

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Duke Energy Ohio, Inc. for Authority to	)	
Establish a Standard Service Offer	)	
Pursuant to Section 4928.143, Revised	)	Case No. 17-1263-EL-SSO
Code, in the Form of an Electric	)	
Security Plan, Accounting Modifications	)	
and Tariffs for Generation Service.	)	

In the Matter of the Application of	)	
Duke Energy Ohio, Inc. for Authority to	)	Case No. 17-1264-EL-ATA
Amend its Certified Supplier Tariff,	)	
P.U.C.O. No. 20.	)	

In the Matter of the Application of	)	
Duke Energy Ohio, Inc. for Authority to	)	Case No. 17-1265-EL-AAM
Defer Vegetation Management Costs.	)	

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**MOTION OF INDUSTRIAL ENERGY USERS-OHIO  
TO DISMISS THE REQUEST BY DUKE ENERGY OHIO, INC.  
FOR AUTHORIZATION FOR A PRICE STABILIZATION RIDER  
AND MEMORANDUM IN SUPPORT**

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Under Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") moves the Public Utilities Commission of Ohio ("Commission") for an order dismissing the request by Duke Energy Ohio, Inc. ("Duke") for authorization of an extension of the placeholder Price Stabilization Rider ("PSR") because there is no legal basis for the Commission to approve the rider as a term of the electric security plan ("ESP"). Dismissing the PSR is especially warranted given that Duke has indicated that it has no intention of litigating the PSR in this proceeding. Without a legal basis to authorize the PSR and an applicant that does not desire to advance its proposal in this proceeding, IEU-Ohio respectfully requests that the Commission grant this motion and

prevent the waste of resources that will otherwise be required to address the PSR during the evidentiary hearing and on brief.

The reasons supporting this Motion are more fully set out in the accompanying Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In its application in its third ESP proceeding (“ESP III”), which the Commission modified and approved in 2015, Duke proposed the PSR with a term through 2040 and also proposed to include its interest in the Ohio Valley Electric Corporation (“OVEC”) in the PSR.<sup>1</sup> If approved, the costs Duke paid OVEC under the Inter-Company Power Agreement (“ICPA”) would have been netted against the market revenue Duke received by liquidating its interest in the energy and capacity of the OVEC plants into PJM

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, *et al.*, Opinion and Order at 15 (Apr. 2, 2015) (“ESP III Case” or “ESP III Order,” as applicable).

Interconnection, LLC's ("PJM") wholesale markets.<sup>2</sup> The difference would have been charged or credited to customers.<sup>3</sup> The record demonstrated that the PSR would have resulted in net costs to customers during the ESP III term.<sup>4</sup> Although the Commission found that a PSR-like rider might satisfy the requirements of R.C. 4928.143(B)(2)(d) "in theory" and therefore authorized a placeholder rider, the Commission denied Duke's request to recover its above-market OVEC costs through the PSR.<sup>5</sup> The Commission found that Duke failed to demonstrate that its PSR proposal would have produced rate stability or that the proposal was in the public interest given its unproven benefits and likely costs.<sup>6</sup>

In this proceeding, Duke seeks an extension of the previously-authorized placeholder PSR beyond the term of ESP III. Duke's application and testimony do not provide any description of the PSR proposal, do not address any issue regarding rate stability, and do not contain any projections of OVEC costs, PJM market proceeds, or a net cost/credit for the PSR rider. Duke's testimony further concedes that Duke does not intend to litigate the PSR in this proceeding. Duke's brief reference to the PSR in its application and testimony violates the Commission's rules and is insufficient to satisfy Duke's burden of proof in this proceeding.

Furthermore, although the Commission approved the placeholder PSR in the ESP III proceeding and indicated that Duke could try again to justify including above-

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 45.

<sup>5</sup> *Id.* at 45-48.

<sup>6</sup> *Id.*

market cost recovery associated with its OVEC interest in the PSR, intervening events confirm that doing so would be unlawful. After the Commission's Order in the ESP III proceeding, the Ohio Supreme Court reversed the nonbypassable generation-related charges contained in the ESPs of The Dayton Power and Light Company ("DP&L") and Ohio Power Company ("AEP-Ohio") because the charges unlawfully permitted the electric distribution utilities ("EDUs") to collect transition revenue or its equivalent. Further, the United States Supreme Court confirmed that states were preempted from providing retail revenue to supplement the wholesale compensation generators receive under Federal Energy Regulatory Commission ("FERC")-approved rates. Arguments based on these two legal principles (transition revenue and preemption), as well as other legal challenges, remain pending on rehearing in the ESP III Case, and demonstrate that the placeholder PSR should not have been approved in that case. Those legal defects remain with the placeholder PSR today.

Requiring intervening parties to present evidence and brief an issue that is legally defective, that is not supported by Duke, and that Duke concedes it has no intention of advancing in this proceeding, would waste parties' time and resources. Because Duke has failed to provide a lawful basis to extend the placeholder PSR, the Commission should dismiss Duke's request from its application.

## **II. STANDARD OF REVIEW**

Although not strictly bound by the Rules of Civil Procedure, R.C. 4903.082 directs the Commission to rely on those rules "wherever practicable." Under the Rule 12(B)(6)

of Rules of Civil Procedure, a complaint or a claim in that complaint may be dismissed for “failure to state a claim upon which relief can be granted.”<sup>7</sup>

“The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward.”<sup>8</sup> “In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief.”<sup>9</sup> “Furthermore, ‘[i]n construing a complaint upon a motion to dismiss for failure to state a claim, [the court] must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.’”<sup>10</sup> The Commission has confirmed that motions to dismiss may be filed in Commission proceedings.<sup>11</sup>

### **III. ARGUMENT**

#### **A. Duke failed to set forth the minimum amount of information necessary for the Commission to approve the PSR as a term of the proposed ESP**

Duke’s application and prefiled testimony fail to set forth the information required for the Commission to approve a provision as part of an ESP. Rule 4901:1-35-03(C)(1), O.A.C., requires that an application for an ESP contain a “complete description of the ESP and testimony explaining and supporting each aspect of the ESP.”<sup>12</sup> In recognition that R.C. 4928.143(C)(1) places the burden of proof in an ESP proceeding on an EDU,

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<sup>7</sup> Civ.R. 12(B)(6).

<sup>8</sup> *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5.

<sup>9</sup> *Id.* (citing *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, syllabus (1975)).

<sup>10</sup> *Id.* (quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988)).

<sup>11</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.*, Opinion and Order, Concurring Opinion of Commissioner Lynn Slaby (Feb. 13, 2014).

<sup>12</sup> Rule 4901:1-35-03(C)(1), O.A.C.



the Commission has held that the failure to present the required information prevents the authorization of a proposed charge.<sup>13</sup> Duke's failure to present the required information results in a situation where there is no set of facts upon which the Commission could approve Duke's request.

In its review of so-called "stability riders" proposed under R.C. 4928.143(B)(2)(d), the Commission has further explained that it requires a detailed filing in support of an application for such a rider. For example, in AEP-Ohio's ESP III Case, AEP-Ohio sought authorization of the NERC Compliance and Cybersecurity Rider. In its application, AEP-Ohio briefly described the rider as needed due to the increasing scope of North American Electric Reliability Corporation ("NERC") compliance and cybersecurity activities and requested authority to track and defer future capital and operations and maintenance ("O&M") expenses associated with new NERC compliance and cybersecurity measures.<sup>14</sup> AEP-Ohio also addressed this rider in the prefiled testimony of Mr. Vegas.<sup>15</sup> However, AEP-Ohio failed to offer evidence demonstrating it would incur any future NERC compliance costs and failed to demonstrate the types of future investments and the projected magnitude of those investments that it would be seeking future recovery of under the proposed rider.<sup>16</sup> Based on that record, the Commission held that AEP-Ohio failed to meet its burden of proof.<sup>17</sup>

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<sup>13</sup> *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 Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 59-62 (Feb. 25, 2015) ("AEP-Ohio ESP III Case").

<sup>14</sup> *Id.* at 59-62; AEP-Ohio ESP III Case, Application at 11-12 (Dec. 20, 2013); AEP-Ohio ESP III Case, Direct Testimony of Pablo Vegas at 13-18 (Dec. 20, 2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

In disregard of the Commission's rule and the decision in the AEP-Ohio case, Duke's application provides no description of the proposed PSR.<sup>18</sup> Instead, the application makes passing reference to the placeholder authorization of the PSR in Duke's ESP III Case, and Duke's stand-alone request in Case Nos. 17-872-EL-RDR, *et al.* for the authorization of the PSR outside of an ESP context.<sup>19</sup> Duke's application only requests the continuation of the previously-authorized placeholder PSR beyond May 31, 2018, the end date of its ESP III.<sup>20</sup> Duke's application does not propose a new end date for the PSR. The application thus fails to provide any description of the PSR, let alone the complete description required by the Commission's rules.

Duke's testimony similarly fails to fully describe or support the PSR. The only Duke witness addressing the PSR is Duke witness Wathen. Mr. Wathen again states that Duke is requesting the Commission modify the end date of the placeholder PSR previously authorized in the ESP III Case.<sup>21</sup> Mr. Wathen does not offer any testimony on the mechanics of the proposed charge, on the benefits of the charge, or on the potential costs of the charge. In fact, Mr. Wathen concedes that Duke is not seeking to address the PSR in this proceeding, stating that Duke is seeking to litigate the PSR in other already filed proceedings and not this one.<sup>22</sup> That other proceeding, Case Nos. 17-872-EL-RDR, *et al.*, has not proceeded beyond Duke's initial application. No procedural schedule has been established; no sworn testimony has been submitted to the Commission; no

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<sup>18</sup> Application at 10 (June 1, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Direct Testimony of William Don Wathen Jr. at 30 (June 1, 2017).

<sup>22</sup> *Id.*

opposing evidence has been submitted; briefs and arguments have not been submitted to the Commission. The record in that case, or lack thereof, does not, and cannot, act as a substitute for the record that Duke is required to establish in this case.<sup>23</sup>

Duke's application and testimony fail to meet the requirements imposed on Duke in R.C. 4928.143(C)(1) and Rule 4901:1-35-03(C)(1), O.A.C. Because Duke has failed to include in its application a complete description of the proposed PSR supported by testimony, there is no basis for the Commission to approve Duke's request that the Commission authorize an extension of the placeholder PSR. The request should therefore be dismissed from its application.

**B. Intervening court decisions issued since the placeholder PSR was approved confirm that the PSR is unlawful**

Since the Commission issued its order approving Duke's ESP, several significant intervening events have occurred that confirm that the PSR cannot be authorized lawfully. The Ohio Supreme Court struck down nonbypassable charges of AEP-Ohio and DP&L as unlawful transition charges. Further, the U.S. Supreme Court upheld as preempted state regulatory action that was designed to provide above market compensation to generators. Each of these decisions confirms that the PSR is unlawful.

**1. The Court has confirmed that transition charges, like the PSR, may not be authorized as a term of an ESP**

In its application, Duke indicates that it is seeking authorization of the PSR under R.C. 4928.143(B)(2)(d). Duke further states that the Commission has authorized nonbypassable riders under this provision for other utilities. In support of this claim, Duke

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<sup>23</sup> R.C. 4928.143(C)(1) (burden of proof in an ESP proceeding is on the EDU).

cites to DP&L's and AEP-Ohio's second ESPs.<sup>24</sup> Duke's reliance on those orders is misplaced as the orders authorizing the nonbypassable generation-related charges under R.C. 4928.143(B)(2)(d) in those cases were reversed by the Court as unlawful transition charges. As discussed below, a populated PSR would also constitute an unlawful transition charge.

Duke's placeholder PSR charge was authorized under R.C. 4928.143(B)(2)(d) on the basis that it could in theory provide rate stability to customers.<sup>25</sup> Similarly, the Commission authorized nonbypassable generation charges in DP&L's and AEP-Ohio's second ESPs on the basis that their respective charges also provided "stability."<sup>26</sup> In reviewing the true nature of DP&L's and AEP-Ohio's so-called "stability" charges, however, the Court determined that their nature was the same as a transition charge. Recovery of transition revenue through a transition charge, however, is no longer permitted.

Electric utilities were provided an opportunity in their electric transition plans ("ETP") to make a request for transition revenue.<sup>27</sup> The opportunity to receive transition revenue was limited to "reasonable transition costs of the utility" that met the following criteria: "(A) [t]he costs were prudently incurred; (B) [t]he costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided

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<sup>24</sup> Application at 17-18, n. 23 (June 1, 2017).

<sup>25</sup> *ESP III Case*, Opinion and Order at 44 (Apr. 2, 2015).

<sup>26</sup> *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 32, 37 (Aug. 8, 2012) ("*AEP-Ohio ESP II Case*"); *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 21-22 (Sep. 4, 2013) ("*DP&L ESP II Case*").

<sup>27</sup> R.C. 4928.31(A)(5).

to electric consumers in this state; (C) [t]he costs are unrecoverable in a competitive market; [and] (D) [t]he utility would otherwise be entitled an opportunity to recover the costs.”<sup>28</sup> Costs that satisfied these requirements could be recovered as transition revenue.

The recovery of transition, however, was a one-time opportunity. “Utilities had until December 31, 2005 ... to receive generation transition revenue ... [and] were also permitted to receive transition revenue associated with regulatory assets ... until December 31, 2010.”<sup>29</sup> Thereafter, “R.C. 4928.38 prohibits the commission from ‘authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility.’”<sup>30</sup> Subsequent legislation enacted in 2008 further “expressly prohibits the recovery of transition costs” under “a standard service offer made through an ESP.”<sup>31</sup>

In the appeal of the Commission’s authorization of the Retail Stability Rider (“RSR”) in AEP-Ohio’s ESP II Case, the Court found that AEP-Ohio “proposed the RSR as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period.”<sup>32</sup> To achieve this result, AEP-Ohio requested that the Commission “guarantee recovery of lost revenue” through the RSR charge related to three sources of generation revenue: retail nonfuel generation revenues, decreased capacity revenue, and revenue lost due to customer switching.<sup>33</sup> “According to [AEP-Ohio’s] witnesses, the RSR was designed to

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<sup>28</sup> R.C. 49298.39

<sup>29</sup> *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, ¶ 16.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 17.

<sup>32</sup> *Id.* at ¶ 23.

<sup>33</sup> *Id.* at ¶ 23-24.

generate enough revenue for the company to achieve a certain rate of return on its generation assets as it transitions to full auction pricing for energy and capacity by June 2015.”<sup>34</sup> The Court also noted that the Commission had approved the RSR charge “to provide AEP with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP.”<sup>35</sup>

Based on the nature of AEP-Ohio’s charge, the Court held that the RSR allowed AEP-Ohio to unlawfully collect transition revenue or its equivalent in violation of R.C. 4928.38.<sup>36</sup> “By inserting the phrase ‘any equivalent revenues,’ the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name.”<sup>37</sup> The Court found that transition revenue represented costs that would not be recovered in a competitive market and the RSR provided AEP-Ohio with revenue lost in the competitive market.<sup>38</sup> “Based on [this] record,” the Court concluded that AEP-Ohio’s RSR charge “recovers the equivalent of transition revenue...” and reversed the Commission’s authorization of the RSR.<sup>39</sup>

Like AEP-Ohio, DP&L sought the recovery of lost generation revenue in its ESP II application. In reliance on the decision authorizing AEP-Ohio’s RSR, the Commission authorized DP&L’s Service Stability Rider (“SSR”).<sup>40</sup> Like the RSR, DP&L’s SSR was

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<sup>34</sup> *Id.* at ¶ 23.

<sup>35</sup> *Id.* at ¶ 8.

<sup>36</sup> *Id.* at ¶ 22.

<sup>37</sup> *Id.* at ¶ 21.

<sup>38</sup> *Id.* at ¶ 22-23.

<sup>39</sup> *Id.* at ¶ 25.

<sup>40</sup> *DP&L ESP II Case*, Opinion and Order at 25-26 (Sept. 4, 2013).

driven by DP&L's claim that it was losing generation revenue to increased customer switching and declining wholesale generation prices.<sup>41</sup> Faced with a charge authorized for the same reasons (to make up for generation revenue that could not be secured in a competitive market) and under the same statutory provision (R.C. 4928.143(B)(2)(d)), the Court reversed the Commission's authorization of DP&L's SSR in a one-sentence decision that cited its decision reversing the Commission's authorization of the RSR.<sup>42</sup>

Like the RSR and SSR, Duke proposed the PSR to make up for generation costs that cannot be recovered in a competitive market. As presented by Duke in the ESP III Case, the PSR would permit Duke to charge customers the difference between what Duke receives from PJM for wholesale energy and capacity and the amounts billed to it by OVEC under the ICPA.<sup>43</sup> When the generation-related costs exceed the market-based revenue, the difference is "costs ... unrecoverable in a competitive market."<sup>44</sup> Recovering generation-related costs that are otherwise unrecoverable in the competitive market is the equivalent of collecting transition revenue and it is prohibited by statute. Like the RSR and SSR, a populated PSR would be an unlawful transition charge.

**2. The U.S. Supreme Court has confirmed that states are preempted from setting the effective price generators receive in wholesale markets through retail revenue supplements**

Since the Commission's decision in the ESP III Case, the U.S. Supreme Court has confirmed that states are preempted from establishing wholesale electric rates through

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<sup>41</sup> *Id.* at 17.

<sup>42</sup> *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, ¶ 1.

<sup>43</sup> *ESP III Case*, Duke Ex. 6 at 13-14.

<sup>44</sup> R.C. 4928.39(C).

retail mechanisms directly tied to wholesale electric prices.<sup>45</sup> The PSR is directly tied to the wholesale revenue Duke receives from the PJM market, and each dollar collected or credited through the PSR alters Duke's wholesale market compensation. Because including Duke's OVEC interest in the PSR would alter the wholesale compensation Duke receives for its OVEC interest, the Commission would be preempted from authorizing the inclusion of the OVEC interest in the PSR. The placeholder PSR thus serves no purpose as the rider cannot be lawfully populated. Duke's request to extend the placeholder PSR should, therefore, be dismissed.

Preemption may be either express or implied.<sup>46</sup> Absent explicit preemptive language in federal law, state regulation may nonetheless be preempted by federal regulation under two types of implied preemption.<sup>47</sup> Under the doctrine of field preemption, state action is preempted "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"<sup>48</sup> Under the doctrine of conflict preemption, state regulation must yield to federal regulation where "'compliance with both federal and state regulations is a physical impossibility.'"<sup>49</sup>

Based on field preemption, the United States Supreme Court most recently held in *Hughes* that FERC's authority to establish wholesale energy prices under the Federal Power Act ("FPA") is exclusive. In that case, the Maryland Public Service Commission

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<sup>45</sup> *Hughes v. Talen Energy Marketing LLC*, 578 U.S. \_\_\_, (2016) (slip op., at 7) ("*Hughes*").

<sup>46</sup> *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992).

<sup>47</sup> *Id.* at 98.

<sup>48</sup> *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>49</sup> *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).



(“Maryland Commission”) had required the incumbent utilities to enter into a 20-year pricing contract with a company (“generator”) proposing to construct a new generation plant in the state.<sup>50</sup> The contract guaranteed that the generator would receive the contract price for capacity and not the wholesale price.<sup>51</sup> That is, if the wholesale price “falls below the price guaranteed in the contract” the utilities would pay the generator the difference, and then “pass the costs of these required payments along to Maryland consumers in the form of higher retail prices.”<sup>52</sup> If the wholesale capacity price “exceeds the price guaranteed in the contract” the generator would pay the utilities the difference and the utilities would “then pass the savings along to consumers in the form of lower retail prices.”<sup>53</sup>

The Court found that the contract “guarantees the [generator] a rate distinct from the clearing price [in the PJM capacity auction] for its interstate sales of capacity to PJM” and thus concluded that the Maryland Commission had “set[] an interstate wholesale rate.”<sup>54</sup> The Court further explained that “however legitimate” a State’s objective might be, States could not “exercise their traditional authority over retail rates, or ... in-state generation” as a means to disregard the wholesale rates established by FERC.<sup>55</sup> “The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.”<sup>56</sup>

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<sup>50</sup> *Hughes*, (slip op., at 7).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (slip op., at 12).

<sup>55</sup> *Id.* (slip op., at 13-14).

<sup>56</sup> *Id.* (slip op., at 12) (citing *FERC v. EPSA*, 577 U.S. \_\_\_, \_\_ (2016) (slip op., at 26)).

Like the “contract for differences” the United States Supreme Court held was preempted by the FPA, including Duke’s OVEC interest in the PSR would alter the wholesale generation compensation Duke receives for that interest. In years in which the OVEC costs exceed the PJM revenue, the PSR would be a nonbypassable retail charge and increase Duke’s compensation for its share of the wholesale capacity and energy it receives from OVEC. In years in which the OVEC costs are less than the PJM revenue, the PSR would be a nonbypassable retail credit and decrease Duke’s compensation. By indirectly setting the revenue for wholesale capacity and energy that Duke receives for its interest in OVEC, the revenue that Duke would receive under the PSR is effectively “tethered” to the wholesale rate. As a result, the Commission would interfere with and invade a field that is within the exclusive authority of FERC.<sup>57</sup>

Because any action of the Commission that would permit Duke to recover any revenue through the PSR would be preempted, there is no reason for the Commission to consider Duke’s request to continue the placeholder PSR in this case. Duke’s request that the placeholder PSR be extended should therefore be dismissed from the application.

**C. Additional statutory provisions prevent the Commission from authorizing the PSR**

**1. The PSR violates the prohibitions against collecting generation costs through distribution rates and against authorization of anticompetitive subsidies**

Permitting Duke to recover any above-market generation costs through the PSR would violate the state energy policy contained in R.C. 4928.02(H). The first clause of the division provides that it is the policy of the State to ensure effective competition in the

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<sup>57</sup> *Id.* (slip. op., at 12-15).

provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service (“CRES”) or a product or service other than retail electric service or vice versa. The second clause prohibits the recovery of any generation-related costs through distribution or transmission rates.<sup>58</sup> The PSR complies with neither.

Authorizing Duke to include any costs in the placeholder PSR will result in an anticompetitive subsidy to or from a noncompetitive retail electric service from or to a service other than retail electric service. If the PSR is populated, it would require all retail distribution customers to incur a charge or credit designed to collect the difference of Duke’s costs and wholesale revenue for a generation-related service. When the difference is a charge, Duke would recover the above-market wholesale costs that exceed the market prices for the generation, a subsidy to Duke. When the difference is a credit (as unlikely as that may be), retail customers would receive a subsidy of any wholesale revenue that exceeds Duke’s costs. In either case, the result runs afoul of Ohio’s pro-competitive policies and the law stated in the first clause of R.C. 4928.02(H).

Authorizing Duke to include any costs in the placeholder PSR will also violate the purpose of the second clause of R.C. 4928.02(H). The charge is undeniably related to Duke’s recovery of generation costs that it cannot otherwise recover in the competitive generation market. Because the charge is unavoidable, it operates in exactly the same manner as a distribution charge: all distribution customers of Duke would be required to

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<sup>58</sup> *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 6 (Jan. 11, 2012) (“*Sporn*”).

pay the charge. Thus, recovering the above-market OVEC costs through the PSR would violate R.C. 4928.02(H).

**2. The Commission’s authority to regulate and establish rates for electric utilities is limited to the provision of retail electric service; the PSR is unrelated to the provision of retail electric service**

The services of a public utility subject to the Commission’s jurisdiction are established through the definitional sections in Chapters 4905 and 4928 of the Revised Code. R.C. 4905.02 provides that a “‘public utility’ includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code.” R.C. 4905.03 then provides a list of the types of public utilities subject to the Commission’s jurisdiction:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

...

- (C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.

The same definition extends to the Commission’s jurisdiction under R.C. Chapter 4928 to EDUs.<sup>59</sup> This definition specifically limits the Commission’s jurisdiction over electric light companies, including EDUs, to instances in which a retail service is being provided, *i.e.* electricity is being supplied “to consumers.” By definition, therefore, the

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<sup>59</sup> See, *e.g.*, R.C. 4928.01(A)(6) & (7) & 4928.05(A) (defining the Commission’s jurisdiction to supervise and regulate competitive and noncompetitive retail electric service supplied by an electric utility).

jurisdiction of the Commission does not extend to wholesale generation-related electric services.

As discussed above, the PSR is related to recovery of wholesale generation costs. The FERC-approved ICPA governs Duke's wholesale purchase of power from OVEC. Duke's liquidation into PJM's market of its interest in the output of OVEC is likewise a wholesale transaction. Neither the purchase nor sale of power is to an ultimate consumer. Populating the PSR would thus be unrelated to the "supply[] [of] electricity for light, heat, or power purposes to consumers within this state," *i.e.* the transaction is not retail, and it is therefore beyond the Commission's jurisdiction.

#### **IV. CONCLUSION**

Duke seeks the continuation of the placeholder PSR authorized in its prior ESP. Duke, however, has not provided a basis for such an authorization. In fact, Duke concedes that the PSR should not be litigated in this proceeding. If Duke does not intend to advance its proposal, the remaining parties to the case should not be required to present evidence addressing the proposal either.

Moreover, since the Commission rejected Duke's PSR proposal and authorized the placeholder PSR in the ESP III Case, several Court decisions have confirmed the illegality of the proposed PSR. Thus, there is no reason to continue the placeholder charge when these cases confirm that authorizing any cost recovery through the charge would be unlawful.

Simply put, the PSR cannot be authorized in this proceeding due to the numerous legal deficiencies outlined herein. To prevent an unnecessary waste of time and

resources, IEU-Ohio urges the Commission to dismiss Duke's request for an extension of the placeholder PSR from Duke's application.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion of Industrial Energy Users-Ohio to Dismiss the Request by Duke Energy Ohio, Inc. for Authorization for a Price Stabilization Rider and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 13<sup>th</sup> day of October 2017, via electronic transmission.

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