in OVEC.

The Commission gratuitously directed such a transfer, outside of the bounds of ESP 3. It has no power or authority under Ohio law to require a utility to dispose of an investment. The corporate separation rules under R.C. 4928.17 make clear provisions for ensuring that competitive assets owned by a utility are not subsidized by non-competitive activity but no reading of Ohio law, however strained, can lead one to the conclusion that the Commission can **order** the divestment of a utility's generation assets or contractual interests. Although the electric distribution utilities are prohibited from competing for retail load in their own service territories, state law allows them to compete for retail load in the service territories of other electric distribution utilities. Furthermore, federal law unambiguously allows Duke Energy Ohio to own and operate generation assets that sell power exclusively in the wholesale market. The notion that Duke Energy Ohio is prohibited from owning generation assets, directly or indirectly, or investing in entities that own such assets is not only at odds with Ohio law but serves to illegally preempt federal law. The Commission's direction that Duke Energy Ohio "pursue transfer of the OVEC contractual entitlement or . . . otherwise pursue divesture of the OVEC asset"[24] must be deleted from the Order.

C. Assignment of Error 4:

The Commission's conclusion that general plant expenditures should not be included in Rider DCI is unreasonable, in light of the Commission's contrary authorizations in other utilities' proceedings.

The Company sought approval of a Distribution Capital Investment Rider (Rider DCI), proposing to recover a return on incremental capital investment in programs designed to maintain customer reliability, thereby moving toward a more proactive approach to

[24] *Id.*

infrastructure. The Commission approved Rider DCI with certain modifications advocated by Staff of the Commission.

Specifically, the Commission modified Rider DCI to prohibit the inclusion of expenditures for general plant, stating that "[t]he inclusion of general plant would go beyond the intent of the statute, which is geared towards reliability infrastructure."[25] It concluded, further, that the inclusion of general plant would not further the objective of proactively modernizing infrastructure in order to improve reliability.[26]

The Commission failed, however, to account for the entirely different approach it took when considering similar proposals by other electric utilities. For example, in a 2010 proceeding, the FirstEnergy utilities proposed a distribution rider that included general and intangible plant and further proposed the use of forecasted data.[27] Staff witnesses Robert Fortney, Hisham Choueiki, and Tamara Turkenton filed testimony in that proceeding and, in doing so, did not oppose the proposed rider. The Commission's Opinion and Order in the proceeding approved the companies' rider proposal, including general plant and the use of forecasted data. Likewise, in a later FirstEnergy proceeding, the Commission permitted recovery of general and intangible plant for another, similar rider.[28]

The Ohio Supreme Court has clearly directed the Commission that it must respect its own precedent. In a 2011 opinion, the Court reiterated that instruction, explaining that the

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[25] *Id.*, pg. 72.
[26] *Id.*
[27] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No.10-388-EL-SSO, Application, pp. 15, 16 (March 23, 2010).
[28] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for 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, pg. 10 (July 18, 2012).

Commission may "change course," but must explain why it is doing so. And, further, the Court emphasized that the "new course also must be substantively reasonable and lawful . . .."[29]

In the Order in these proceedings, the Commission has not recognized its own departure from precedent, even though the issue was fully briefed. And certainly, without admitting to such departure, it has also not provided a rationale for the change.

Furthermore, the Commission is incorrect in its conclusion that the inclusion of general plant in Rider DCI would not further the legislative objective of proactively modernizing infrastructure in order to improve reliability. Rather, reliable infrastructure includes IT and other back office support. It is irrational to be proactive in modernizing infrastructure without also modernizing the infrastructure relating to IT, communications, and similar technology, that just happens to be classified as "general plant." Investment in those projects is as important for reliability as any other investment. Investments in general plant are integral to the overall plan for reliability and optimally meeting customer expectations.

Duke Energy Ohio respectfully requests that the Order be modified to delete the requirement that general plant be excluded from Rider DCI.

C. Assignment of Error 5:

The Commission's conclusion that the Company's proposed ESP should be amended to add an economic development program, to be funded annually by $2 million of shareholder funds, is unreasonable in that it is not based on evidence or law and, in addition, it is unconstitutional, arbitrary, and inconsistent with the treatment of other electric utilities in Ohio.

The Commission, in the Order, required the Company to establish an economic development program for the term of the ESP, and to fund that program with $2 million of

[29] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 525, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (2011).

shareholder money for each year of the ESP.[30] The Commission attempts to justify its decision by claiming that it is "consistent with our directives in the *ESP 2* Case, as well as our treatment of other EDUs . . .." Further, it specified that the costs of this program would not be recoverable from customers.[31]

No economic development program was proposed by the Company, and no evidence exists in the record to support the need for such a program, the potential terms of the program, or the rationale for using shareholders' dollars to fund it. Neither is there any law to allow the Commission to add such a mandate to the ESP. The situation is not at all comparable to the ESP 2 as there was no stipulation here, and is in no way consistent with the Commission's treatment of other Ohio electric utilities. Demanding that the Company expend shareholder funds on this program is simply and unconstitutional taking of private property.

This requirement is unreasonable, arbitrary, unconstitutional and well outside the Commission's authority. The Order should be modified, either to eliminate the Commission-established economic development program or to modify it to more justifiable terms.

1. The Commission has no authority to confiscate shareholder funds from Duke Energy Ohio.

The Commission relies exclusively on R.C. 4928.143(B)(2)(i) as the source of its authority to compel Duke Energy Ohio to contribute $6 million of shareholder funds over the term of this ESP. Although the Commission is correct that the cited statutory provision allows a utility to propose such a program in an ESP, the statute says nothing about the Commission being able to require it to be include, without the utility having offered it. The statute does not empower the Commission to compel a utility to contribute shareholder funds to an economic development fund.

[30] Under its Order, partial years would be prorated.
[31] Order, pg. 91.

Although the Commission appears to be attempting to use the statute's permissive inclusion of economic development as grounds for a mandatory program to be funded by shareholders, the statute cannot reasonably be read in such a fashion. The effect of the Commission's Order, therefore, is to modify the statute. But the Commission has no such power. "[T]he commission may not legislate in its own right."[32]

Lacking any legal basis to compel Duke Energy Ohio to fund an economic development program from shareholder funds, the Commission should grant rehearing on this issue and reverse the decision to unconstitutionally confiscate shareholder funds.

2. No record evidence justifies any need for an economic development fund.

Numerous intervenors and Commission Staff filed testimony in these proceedings, making recommendations as to how the Company's ESP 3 should be modified. A hearing was conducted over a period of three weeks, during which all of the parties, including Staff of the Commission, had an opportunity to cross-examine witnesses. Many of the parties filed initial and reply briefs to explain their respective positions for the Commission's consideration. In the thousands of pages of testimony, transcripts, and legal briefs, not a single party suggested that there was a need for the Company to contribute any amount of money to a shareholder-funded economic development program. The Commission's Staff similarly made no such recommendation. And no one proposed that such a program was necessary in order for the proposed ESP to be more favorable an a market-rate offer under R.C. 4928.142.

The Ohio Supreme Court has made it extremely clear that the Commission must base its decisions on record evidence. In a landmark 1999 case,[33] the Commission issued an order that relied on no sworn testimony and no comments or report filed by Staff. The Commission

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[32] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820 (1981).
[33] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999).

nevertheless agreed with Staff's "recommendations," without any record. The Court remanded the case, saying:

> [A] commission order must provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[34]
>
> Suffice it to say, some factual support for commission determinations must exist in the record, an obligation which the commission itself has recognized in its orders.[35]
>
> This court noted recently that "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support."[36]

Regardless of this well-established principle, the Commission made no effort to point to any factual justification for its mandate that the Company spend a total of $6 million of shareholder funds on economic development. And absolutely nothing in the record in these proceedings exists to support that mandate. The Commission's Order, in this regard, deprived the Company of all due process. And, further, it orders the deprivation of private property, in violation of constitutional principles. The Order must be modified to delete the economic development mandate.

3. The Commission's reliance on prior decisions is misplaced and ill-informed.

In further support of its decision to confiscate shareholder funds, the Commission references similar, prior Commission decisions, including its recent decision in a Dayton Power & Light Company (DP&L) ESP case.[37] It is noteworthy that, in pointing to that decision, the Commission failed to acknowledge its concession in the DP&L ESP case that "DP&L's

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[34] *Id.*, pg. 89 (*quoting Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 363-364, 102 N.E.2d 842 (1951)).
[35] *Id.*, pp. 89-90 (citation omitted).
[36] *Id.*, pg. 90 (*quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166, 666 N.E.2d 1372 (1996)).
[37] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order, pp. 42-43 (Sept. 4, 2013).

contributions to the [economic development fund] are voluntary,"[38] going on to explain that DP&L had the ability to decline the modified ESP and the mandated *quid pro quo*. It is also important to understand the distinction from the present situation, in that there was record evidence in the DP&L case with regard to the need for an economic development initiative, as pointed out by the Commission.[39] But record evidence in one case has nothing to do with another.

The Commission also points to Duke Energy Ohio's ESP 2 for support of this mandate. The ESP 2 Stipulation did indeed include an economic development provision, under which Duke Energy Ohio voluntarily agreed to contribute shareholder funds to economic development. However, there are two critical differences that make ESP 2 an inappropriate precedent:

- As recognized by the Commission throughout its order, ESP 2 was the product of a broad-based, settlement agreement that included numerous provisions that favored one or more parties. In contrast, ESP 3 is not based on any settlement. Duke Energy Ohio has not offered or agreed to contribute its investors' funds for economic development, and has not received counterbalancing concessions from other stipulating parties.
- While ESP 2 did include shareholder funding of economic development, it also recognized the burden such a provision places on the Company. Because of that recognition by the stipulating parties, the program limited the extent to which the Company's shareholders would make such contributions to those years when Duke Energy Ohio's earnings were above a stated threshold. Here, however, the Commission's Order would require the Company's shareholders to make contributions to the ED program, regardless of the Company's level of earnings.

By basing its decision on the Company's ESP 2, the Commission is confusing settlement terms with evidence-based decisions. And it is not only confiscating shareholder dollars but, when the Company's earnings are low, impeding the Company's opportunity to earn a fair return – an

[38] *Id.*, Second Entry on Rehearing, pg. 32 (March 19, 2014).
[39] *Id.*, Opinion and Order, pg. 42.

opportunity that is a cornerstone of utility regulation.[40] The goal in the ESP 2 Stipulation was a balance between the needs of the utility and the needs of the ratepayers. The Commission's Order in this ESP is not balanced; it requires shareholder contribution regardless of earnings.

Finally, by likening this mandate to similar requirements for other companies, it appears that the Commission has failed to account for the relative scale of the various utilities. One of the cases cited by the Commission to support its mandate is its recent order in an AEP Ohio case. There, the Commission similarly required AEP Ohio to contribute shareholder dollars in the amount of $2 million per year for economic development. But that is not comparable to the Duke Energy Ohio requirement, as AEP Ohio has more than twice Duke Energy Ohio's customer base and earnings.[41] The burden on Duke Energy Ohio's shareholders of contributing $2 million per year is therefore more than twice the burden that the Commission placed on AEP Ohio's shareholders. The Commission cannot justify this mandate as being "consistent with the treatment of other EDUs," considering the relative burden it is placing on Duke Energy Ohio's shareholders as compared to AEP Ohio's shareholders.

An additional difference between the present proceedings and the others cited by the Commission is that, in every one of the cited cases, the utility was granted authority to receive some form of non-bypassable generation charge. Here, however, that is not the case. There is no *quid pro quo* and nor rationale to impose this burden on the Company's investors.

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[40] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order, pp. 22-23 (July 2, 2012).

[41] Compare:
http://www.puco.ohio.gov/emplibrary/files/docketing/AnnualReports/2013/Electric%20Distribution%20&%20Transmission%20Companies/Ohio%20Power%20Company%202013%20FERC%201%20SUPP.pdf

http://www.puco.ohio.gov/emplibrary/files/docketing/AnnualReports/2013/Electric%20Distribution%20&%20Transmission%20Companies/Duke%20Energy%20Ohio%20Inc%202013%20FERC%201%20SUPP%2089-6002.pdf

Consistency and transparency are critical. The Commission should modify its Order to delete the requirement to add an economic development program to ESP 3. Alternatively, if the Commission does not agree to delete the program, it should at least modify the mandate such that no annual contributions from the Company's investors would be required unless the Company's annual return on equity, as determined under the significantly excessive earnings test set forth in R.C. 4928.143(F), exceeds 10 percent. Furthermore, if the program is not deleted in its entirety, the Commission should clarify on rehearing that contributions toward economic development initiatives in the Duke Energy Ohio service territory shall continue, during the term of the ESP 3, consistent with historical giving.

D. Assignments of Error 6 and 7:

The Commission's conclusion that additional capacity from continuation of the large customer interruptible load program should be bid into base residual auctions should be modified or clarified, as the requirement is unachievable.

The Commission's modification regarding the large customer interruptible load program, requiring the Company to apply for recovery of the associated costs, should be clarified or deleted, such that there is no uncertainty regarding the Company's right to recover such costs.

In its application in these proceedings, the Company proposed the discontinuation of its large customer interruptible load program, together with the Economic Competitiveness Fund Rider (Rider DR-ECF), through which the costs of the program were being recovered. The Commission concluded that the program should not be discontinued, based on various benefits raised by another party. In reaching that decision, the Commission also noted that "[t]he Company should also bid the additional capacity resources associated with the program in PJM's

BRAs held during the ESP term, with any resulting revenues credited back to customers through Rider DR-ECF."[42]

As the Commission is aware, the base residual auctions (BRAs) held by PJM occur once a year and relate to the delivery year that commences slightly more than three years later. The Commission's order to bid capacity resources associated with the interruptible load program into PJM's BRA auctions would, therefore, not be workable within the bounds of this ESP.

- If the Commission's intent was to order the Company to bid the capacity into BRAs for the delivery years covered by this ESP, such BRAs have all already occurred. Compliance with the first of these is an impossibility, unless the Commission's intent was to refer to incremental auctions – and, even then, the incremental auctions for the 2015/2016 delivery year have all been completed. Furthermore, the demand resources for the years of the ESP may already have been bid into BRAs through existing curtailment service providers.
- If the Commission's intent was to order the Company to participate in BRAs that will occur during the ESP, it should be understood that those BRAs relate to periods beyond the term of this ESP. Thus, the Commission would be impermissibly binding the Company to a future SSO structure and to what may be speculative and thus costly positions in the BRAs. Further, the Commission would be obligating all customers to having to pay for the costs of such auction participation. This intent, if correctly described by Duke Energy Ohio, is unreasonable and further conflicts with the Commission's acknowledgment that the continued treatment of demand response as a supply resource is being threatened and may cease to exist.

The Commission should reconsider this requirement, modifying it to fit within the term of the Company's proposal and to be feasible within the realities of the PJM auctions.

The Commission also noted, with regard to the large customer interruptible load program, that "Rider DR-ECF will also need to continue, through which Duke may apply for cost recovery."[43] The Commission did not make it clear whether or not there would be a review of that application, such that the Company might not receive full recovery of its costs. Thus, Duke Energy Ohio asks that the Commission clarify that the Company is legally entitled to recover the

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[42] Order, pg. 78.
[43] Order, pp. 77-78.

actual costs of providing the large customer interruptible load program. To the extent the Commission intended the recoverability of those costs to be determined in a subsequent proceeding, that requirement should be modified.

E. Assignments of Error 8 and 9:

The Commission's conclusion that costs eligible for inclusion in Rider DSR are only those that are "incremental" is unreasonable in that it does not include an explanation of what is included in the baseline.

The Commission's conclusion that carrying costs must cease to accrue in Rider DSR once recovery begins is unreasonable in that there is no factual justification for disallowing recovery of such carrying costs and no comparable legal precedent for such disallowance. Furthermore, the rationale for such disallowance is not provided, contrary to R.C. 4903.09.

The Company proposed a distribution storm rider (Rider DSR), to enable the deferral and recovery of expenses incurred in responding to major storm events. Although the Commission approved Rider DSR, it modified the proposal in significant ways. Two of those modifications are discussed herein.

First, the Commission noted that Staff had offered recommendations concerning recoverable costs and indicated that "eligible costs must be incremental."[44] Although Duke Energy Ohio does not disagree with the general principle that expenses already being recovered in base rates should not be included in Rider DSR, leaving the definition of "incremental" to be determined in a subsequent rider proceeding leaves the Company in an untenable position. It is imperative to be able to determine, in advance, what types of expenses are deemed to be included in the baseline and what are incremental.

[44] Order, pg. 74.

Furthermore, there must be some assurance that the types of costs that are included in the baseline and the types included in the tracked costs are comparable. For example, if the baseline of $4.4 million includes some level of "supplemental compensation," but supplemental compensation is to be excluded from the tracked costs, then the baseline number would have to be adjusted to remove those supplemental compensation costs so that the baseline would not be inflated for a cost that is not being tracked. The Commission should modify its Order to provide additional detail around this issue.

The Commission's second modification of Rider DSR relates to the accrual of carrying costs. Under Duke Energy Ohio's proposal, "[a]ny monthly positive or negative balance in this deferral account would accrue a carrying cost at the Company's long-term cost of debt as approved in its most recent base distribution case."[45] Nevertheless, the Commission modified proposal to require accrual of carrying costs to "cease once the recovery begins."[46]

Contrary to the requirements of R.C. 4903.09, the Commission offered no explanation whatsoever for this astonishing limitation. It is undeniable that, until all dollars are fully recovered or fully refunded to customers, there is a time-value of money. It is a fact. Ending carrying costs on the first day when recovery begins blindly ignores that fact and deprives either the Company or the customers of the time value of that money.

E. Assignment of Error 10:

The Commission's decisions with regard to the confidentiality agreement terms under which the Company was required to release its proprietary information were unreasonable, arbitrary, and contrary to established precedent.

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[45] Duke Energy Ohio Ex. 9, Testimony of Peggy A. Laub, pp. 7-8.
[46] Order, pg. 74.

In the months leading up to the hearing in these proceedings, the parties disputed a number of issues relating to confidentiality and, specifically, the terms of the confidentiality agreements pursuant to which the Company would disclose its proprietary information to intervenors. As the Commission is aware, those disagreements were ultimately ruled upon by the Commission itself, in response to an interlocutory appeal under O.A.C. 4901-1-15, and a subsequent application for rehearing, filed by Duke Energy Ohio. The Company argued this issue in its brief, but the Commission did not alter its prior ruling. Duke Energy Ohio, therefore, would repeat here those arguments made in its interlocutory appeal and application for rehearing related to the Commission's decision on that appeal. Those arguments are hereby incorporated fully by this reference. The Commission should reverse its prior decisions with regard to the subsequent use of confidential information, in unrelated proceedings.

CONCLUSION

Duke Energy Ohio respectfully requests that the Commission reconsider Order, grant rehearing, as outlined in Assignments of Error 1 through 10 above, and take action to correct the errors discussed therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 4th day of May, 2015, to the parties listed below.

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