

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service.) Case No. 18- 973
)
) On Appeal from the Public Utilities Commission of Ohio
)
) Case No. 14-841-EL-SSO
) Case No. 14-842-EL-ATA
 In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.)

NOTICE OF APPEAL

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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel (“OCC” or “Appellant”), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio (“Appellee” or “PUCO”) of this appeal of PUCO Orders approving an electric security plan for Duke Energy Ohio, Inc. This appeal seeks to stop customers from paying hundreds of millions of dollars in unjust, unreasonable, and unlawful rates for electric utility service. The unjust, unreasonable, and unlawful electric security plan approved by the PUCO allows Duke Energy Ohio, Inc. authority to charge customers to subsidize two Eisenhower-era coal plants when Ohio law and federal law preclude such subsidies.

This appeal is taken from PUCO decisions pertaining to the electric security plan of Duke Energy Ohio, Inc., Case Nos. 14-841-EL-SSO and 14-842-EL-ATA. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on April 2, 2015 (Attachment A); the PUCO's Entry on Rehearing of May 28, 2015 (Attachment B); the PUCO's Second Entry on Rehearing of March 21, 2018 (Attachment C); and the PUCO's Third Entry on Rehearing of May 16, 2018 (Attachment D).¹ Under R.C. 4903.20, this appeal should be taken up and disposed by the Court out of order on the docket.

Appellant is the statutory representative, as established under R.C. Chapter 4911, of Duke Energy Ohio, Inc.'s over 629,000 residential customers. OCC was a party of record in the case being appealed.

On May 4, 2015, OCC filed a timely application for rehearing of the PUCO's April 2, 2015 Opinion and Order (Attachment E). Nearly three years later, on March 21, 2018, the

¹ Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

PUCO issued an Entry on Rehearing denying, inter alia, OCC's application for rehearing. Thereafter, on April 20, 2018, Duke Energy Ohio, Inc. filed an application for rehearing from the PUCO's Entry on Rehearing. On May 16, 2018, the PUCO ruled on Duke's rehearing request.

The issues OCC raises on the prior rulings of the PUCO, all pertaining to the Duke Energy Ohio, Inc. electric security plan proceeding, are now ripe for the Court to review, following the final order the PUCO issued on May 16, 2018.

These Orders are unlawful and unreasonable in the following respects, which were raised in OCC's Applications for Rehearing,² as noted:

1. The PUCO unreasonably and unlawfully approved a tariff allowing the utility the opportunity to collect from customers a so-called Price Stabilization Rider.
 - A. The Price Stabilization Rider is unreasonable and unlawful because it will allow the utility the opportunity to charge customers unlawful transition revenues or "any equivalent revenues," after the market development period expired, violating R.C. 4928.38. et al. (OCC Application for Rehearing at 35-37 (May 4, 2015)).
 - B. The Price Stabilization Rider is not a lawful provision of an electric security plan under R.C. 4928.143 that may be included as a "limitation on customer shopping" under R.C. 4928.143(B)(2)(d). (OCC Application for Rehearing at 18-21 (May 4, 2015)).
 - C. The PUCO finding that the Price Stabilization Rider is a "limitation on customer shopping" under R.C. 4928.143(B)(2)(d) lacks record support, violating R.C. 4903.09. (OCC Application for Rehearing at 18-21 (May 4, 2015)).
 - D. The Price Stabilization Rider is unlawful because it does not provide rate stability or certainty to customers as required by R.C.

² Under R.C. 4903.10, an appeal may be based on an Error alleged in another party's application for rehearing, including a non-appellant intervening party. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, ¶16, citing *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St.3d 177, 180, 749 N.E.2d 262 (2001).

4928.143(B)(2)(d). (OCC Application for Rehearing at 25-30 (May 4, 2015)).

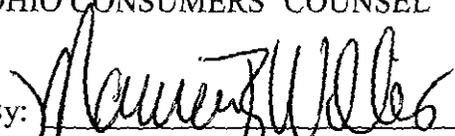
- E. The Price Stabilization Rider is unlawful because it is preempted by the Federal Power Act and a 2016 United States Supreme Court decision, *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288. The exercise of state authority violated the Federal Power Act and in doing so violated the Supremacy Clause of the United States Constitution, Article 6. The PUCO declined to address this constitutional issue and deferred it to this Court. Yet at the same time, the PUCO unlawfully exercised jurisdiction by approving the rider mechanism for collecting these unlawful charges from customers. (OCC Application for Rehearing at 3-15 (May 4, 2015)).
 - F. The Price Stabilization Rider allows the utility to charge customers to subsidize two uneconomic coal-burning power plants, contrary to the state policy that the PUCO ensure effective competition by avoiding anticompetitive subsidies, violating R.C. 4928.02(H). (OCC Application for Rehearing at 31-32 (May 4, 2015)).
2. The PUCO unlawfully and unreasonably determined that Duke Energy Ohio, Inc.'s electric security plan "was more favorable in the aggregate" to customers than a market rate offer. This determination was unlawful and unreasonable because:
- A. The PUCO approved the Price Stabilization Rider as a "placeholder" rider, set at zero. Yet, without considering the costs that customers will pay for the Price Stabilization Rider, the PUCO found the electric security plan to be more favorable in the aggregate than a market rate offer. The PUCO finding was unreasonable and unlawful in that the PUCO failed to fulfill its duty under R.C. 4928.143(C)(1). (OCC Application for Rehearing at 48-49 (May 4, 2015)).
 - B. The PUCO excluded the \$272 million Distribution Capital Investment Rider revenues from the more favorable in the aggregate test on the basis that equivalent revenues could be recovered under a market rate approach, when they cannot. (OCC Application for Rehearing at 49-51 (May 4, 2015)).

The PUCO's unlawful and unreasonable rulings are allowing Duke Energy Ohio, Inc. to charge customers more than what is allowed by law. OCC respectfully submits that the PUCO's Opinion and Order entered in its Journal on April 2, 2015; the PUCO's Entry on Rehearing of

May 28, 2015; the PUCO's Second Entry on Rehearing of March 21, 2018; and the PUCO's Third Entry on Rehearing of May 16, 2018, are unreasonable and unlawful, and should be reversed or modified with specific instructions to the PUCO to correct its errors.

Respectfully submitted,

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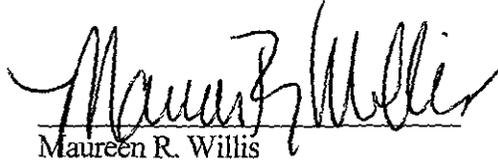
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 16th day of July 2018.



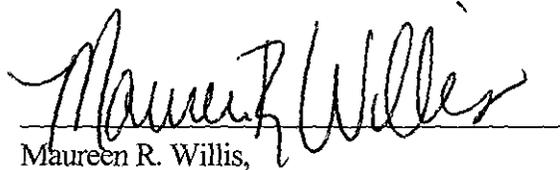
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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

A handwritten signature in cursive script, reading "Maureen R. Willis", written over a horizontal line.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

OPINION AND ORDER

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The Public Utilities Commission of Ohio, having considered the above-entitled application, the applicable law, and the record in these proceedings, and being otherwise fully advised, hereby issues its Opinion and Order.

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Bricker & Eckler, LLP, by Dane Stinson, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Development Services Agency.

OPINION:

I. BACKGROUND

A. History of Proceedings

Duke Energy Ohio, Inc. (Duke or Company) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

On May 29, 2014, Duke filed an application for a standard service offer (SSO) pursuant to R.C. 4928.141. This application is for an electric security plan (ESP) in accordance with R.C. 4928.143. Duke's current ESP was approved in *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (Nov. 22, 2011) (*ESP 2 Case*) (OMA Ex. 2).

By Entry issued June 6, 2014, the attorney examiner established the procedural schedule in these cases. On June 12, 2014, a technical conference was held regarding Duke's application. By Entry issued August 5, 2014, four local public hearings were scheduled in these matters for September 8, 9, 10, and 18, 2014. Duke submitted proofs of

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publication for the hearings on October 10, 2014. In total, at the four local public hearings, 27 witnesses testified.

The following entities were granted intervention by Entry dated August 5, 2014: Industrial Energy Users-Ohio (IEU); The Ohio Energy Group (OEG); Ohio Partners for Affordable Energy (OPAE); The Kroger Company (Kroger); Ohio Environmental Council (OEC); FirstEnergy Solutions Corp. (FES); The Greater Cincinnati Health Council (GCHC); Constellation NewEnergy, Inc. (Constellation) and Exelon Generation Company, LLC (ExGen) (jointly, Exelon); Ohio Consumers' Counsel (OCC); Wal-Mart Stores East, LP and Sam's East, Inc. (Wal-Mart); Ohio Manufacturers' Association (OMA); Retail Energy Supply Association (RESA); Ohio Power Company (AEP); city of Cincinnati (Cincinnati); People Working Cooperatively, Inc. (PWC); Environmental Law & Policy Center (ELPC); EnerNOC, Inc. (EnerNOC); Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy); Miami University and The University of Cincinnati (Miami/UC); Natural Resources Defense Council (NRDC); Interstate Gas Supply, Inc. (IGS); Energy Professionals of Ohio (EPO); Dayton Power and Light Company (DP&L); Sierra Club (Sierra), and the Ohio Development Services Agency (ODSA). By Entries issued August 5, 2014, and October 20, 2014, and at the evidentiary hearing on October 28, 2014, the motions for admission pro hac vice on behalf of Samantha Williams, Justin Vickers, Rick D. Chamberlain, Tony G. Mendoza, and Michael J. Castiglione were granted.

The evidentiary hearing was initially scheduled to commence on September 8, 2014, and, by Entry issued August 5, 2014, the evidentiary hearing was rescheduled to October 7, 2014, at the request of some of the parties. Subsequently, at the prehearing conference held on August 12, 2014, the commencement of the evidentiary was rescheduled to October 22, 2014. The evidentiary hearing was held, as rescheduled, on October 22, 2014, through November 12, 2014, with rebuttal on November 20, 2014. Briefs and reply briefs were filed on December 15, 2014, and December 29, 2014, respectively.

B. Procedural Matters

1. Interlocutory Appeal

On September 23, 2014, Duke filed a motion to compel discovery from OCC, stating that OCC refused to provide substantive responses to certain discovery requests, claiming such responses are privileged from discovery under the joint defense or common interest doctrine. Duke explains the discovery requested OCC to identify all communication it has had with any other intervenors and all agreements into which it had entered with other intervenors in these proceedings. Duke argues the joint defense agreement (JDA), which OCC entered with OMA and OPAE, confirms that there is no proper common legal interest; thus, there is no permissible bar from disclosure. Duke submits the common interest that allegedly binds the parties to the JDA of OCC, OMA, and OPAE is

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administrative efficiency. According to Duke, the common interest doctrine relied on by OCC only extends to identical legal interests and not commercial interests. Duke maintains there is no identical legal interest between OCC, OMA, and OPAE. Duke asserts the information requested is relevant or reasonably calculated to lead to the discovery of admissible evidence; therefore, OCC should be compelled to provide the information.

On September 29, 2014, OCC filed a memorandum contra Duke's September 23, 2014 motion to compel discovery, stating the information requested by Duke does not involve seeking information that goes to the merits of these cases, but only communications between certain intervening parties. The information requested is protected by a JDA and, therefore, OCC argues it is not discoverable. According to OCC, there is overwhelming precedent that supports its position, the parties have a valid common interest, and public policy encourages the broad application of the common interest doctrine. On October 1, 2014, Duke filed a reply to OCC's memorandum contra Duke's September 23, 2014 motion to compel.

By Entry issued October 20, 2014, the attorney examiner, inter alia, granted Duke's motion to compel OCC to provide the documents to the extent the documents requested do not include information reflecting the parties to the JDA's legal strategies in these cases. Accordingly, by noon on Tuesday, October 21, 2014, OCC was required to provide Duke with responses to the discovery requests. In the event OCC claims that some of the documents that are responsive to Duke's discovery request are protected under the agreement because they reflect the signatory parties' legal strategies in these cases, OCC was to provide Duke and the attorney examiner with a privilege log of the information withheld. In addition, OCC was to provide the attorney examiner with the withheld information for an in camera review of the documents.

On October 21, 2014, OCC provided Duke with redacted documents and provided the attorney examiner with the withheld information for the in camera review, as required by the October 20, 2014 ruling (Tr. I at 46). At the hearing on October 22, 2014, OCC argued the redacted information subject to the privilege log reveals legal strategy and, therefore, should be subject to the common interest privilege (Tr. I at 47).

After review of the information provided in the privilege log and consideration of the arguments made by OCC, at the hearing on October 22, 2014, without ruling on the merits of the arguments made by Duke and OCC, the attorney examiner stated that, while at one point in time the information redacted by OCC may very well have been information the parties were discussing regarding how to move forward with a specific pleading, that information is already in the open record. Furthermore, the attorney examiner found that, given this specific situation where the disputed information is

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already in the open record, there is no need to protect the information, therefore, the information should be turned over to Duke. However, the attorney examiner emphasized that this ruling should not be construed to set any precedent for future proceedings as it is based strictly on the facts of this situation and the information reviewed in these cases. (Tr. I at 47-48.)

Ohio Adm.Code 4901-1-15 provides that any party who is adversely affected may take an immediate interlocutory appeal to the Commission from any oral ruling that grants a motion to compel discovery or denies a motion for a protective order. Any party wishing to take an interlocutory appeal must file the appeal within five days after the ruling is issued.

On October 27, 2014, OCC filed an interlocutory appeal of the attorney examiner's oral ruling at the evidentiary hearing on October 22, 2014. In support of the appeal, OCC asserts it is in the interest of preserving the benefits of JDAs for facilitating consensus-building among parties with like interests and for the efficiencies inherent in joint legal work. According to OCC, the ruling can be interpreted to require OCC to provide discovery documents that are privileged from disclosure under attorney-client and/or trial preparation privilege. OCC maintains reversal of the ruling is necessary to prevent severe prejudice to OCC and others. OCC explains: the attorney-client privilege protects against disclosure of communications between attorney and client; the work-product privilege protects attorneys' work; and the common interest doctrine is an extension of the attorney-client and work product privileges, and permits parties and their counsel to share privileged information without waiving the privileges. In addition, OCC contends the joint defense privilege is an extension of the attorney-client privilege and the attorney work-product privilege. OCC argues the JDA, which was entered into between OCC, OMA, and OPAE, protects the documents at issue in this pleading. To assert the joint defense privilege, a party must show that the information was shared in the course of a joint defense effort, the information was designed to further the efforts, and the privilege has not been waived. OCC offers that the information at issue is numerous emails exchanged by counsel and parties subject to the JDA regarding the filing of a motion to reject Duke's ESP, and regarding the counsels' impression of Duke's motivation and leverage in this litigation. Therefore, the emails consist of attorney opinion work product and attorney-client communications designed to further the parties' efforts pursuant to the JDA and are privileged. Moreover, OCC notes that it has not waived the applicable privileges. OEG, OMA, IEU, and RESA filed letters in support of OCC's interlocutory appeal.

On October 29, 2014, OPAE filed a memorandum contra OCC's appeal, stating that its interests were not explicitly addressed in OCC's appeal filed on October 27, 2014, and requesting the Commission overturn the attorney examiner's ruling. Duke filed a reply to

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OPAE's filing stating that, having missed the time for the filing of an interlocutory appeal, OPAE now decides to file a "memorandum contra" that purports to oppose Duke's application for an ESP. Duke submits OPAE exaggerates the attorney examiner's ruling and ignores the attorney examiner's clear directives, as the ruling did not order the discovery of all confidential email communications and does not threaten future collaboration between intervenors. Therefore, Duke asserts OPAE's memorandum contra is barred by the time frames for the filing of an interlocutory appeal and should be dismissed. Upon review of OPAE's filing, it is evident by its wording that OPAE's intent was to essentially file its own interlocutory appeal; however, since it was past the time for the filing of an interlocutory appeal, OPAE termed it a "memorandum contra." Such a pretense is not appropriate and, therefore, the Commission finds that OPAE's memorandum contra should not be considered in our determination of this interlocutory appeal issue.

In its memorandum contra OCC's interlocutory appeal, Duke points out that, despite the attorney examiner's explicit disclaimer of any precedential authority, OCC expresses concern over the impact of the ruling on parties practicing before the Commission. In addition, Duke maintains the joint defense and common interest doctrine privileges do not apply where the confidential information has already been disclosed in public filings. Moreover, Duke asserts that, even if the privileges do attach, they have been waived by communications with counsel outside the purported joint defense group, noting that, among the redacted documents are communications with counsel for IGS, AEP, and Kroger, none of which are signatory parties to the JDA. Therefore, Duke argues the attorney examiner's ruling should be undisturbed because the ruling does not allow Duke to discover any information protected from disclosure that has not already been disclosed.

Initially, the Commission notes that a review of the record in these cases reflects a propensity of the parties to litigate procedural issues, including this issue. The Commission disagrees that there is any harm in the release of the information that is the subject of this interlocutory appeal. Despite the fact that, as noted by the attorney examiner and, in fact, admitted by OCC, the information is contained in the open record in these cases, we will still allow the information to remain under seal. However, this determination should in no way be a reflection on whether or not we agree or disagree with the arguments raised by OCC or Duke on this issue. Rather, in light of the fact that the record is closed in these matters, we are declining to rule on the merits of the parties' arguments.

2. Motions for Protective Order

At the hearing held in these matters, the attorney examiner granted the motions for protective treatment of certain information presented on the record in these dockets in the

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following documents: Duke Exs. 16A-17A, 21A; OCC Exs. 4A-5A, 7A-8A, 10A-27A, 29A-31A, 39A, 41A, 43A-44A; OEG Ex. 1A; IGS Exs. 4A, 7A-8A, 12A; Sierra Ex. 4A; and OMA Exs. 3A-8A. In addition, the attorney examiner granted the motions for protective treatment of portions of the following transcripts that contained testimony referencing confidential information: III, V-VII, IX-XII, and XV. Finally, on December 15, 2014, IGS, OCC, and Sierra filed briefs under seal, and IGS and Sierra filed motions for protective order.

In reviewing the briefs filed in these cases, it is evident IGS and Sierra did not have the opportunity to collaborate with Duke prior to the filing of the briefs to ensure that only the information granted confidentiality at the hearing would be kept under seal in the briefs. Thus, at this time, the Commission finds that Duke should review the unredacted versions of the briefs filed by IGS and Sierra and provide each of those parties with a revised redacted version that is consistent with the rulings on confidentiality in these cases. Duke should conduct such a review and provide those parties with the revised redacted versions by April 15, 2015. Upon receipt of the revised redacted versions of their briefs, IGS and Sierra shall file the revised redacted versions in these dockets by April 20, 2015.

Upon consideration, the Commission finds that the briefs filed by IGS, Sierra, and OCC should be afforded protective treatment and the attorney examiners' rulings with regard to the motions for protective order for portions of the exhibits and transcripts are affirmed. Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24 months from the date of this Order or until April 3, 2017. Until that date, the docketing division should maintain, under seal, the information filed confidentially. Any party wishing to extend the protective order must file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to the parties.

3. Disclosure of OVEC Entities

On brief, OCC asserts the attorney examiner erred by preventing disclosure of the identities of entities seeking to transfer their Ohio Valley Electric Corporation (OVEC) generation assets and the entities that denied consent to them, as well as the identities of the entities' representatives communicating regarding such requests. Specifically, OCC points to the attorney examiner's ruling concerning testimony provided by witnesses Brodt and Whitlock, who were called as-on-cross by OCC, and OCC Exs. 10-21, 27, and 44. (OCC Br. at 119-120; Tr. IX at 2528, 2541.) OCC argues that, under R.C. 4905.07 and 4901.12, the information should be open to inspection by interested parties and their attorneys and the documents are public records. OCC notes the Ohio public records laws

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are to be supported by a strong presumption in favor of disclosure. *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 597 N.E.2d 147 (1992). OCC continues that Ohio Adm.Code 4901-1-24(D)(1) limits redactions for confidentiality to only information that is essential to prevent disclosure of information that is alleged confidential. However, according to OCC, the attorney examiner unreasonably and unlawfully granted Duke's request to protect the identities of those sponsoring companies and their representatives as confidential trade secret information. OCC points to R.C. 1333.61(D) for the definition of a trade secret, noting the six-factor test used by the Commission in its consideration of this definition. *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997). OCC argues there is no evidence that the information has economic value or otherwise warrants protection as a trade secret. According to OCC, a complete public record on whether Duke made good faith efforts to transfer its OVEC interest is important to consideration of the merits of Duke's proposed Price Stabilization Rider (PSR). Therefore, OCC asserts the Commission should reverse the attorney examiner's ruling. (OCC Br. at 121-123.)

The Commission finds OCC's argument to be without merit. Initially, we note the ruling objected to by OCC occurred on the tenth day of hearing in these cases. We are confident that, by this point in the proceedings, the attorney examiner was vastly familiar with the evidentiary record and was ensuring that only minimal information that warranted protective treatment was consistently treated as such. Attorney examiners have discretion in determining, in keeping with the statute and the rules, whether information should be treated as confidential. In this situation, the attorney examiner rendered the ruling based on the facts and record in these cases, and the Commission is not going to second guess the ruling at this juncture. Accordingly, OCC's request should be denied.

4. Rebuttal Testimony

On brief, OCC argues the attorney examiner erred by allowing Duke to present witnesses on rebuttal. Specifically, OCC asserts Duke witness Morin's testimony (Duke Ex. 40), testifying to return on equity (ROE), while presented on rebuttal, was essentially presenting direct testimony. (OCC Br. at 123-124.) At the hearing, OCC's motion to strike portions of Dr. Morin's testimony as improper rebuttal testimony was denied; therefore, OCC asserts the Commission should reverse the attorney examiner's ruling (OCC Br. at 124; Tr. XVI at 4199-4205). If the testimony is permitted in the record, OCC argues it should be accorded little weight, given that it was essentially direct testimony and OCC was precluded from properly reviewing it since it was presented on rebuttal. In support of its request, OCC asserts that, since Duke has the burden of proof regarding the rate or return, the testimony should have been part of its direct case. Instead, OCC believes Duke incorrectly assumed that the rate of return from its most recent electric distribution case, *In re Duke Energy Ohio, Inc.*, Case No. 12-1682-EL-AIR, et al., Opinion and Order (May 1, 2013) (*Distribution Rate Case*), was the starting point for the rate of return. However, OCC

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notes the rate of return in the *Distribution Rate Case* was part of a stipulation and, by the terms of that stipulation, it was not to be used as precedent in future proceedings. OCC asserts the Commission should protect the integrity of the settlement process by determining Duke improperly relied on the rate of return in the *Distribution Rate Case*. According to OCC, the rate of return should be modified to reflect the lower business risk faced by Duke. (OCC Br. at 124-126.)

In response, Duke asserts the attorney examiner did not err in admitting Dr. Morin's testimony. Duke notes that, unlike traditional base rate cases, the statutory requirements for an ESP application do not require, as part of the initial application, an entire rate of return analysis. R.C. 4928.143(B)(2)(h) sets forth what the Commission must find in approving a distribution rider, i.e., reliability, alignment of expectations, and sufficient dedication of resources. That subsection authorizes the Commission to approve a just and reasonable ROE and the Commission's rule, Ohio Adm.Code 4901:1-35-03(C)(9)(g), does not identify additional requirements as to an ROE that must be included in an ESP application. According to Duke, it supported its proposed ROE with reference to the ROE approved in the *Distribution Rate Case*. However, Duke asserts OCC's opposition to the proposed ROE offered no calculation of the ROE, other than to say that it must be lower. On rebuttal, Duke believes it confirmed the ROE proposed is reasonable and believes OCC is now contesting Duke's rebuttal testimony because OCC recognizes this. According to Duke, rebuttal testimony is within the discretion of the attorney examiner and is permissible for purposes of contradicting the opponent's evidence. *In re Bell Atlantic Corp., et al.*, Case No. 98-1398-TP-AMT, Entry (July 16, 1999). OCC offered evidence to contradict Duke's evidence, claiming that, had the *Distribution Capital Investment Rider (Rider DCI)* been offered in the last base rate case, it would have yielded a lower ROE. Therefore, Duke is permitted to refute this allegation through rebuttal testimony. (Duke Reply Br. at 107-108.)

Upon consideration of OCC's request and Duke's response, the Commission finds the request to be without merit. There is no certain rule as to when rebuttal testimony may or may not be presented. Rather, it depends on the circumstances in a given proceeding. As pointed out by Duke, it is within the discretion of the attorney examiner whether rebuttal testimony is appropriate in a given case. The Commission finds no error in the attorney examiner's ruling in this situation and, therefore, OCC's request should be denied.

II. DISCUSSION

A. Applicable Law

R.C. Chapter 4928 provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable,

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and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing Duke's application, the Commission is cognizant of the challenges facing Ohioans and the electric industry and is guided by the policies of the state as established by the General Assembly in R.C. 4928.02, as amended by Amended Substitute Senate Bill 221 (SB 221).

In addition, SB 221 enacted R.C. 4928.141, which provides that, beginning on January 1, 2009, electric distribution utilities (EDUs) must provide consumers with an SSO, consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the EDU's default service. R.C. 4928.143 sets out the requirements for an ESP. Pursuant to R.C. 4928.143(B)(1), an ESP must include provisions relating to the supply and pricing of generation service. The ESP, according to R.C. 4928.143(B)(2), may also provide for the automatic recovery of certain costs, a reasonable allowance for certain construction work in progress, an unavoidable surcharge for the cost of certain new generation facilities, charges relating to certain subjects that have the effect of stabilizing or providing certainty regarding retail electric service, automatic increases or decreases in components of the SSO price, provisions to allow securitization of any phase-in of the SSO price, provisions relating to transmission-related costs, provisions related to distribution service, and provisions regarding economic development. R.C. 4928.143(C)(1) provides that the Commission is required to approve, or modify and approve, the ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

In accordance with R.C. 4928.06 and 4928.141, the Commission promulgated rules, which are contained in Ohio Adm.Code Chapter 4901:1-35, for the purpose of considering SSO filings made by EDUs in conformance with R.C. Chapter 4928.

B. Summary of the Local Public Hearings

Four local public hearings were held to allow Duke's customers to have the opportunity to express their opinions regarding the issues in these proceedings. Two evening hearings and an afternoon hearing were held in Cincinnati and another evening hearing was held in Middletown. At these hearings, public testimony was heard from individuals on behalf of Sierra, Ohio Citizens Actions, Ohio Aggregate and Industrial Minerals Association, and Public Citizens Energy and Climate Program. Numerous individual consumers from Duke's service territory also gave testimony. In addition to the public testimony, many customers filed letters expressing their concerns regarding the Company's proposal. A majority of the testimony and letters were in opposition to Duke's proposed ESP, in particular the proposed PSR. Several small businesses and trade groups gave their support for Duke's proposal to terminate the Load Factor Adjustment Rider (Rider LFA).

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C. Analysis of the Application

As discussed in further detail below, Duke proposes a three-year term for this ESP, beginning June 1, 2015, to May 31, 2018. Duke explains that the ESP extends certain components of the *ESP 2 Case*, either eliminates or refines other elements, and adds new provisions for enhancing Duke's distribution reliability. Duke will rely upon a competitive bidding process (CBP) plan for procuring the supply necessary to serve the SSO load. (Duke Ex. 6 at 3.)

1. Price Stabilization Rider

(a) Duke

Duke proposes a nonbypassable PSR that would extend beyond the term of the proposed ESP, such that the term for the PSR would correspond with the period during which Duke receives energy and capacity under the Inter-Company Power Agreement (ICPA) with the OVEC, June 30, 2040 (IEU Ex. 5; Duke Ex. 1 at 14; Duke Ex. 6 at 11, 13; OCC Ex. 43 at 3). Through the PSR, Duke will provide customers the net benefit of all revenues accruing to the Company as a result of its ownership interest and contractual entitlement in OVEC, less all costs associated with the entitlement. In addition, Duke proposes additional contractual arrangements could be included in the PSR to increase the benefits available to customers. (Duke Ex. 1 at 13; Duke Ex. 6 at 11.)

Duke, along with 12 other entities (sponsoring companies), owns stock in OVEC; Duke's share is currently 9 percent. OVEC and its wholly-owned subsidiary, Indiana Kentucky Electric Corporation (IKEC), were created in the 1950s to provide power for uranium enrichment facilities located near Portsmouth, Ohio. OVEC owns two coal-fired generating units that have a combined nameplate capacity of nearly 2,000 megawatts (MW). (Duke Ex. 6 at 10-11; Duke Br. at 23.) OVEC has 11 coal-fired generating stations, five at Kyger Creek (Kyger), in Cheshire, Ohio, and six at Clifty Creek (Clifty), near Madison, Indiana (Staff Ex. 1 at 4; OEG Ex. 1 at 12). Until 2003, when the Department of Energy (DOE) canceled the contract, DOE was the primary consumer of the power from OVEC (Duke Ex. 6 at 11). Each sponsoring company now receives its entire portion of OVEC capacity and generation for its own supply portfolio, and the fixed and variable costs associated with Clifty and Kyger are allocated to the sponsoring companies based on their respective equity interests (OEG Ex. 1 at 12; Duke Ex. 6 at 11). Duke is entitled to capacity from the OVEC-owned generating stations commensurate with its contractual entitlement, or approximately 200 MW. Duke is also entitled to a share of the energy produced by the OVEC-owned stations, although it is not obligated to take energy. However, if it does not take energy, Duke must pay OVEC's variable cost of producing energy. (Duke Br. at 23.)

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Duke seeks approval of the PSR, under R.C. 4928.143(B)(2)(d), which allows an ESP to include terms, conditions, and charges relating to, among other things, bypassability, as would have the effect of stabilizing or providing certainty regarding retail electric service. Duke states the PSR is intended to mitigate anticipated, yet undefined, volatility in the wholesale market. Duke offers the PSR meets the three specific criteria recognized by the Commission in assessing adherence to R.C. 4928.143. First, the PSR involves a term, condition, or charge by providing all customers the net benefits of Duke's OVEC entitlement. Second, the rider concerns the issue of bypassability delineated in the statute, as the corollary to bypassability is nonbypassability. Therefore, according to Duke, a term, condition, or charge relating to a nonbypassable rider is properly included in an ESP. Third, the PSR would have the effect of stabilizing or providing certainty regarding retail electric service. (Duke Br. at 18-19.) According to Duke, 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 (Duke Br. at 24).

Duke states that, to ensure a fully-competitive auction process for SSO supply, it proposes that the energy, capacity, and ancillary service to which it is currently entitled from OVEC not be used for such supply obligations; rather, Duke proposes to sell 100 percent of its share into the market (Duke Ex. 1 at 13; Duke Ex. 6 at 11). The difference between the revenue generated from such sales and the costs allocated from OVEC to Duke will be flowed through to customers (Duke Ex. 6 at 12). According to Duke witness Henning, in a rising price environment, Duke's margins from its contractual entitlement will be positive and the net amount passed through the PSR should similarly increase (Duke Ex. 2 at 10).

Duke contends the PSR provides three primary benefits. First, it will act as a hedge to mitigate some of the volatility in overall rates that customers pay for generation service, because the amounts flowing through the rider will reflect market conditions. Thus, in a rising market price environment, when the margins from Duke's contractual entitlement from OVEC are positive, the net rider amount should increase to the benefit of customers. Duke asserts this will temper the volatility of generation rates, thereby adding stability and certainty with regard to the overall price of retail electric service. In order to enable customers to benefit from those periods of increasing market volatility, Duke proposes that the term of the PSR extend beyond the term of this ESP. (Duke Ex. 1 at 13-14; Duke Ex. 6 at 13-14.) Duke explains the costs for its share of OVEC are relatively stable as it is allocated a share of fixed costs, which are generally stable, and variable costs, which are mostly fuel (Duke Ex. 6 at 14). Second, Duke submits the proposal is competitively neutral, because Duke's entitlement share will continue to be sold into the wholesale markets and the proposal will not impact the competitive retail electric service (CRES)

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market (Duke Ex. 6 at 15; Duke Br. at 19). According to Duke, its proposal will not interfere with CRES providers' ability to compete for customers, as the nonbypassable PSR will neither reward nor penalize customers' decisions regarding choice (Duke Ex. 1 at 13). As for the wholesale market, as of the effective date of the ESP, Duke will not have generation business; therefore, there cannot be any subsidy between its noncompetitive electric business and its generation business. Finally, Duke notes the benefit to Ohio of having the reliable power available from the OVEC generating assets. (Duke Ex. 6 at 15.)

Duke witness Henning opines that retail customers are significantly influenced by current wholesale market design fundamentals for energy and capacity, which are creating a volatile and uncertain environment, as the PJM Interconnection, LLC (PJM) market design does not place any additional value on resource diversity. In addition, 24,932 MW of capacity in the PJM zone is expected to retire between 2011 and 2019; 92 percent will occur by June 1, 2015, with the overwhelming majority being coal plants. According to the witness, retirement of these coal plants places greater reliance on a single fuel source, such as natural gas-fired generation, and this reduction in fuel diversity will most likely lead to more episodes of the volatility and uncertainty experienced with the polar vortex in January 2014 (2014 polar vortex). Duke notes that, in response to the energy supply vulnerabilities exposed by the cold period in January 2014, PJM is proposing to implement a capacity performance initiative that is likely to lead to increased wholesale capacity prices. Mr. Henning submits that repeating an event like the 2014 polar vortex without all the retiring coal generating capacity undeniably increases volatility in both energy and capacity. This volatility will have an effect on the retail level, as prospective wholesale suppliers could incorporate risk premiums into their bids and CRES providers will likely structure contracts so they can recover additional costs. (Duke Ex. 2 at 4, 9; Duke Br. at 21-22.) Without a change, Mr. Henning submits all stakeholders should expect to incur increasing costs and experience volatility for generation supply (Duke Ex. 2 at 5). Moreover, Duke states there are legal proceedings pending at the Federal Energy Regulatory Commission (FERC), referring to FERC Order No. 745, that further confirm the volatile and uncertain nature of the wholesale market (Duke Br. at 22; Tr. VI at 1696, 1698-1699). In response to these challenges, Mr. Henning states Duke is proposing to provide an ESP that strikes the appropriate balance between customers, investors, competitive suppliers, and the state of Ohio. According to Mr. Henning, Duke's proposal mitigates some of the volatility in overall rates customers pay for generation and it could be extended to include similar financial arrangements with other generators to provide further protection for customers. (Duke Ex. 2 at 5, 10; Duke Br. at 24.)

Duke maintains its proposal does not contravene the Commission's objective to transition Ohio to a competitive retail market construct. Duke offers that none of Duke's share of OVEC's capacity and energy will be used to displace any SSO service and no physical capacity or energy from OVEC will be delivered to any retail customer; therefore,

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there will be no double recovery. Duke will collect no revenue from any retail customer for generation service except for generation service provided by SSO auction winners. Thus, all of the revenue collected for generation service provided by SSO auction winners will be passed through to those suppliers. (Duke Ex. 6 at 12.)

With regard to extending the PSR beyond the term of the ESP, Duke points to its Alternative Energy Resource Rider (Rider AER-R) approved in the *ESP 2 Case* as an example of a rider the Commission authorized to continue beyond the term of the ESP so that customers could benefit from the stability afforded by the rider during an uncertain and challenging time (Duke Ex. 2 at 11). Staff and GCHC respond that the Rider AER-R is distinguishable from the PSR, because Rider AER-R is bypassable and is intended to only recover costs that occurred during the term of the plan approved in the *ESP 2 Case*. However, the PSR would be nonbypassable and would, if the OVEC projections are accurate, potentially recover costs beyond the term of the proposed ESP. (Staff Br. at 24; Staff Reply Br. at 12; GCHC Br. at 9; Tr. I at 263-264.)

Duke proposes to file, on a quarterly basis, a projection of the revenue expected from selling its share of the OVEC output into the PJM markets and the expenses it expects to be billed from OVEC. The difference between the expected revenue and the expected cost for the upcoming quarter will be divided by the projected kilowatt hour (kWh) sales for the same quarter to calculate the per kWh rate. Duke notes that customers taking service above distribution voltage levels will have slightly lower prices to account for the lower line losses at their service level. As actual data is available, Duke will true-up the rider to ensure there is no over- or under-recovery. (Duke Ex. 6 at 16.)

(b) Intervenors and Staff

(i) OEG's Position

Other than Duke, no party in these cases supports the PSR as filed. Staff and the intervenors, with the exception of OEG, argue the PSR violates Ohio and federal law, is an improper cross-subsidy, and is unsupported by the evidence and should be rejected (Staff Ex. 1 at 10; Kroger Ex. 1 at 4; OCC Ex. 43 at 13; IGS Ex. 12 at 3; Wal-Mart Ex. 1 at 3; Sierra Ex. 4 at 3; Direct Energy Ex. 1 at 5; IEU Br. at 2; OMA Br. at 17; OEC Br. at 4; OPAE Br. at 16; Sierra Br. at 4; Wal-Mart Br. at 8; Direct Energy Br. at 13; GCHC Reply Br. at 4). While OEG finds merit with the PSR, Exelon points out that even OEG would revamp the rider in such significant ways that it is practically a different proposed rider (Exelon Reply Br. at 2).

OEG supports the concept of the PSR, with certain modifications, stating that it represents a financial limitation on customer shopping that would have the effect of stabilization or providing certainty regarding retail electric service rates for customers,

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consistent with R.C. 4928.143(B)(2)(d) (OEG Ex. 1 at 4; OEG Br. at 1, 5). OEG offers that the PSR would result in all customers paying a price for retail electric generation that is approximately 3 percent cost-based from OVEC and 97 percent market-based from the FERC-regulated PJM wholesale market. OEG submits that the financial impact of the PSR will not be significant, noting that Duke projects the PSR will be a charge for the first three years and then a credit to customers in 2019 through 2024. (OEG Ex. 1 at AST-2; OEG Br. at 2, 6.) The average annual cost of the charge in the first three years is only \$7.33 million, which is about a \$0.30 per month charge for the typical 1,000 kWh per month residential household (OEG Br. at 2; Tr. XI at 3114).

OEG notes, in accordance with Duke's forecast analysis from January 2014 (Duke OVEC analysis), OVEC's combined demand and energy costs are expected to be above market prices in the next several years; therefore, the OVEC net benefits are expected to be negative, i.e., market prices will be less than OVEC costs, in 2015 through 2018, but positive in 2019 and in all years thereafter (OEG Ex. 1 at 15, Att. AST-2). However, OEG thinks the Duke OVEC analysis of the benefits is conservative, especially in light of the fact that it was developed before the full impact of the 2014 polar vortex. Given the amount of capacity being retired in PJM, OEG believes there will be upward pressure on capacity prices that will increase the net benefits of the hedge beyond Duke's forecast. (OEG Ex. 1 at 16-17.) According to OEG, based on the Duke OVEC analysis, the expected OVEC net benefits over the 8.5 years from June 2015 through the end of 2023, would be approximately negative \$6 million or negative \$627,000 per year (OEG Ex 1 at 18, 20, Atts. AST-2, AST-3). OEG believes OVEC's generation represents a stable source of power from facilities that have recently been upgraded with pollution control equipment that allows them to comply with the upcoming standards. In addition, there are no significant capital expenditures expected over the next decade, the forecast of demand charges is relatively flat, the cost of coal is likely to be stable, and the coal plant retirements will put upward pressure on the capacity and energy market prices, so OVEC's all-in generation costs are likely to be at or below market prices in the near future. (OEG Ex. 1 at 13; OEG Br. at 8.)

OEG believes that, while the current costs of the OVEC power supplies are greater than the market benefits of the supplies, such is likely to change because a significant amount of coal-fired generation in the PJM system is retiring and market supplies for energy and capacity are tightening; thus, driving up market prices and increasing the benefits with the OVEC generation. Also, given that a portion of the OVEC assets is a fixed cost and the remainder is based on low-cost coal at a relatively fixed price, the OVEC generation is likely to provide countercyclical benefits. Thus, as energy market prices rise, either because of severe weather conditions or generating capacity scarcity, the OVEC plants will be dispatched more and their all-in \$/megawatt hour (MWh) price of generation will decline. OEG submits customers with a balanced, blended portfolio of market purchases and OVEC generation would experience offsetting influences that

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would stabilize their electricity prices and help weather economic storms. OEG believes that, while marginal cost or spot energy markets can be a valuable component of a supply portfolio of a utility or end user, state-regulated hedging products or fixed-cost supplies should be part of the portfolio as well. (OEG Ex. 1 at 4-5, 7.)

OEG explains the PSR, with OEG's proposed modifications, does not change the physical amount for energy or capacity a shopping customer must buy or the amount of energy or capacity that must be supplied in the SSO auctions for nonshopping customers (OEG Ex. 1 at 6). According to OEG, the PSR should have no effect on CRES providers and it would provide rate stabilization benefits for Duke's customers, while having no adverse effect on the market (OEG Ex. 1 at 15). The PSR would also be neutral in terms of wholesale competition, as no wholesale supplier will benefit or be harmed (OEG Br. at 6). First, OEG recommends the rider be established as a noncancellable rider that should be formally instituted for a reasonable period of time, i.e., start in June 2015 and continue to the end of 2024, or for 9.5 years. OEG espouses the rider should be locked because, if customers are going to be exposed to the early years of negative benefits, they should be assured of the opportunity to benefit from the expected positive benefits in future years. OEG argues going too far into the future may expose Duke's customers to unknown risks, e.g., decommissioning costs, and environmental compliance costs. (OEG Ex. 1 at 5, 16, 18-19; OEG Br. at 14-15.)

Next, OEG suggests a levelization approach that would flatten the PSR and remove what is otherwise likely to be a front-loaded cost to customers under the current plan. OEG believes this approach would advance the long-term benefits and bring the rider closer to a market-neutral hedge in all years. (OEG Ex. 1 at 5; OEG Br. at 15.) With this approach, Duke would advance future savings to customers in the current year; thus, there would be a regulatory balancing account included in the arithmetic of the rider whereby Duke would be made financially whole by earning its weighted average cost of capital on the cumulative balance on the account. This approach is revenue-neutral to Duke. Under this approach, the combination of the levelized return and the levelized net benefits would yield an initial PSR of \$1.593 million per year. The first year would be adjusted for the 2015 partial year and for a 10 percent participation rate, which OEG recommends be allocated to Duke's shareholders as an incentive to keep costs low. (OEG Ex. 1 at 6, 19-21.) At the end of each quarter, there would be two true-up components, i.e., the three-year amortized differences and the true-up return would be added to the original levelized PSR (OEG Ex. 1 at 20-21, Att. AST-3). Exelon disagrees with OEG's levelization proposal, stating that, while the short-term losses may prove to be accurate or even understated, the long-term profits may never arrive. Thus, this approach could end up being a subsidy by future distribution service customers for today's customers' capacity costs. Moreover, Exelon submits it is questionable whether R.C. 4928.02, which

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prohibits subsidies between wire services and generation service, permits such a scheme. (Exelon Reply Br. at 8.)

In addition, OEG asserts that any customer with more than 10 MW of load per single site should be given the chance to self-insure and not participate in the hedge. This would be a one-time election and such customers would either be in or out of the hedge for the entire 9.5 years. The percent of load for customers who choose not to participate would be added to Duke's shareholders' 10 percent. (OEG Ex. 1 at 22; OEG Br. at 15.) In response Miami/UC state that, since they own their own generation, they are already hedged for future capacity costs and do not need to take ownership of the OVEC units; therefore, they request the PSR be rejected. However, if it is not, Miami/UC propose that either the few customers with large-scale generation be allowed to bypass the PSR or OEG's exemption for 10 MW or greater customers be accepted. (Miami/UC Br. at 6-7.) Exelon agrees the PSR should be bypassable for all customers and not just customers with 10 MW of demand (Exelon Reply Br. at 8). OCC submits residential customers should have the same right to choose the best position between regulation and market that the large industrial customers would have (OCC Reply Br. at 13).

RESA, Staff, and OCC insist OEG's proposals be rejected (RESA Br. at 20; Staff Reply Br. at 15; OCC Reply Br. at 13). RESA states OEG's proposals: do not comport with R.C. 4928.143(B)(1), as they do not contain a provision to test the ESP; will force all customers, except those OEG members that opt out, to pay Duke's generation costs; and force customers who cannot opt out to pay for OVEC generation for significantly longer than Duke is proposing (RESA Br. at 20). OCC argues extending the PSR through 2024 would: subject customers to years of unlawful charges; be inconsistent with the term of the proposed ESP; be contrary to the requirement in R.C. 4928.143 that any provision not exceed the term of the ESP; and exacerbate the risk and harm to customers. OCC points out OEG witness Taylor did not prepare an independent analysis of OVEC costs or revenues, or review Duke's workpapers until after the filing of his testimony and deposition, and his opinions were not informed by the depositions or testimony pertaining to the Duke OVEC analysis. (OCC Reply Br. at 11-12; Tr. VII at 1943-1946.) IEU disagrees with OEG's claim the PSR is a limitation on shopping, as authorized under R.C. 4928.143(B)(2)(d), noting OEG failed to demonstrate how the rider would operate as such and Duke stated the PSR would not affect shopping (IEU Reply Br. at 20; OEG Br. at 5; Duke Ex. 6 at 12).

Duke asserts the flaw in OEG's proposal for Duke to retain 10 percent of the PSR is that it cannot be achieved because Duke does not control OVEC or the costs it incurs. In addition, Duke points out the PSR is structured as a long-term hedge to June 2040, where the commitment is reciprocal and Duke is committing to its customers the net benefits. Thus, OEG's shorter 9.5 year firm termination date does not work. OEG's levelized

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proposal conflicts with the purpose of the PSR, according to Duke, as OEG's proposal would not allow the credit to flow back to customers when retail generation prices are rising. Finally, OEG's proposal to exempt certain customers would be contrary to the intent of the rider, which is to apply it to all customers to eliminate any impact on competition. (Duke Reply Br. at 68-69.)

(ii) R.C. 4928.141 and 4928.143

Wal-Mart argues the PSR should be rejected because there has been no showing by Duke that the provision is "necessary to maintain essential electric service to consumers****," as required for SSOs under R.C. 4928.141(A) (Wal-Mart Br. at 8). Moreover, Wal-Mart, IEU, OEC, and Sierra assert the PSR does not relate to the supply and pricing of electric generation service, under R.C. 4928.143(B)(1); because it is not an offer of electric generation service (Wal-Mart Br. at 8; OEC Br. at 4; IEU Br. at 7; Sierra Br. at 20; Duke Ex. 6 at 12). Furthermore, Cincinnati asserts neither R.C. 4928.141 nor 4928.143 contains any provisions that would authorize the PSR, as it has no relationship with either generation or distribution service (Cincinnati Br. at 7).

IGS explains Duke's argument is that the PSR meets the three criteria of R.C. 4928.143(B)(2)(d) because: it is a term or charge; it relates to bypassability since it is a nonbypassable charge; and it stabilizes retail electric rates. While the PSR meets the first criterion as a term or a charge, IGS submits it does not meet the second criterion regarding bypassability. IGS submits R.C. 4928.143 includes two provisions, (B)(2)(b) and (c), that authorize generation-related nonbypassable charges in an ESP under certain circumstances. IGS argues inclusion of a nonbypassable charge under (B)(2)(b) and (c) implies exclusion under (B)(2)(d). Citing *Montgomery Co. Bd. of Commr.'s v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 175, 503 N.E.2d 167 (1986). On the third criterion, IGS submits the PSR does not provide stability or certainty with respect to retail electric service, pointing out Duke has not demonstrated the PSR relates to retail electric service, as the PSR involves Duke's interest in a wholesale purchased power agreement (PPA). Even assuming the PSR relates to retail electric service, IGS maintains it does not provide stability or certainty. IGS points out customers do not purchase energy on an hourly basis in the wholesale energy markets; rather, they have long-term fixed price contracts, pursuant to which CRES providers can hedge customers' usage requirements. IGS asserts the PSR inserts uncertainty and volatility into customers' bills, since there is no way of knowing if it will be a charge or credit, and it will undermine the stability and certainty CRES providers already give their customers through fixed-price contracts. (IGS Reply Br. at 7, 9-10.) IEU, Staff, and Sierra agree Duke failed to demonstrate that the PSR will have the effect of providing stability or certainty in the provision of retail electric service as required under R.C. 4928.143(B)(2)(d) (IEU Reply Br. at 6; Staff Reply Brief at 7; Sierra Reply Br. at 3). Sierra advocates the Commission follow precedent and find that R.C. 4928.143(B)(2)(d) permits approval of a hedge mechanism only where the proposal

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provides for fixed rates or allows recovery of fixed costs. *Citing In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, et al. (*AEP ESP 2 Case*), Entry on Rehearing (Jan. 30, 2013) at 16. (Sierra Reply Br. at 5.)

R.C. 4928.143(B)(2) identifies nine provisions of an ESP that may be authorized and, according to IEU and OEC, the PSR is not authorized under any of these provisions (IEU Br. at 8-12; OEC Br. at 4-5). ELPC agrees Duke has failed to demonstrate that the PSR fits into one of the categories in R.C. 4928.143(B)(2), noting that Duke's reliance on section (B)(2)(d) is misplaced because the PSR does not limit customer shopping, does not relate to bypassability, and has no relation to retail electric service (ELPC Br. at 2, 10-13; Tr. II at 429-430). In addition, Wal-Mart notes that financial hedging arrangements do not fall within one of the nine allowable categories of ESP provisions set forth in R.C. 4928.143(B)(2) (Wal-Mart Br. at 9). For example, Kroger states that R.C. 4928.143(B)(2)(a) provides that an ESP may include the cost of purchase power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate. However, Duke proposes that the energy, capacity, and ancillary service to which it is entitled from its contractual rights in OVEC not be used for such supply obligations; instead, Duke proposes to sell such services associated with the OVEC contract into the market. (Kroger Br. at 8-9.) Staff, OMA, and OCC emphasize the PSR does not relate to default service (Staff Reply Br. at 5; OMA Br. at 19; OCC Br. at 8-10).

OPAE calls Duke's assertion that R.C. 4928.143(B)(2)(d) applies because the PSR is a nonbypassable rider absurd, noting that all utility charges are either bypassable or nonbypassable (OPAE Reply Br. at 7). Kroger states, and Staff agrees, Duke's suggestion that the PSR would be proper whether it is bypassable or nonbypassable, as both relate to bypassability under R.C. 4928.143(B)(2)(d), renders the term bypassability meaningless (Kroger Reply Br. at 5; Staff Reply Br. at 3). The Ohio Supreme Court has stated that a cardinal rule of statutory construction requires that a statute should not be interpreted to yield a result that is absurd. *Citing Mishr v. Poland Bd. of Zoning Appeals*, 76 Ohio St.3d 238, 240, 667 N.E.2d 365, 367 (1996); *Canton v. Imperial Bowling Lanes, Inc.* 16 Ohio St.2d 47, 53, 242 N.E.2d 566, 570 (1968). (Staff Reply Br. at 3; IEU Reply Br. at 3.) IEU agrees, stating Duke's interpretation of R.C. 4928.143(B)(2)(d) would result in violations of several other provisions in Ohio law that restrict the Commission's authority to authorize generation-related nonbypassable charges, i.e., R.C. 4928.02(H) and 4928.39 (IEU Reply Br. at 3).

According to Duke, the Ohio Supreme Court has confirmed R.C. 4928.143(B)(2) allows for unlimited inclusion of the items listed in the statute, as the statute merely delineates the types of categories that may be included in an ESP. *Columbus S. Power Co. v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶33. The theory advanced by Staff and intervenors would require that any component in an ESP must be expressly and clearly described in the statute. Thus, according to Duke, proposals agreed

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to in past ESPs would be unlawful, including the CBP plan that is not expressly provided for in the statute. (Duke Reply Br. at 56-57.)

(iii) State Policy

GCHC, Kroger, OMA, OCC, Sierra, ELPC, IGS, and OP AE maintain the PSR violates R.C. 4928.02(H), which prohibits Duke from using revenues from competitive generation service components to subsidize the cost of providing noncompetitive distribution service, or vice versa (GCHC Br. at 11; Kroger Br. at 11-12; OMA Br. at 20; OCC Br. at 20; Sierra Br. at 15; ELPC Br. at 3, 15; IGS Ex. 12 at 4, 7; OP AE Reply Br. at 10). Staff, IGS, Wal-Mart, Constellation/RESA, OCC, IEU, OEC, OP AE, and Exelon assert Duke's proposed PSR is inconsistent with the Commission's objective of transitioning all of Ohio's EDUs to a fully-competitive retail market construct and violates the state's policy goals in R.C. 4928.02(H) (Staff Ex. 1 at 11; Staff Br. at 2, 15; IGS Ex. 12 at 7; Wal-Mart Ex. 1 at 9; RESA Ex. 3 at 10; OCC Ex. 43 at 35; IEU Br. at 12; IGS Br. at 20; OEC Br. at 11; OP AE Br. at 8-9; Exelon Br. at 5). IEU and OP AE submit the PSR would result in an anticompetitive subsidy between a noncompetitive retail electric service and a service other than retail electric service (IEU Br. at 12; OP AE Br. at 15). GCHC argues distribution customers should not be forced to subsidize Duke's independent investment in generation supply that has nothing to do with the provision of distribution service. To avoid cross-subsidization, GCHC asserts the PSR must be fully bypassable. (GCHC Br. at 11.) Sierra argues the PSR would reverse the transition to competition because it requires customers to subsidize potentially uneconomic generation, subjects customers to the risk of owning generation over the long term without any control over decisions that affect costs and revenues, and is an inappropriate mechanism to manage volatility in a competitive environment (Sierra Br. at 15-17).

Staff and OCC note the Ohio Supreme Court criticized similar anticompetitive subsidies and reversed a Commission decision that allowed AEP to charge all of its distribution customers for costs related to the potential construction of a generation facility. The Court held it was unlawful for the Commission to allow "revenues from noncompetitive distribution service to subsidize the cost of providing competitive generation service component." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195. (Staff Br. at 16; OCC Br. at 17.) OCC also cites *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, in support of this argument (OCC Br. at 17).

In addition, Staff, IEU, OCC, and Exelon point to *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR (*Sporn*), Finding and Order (Jan. 11, 2012), for precedent wherein the Commission rejected AEP's request to establish a nonbypassable charge that would recover plant closure costs from all distribution customers (Staff Br. at 17; IEU Br. at 13; OCC Br. at 18). IEU states that, as the Commission found in *Sporn*, a generation-related

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nonbypassable rider is the equivalent of a distribution rider since it is billed and collected from all customers. *Sporn*, Finding and Order at 19. Therefore, if the Commission authorized a nonbypassable PSR, the rider would violate the prohibition of the recovery of generation-related costs through a nonbypassable rider contained in R.C. 4928.02(H). IEU notes the Commission's decision in *Sporn* determined the provisions of R.C. 4928.143(B)(2)(d) cannot be interpreted to override the prohibition of the recovery of generation-related costs through a nonbypassable rider set out in R.C. 4928.02(H). (IEU Reply Br. at 5.) Duke asserts the Commission's decision in *Sporn* is factually inapposite to the circumstances in these cases. Unlike AEP in *Sporn*, Duke is not seeking cost recovery for any component of generation service that it owns or otherwise controls and Duke has not invoked R.C. 4928.143(B)(2)(c), which was the subsection at issue in *Sporn*. Duke acknowledges that, in *Sporn*, the Commission noted AEP's request was contrary to R.C. 4928.02(H), because it would enable recovery of generation-related costs through distribution rates. However, in the instant cases, the OVEC-owned generating units are not providing service to Duke's retail customers and, therefore, the PSR will not recover costs for the generation component of electric service. (Duke Reply Br. at 62-63.)

OPAE asserts that, in accordance with the policy of the state set forth in R.C. 4928.02, the Commission must ensure the ESP addresses the affordability of electric service or the protection of at-risk populations. According to OPAE, Duke's proposed ESP will increase the cost of electricity for all consumers without addressing the impact on consumers, especially low-income, at-risk residential consumers. (OPAE Br. at 3-4; OPAE Reply Br. at 4-5.) In addition, IEU notes that R.C. 4928.20(K) requires the Commission to consider the effect of the ESP on large-scale governmental aggregation of any nonbypassable generation charge. However, Duke failed to comply with these requirements and Ohio Adm.Code 4901:1-35-03(C)(6) to demonstrate the effect of the PSR on large-scale governmental aggregation. According to IEU, Duke provides conflicting statements regarding compliance with the statute. IEU maintains Duke failed to carry its burden of proof and the Commission cannot determine what the effect of the PSR is on large-scale governmental aggregation. (IEU Reply Br. at 18-19; Duke Ex. 1 at 19.)

Duke opines state policies are intended to guide the Commission and they do not mandate any particular outcome or preclude the Commission from arriving at outcomes consistent with its mission. With regard to R.C. 4928.02(H), Duke states that, under this provision, the legislature warned against anticompetitive subsidies flowing between noncompetitive and competitive retail electric service, which includes the recovery of generation-related costs through distribution or transmission rates. However, the PSR is not providing retail generation service, as customers will continue to receive their competitive generation service through either the SSO auctions or CRES contracts. None of the energy and capacity associated with Duke's OVEC entitlement will be used to directly supply customers; therefore, it cannot displace the energy and capacity supplied

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via competitive auctions or contracts. Consequently, there is no anticompetitive subsidy. Moreover, Duke submits the statute specifically identified the desire to prevent the collection of generation charges through distribution or transmission rates; however, the designation of the PSR as a nonbypassable rider does not render it such a rate. (Duke Reply Br. at 59-60.)

(iv) Duke's OVEC Analysis

Given that Duke's OVEC analysis is speculative, OP&E and GCHC assert there is no evidence upon which to base a factual decision on the impact of the PSR on distribution customers beyond the negative impact during the term of the ESP (OP&E Reply Br. at 16; GCHC Br. at 6; Tr. I at 255-256; Tr. III at 666-668). OCC points out, and Sierra agrees, that Duke produced no estimates of the impact of the PSR on customer rates in its application or testimony, and assumed that any impact would be \$0 (OCC Br. at 28; Tr. II 351-352; OCC Ex. 43, Att. JFW-2; Sierra Ex. 4 at 3, 6; Sierra Br. at 6). OCC and I&U offer Duke has not performed any analysis to demonstrate that customers are subject to price volatility, show examples or estimates of the potential impact of the PSR on the stability of rates, or suggest that the PSR would provide customers with value as a hedge (OCC Ex. 43 at 27-28; I&U Br. at 5). IGS agrees Duke filed no projections of the rate impacts of the PSR, noting the PSR is not a hedge for customers; rather, it is a hedge to guarantee Duke's earnings (IGS Br. at 26-27; Tr. I at 223, 225-226; Tr. XII at 3899).

By failing to present any evidence regarding the projected rate impact of the PSR, OCC and Wal-Mart argue, Duke failed to carry its burden of proof in accordance with R.C. 4928.143(C)(1) (OCC Br. at 28-29; Wal-Mart Br. at 3). In discovery, Duke provided, for the first time, the Duke OVEC analysis (OCC Exs. 4-4A; OCC Ex. 43 at 6, Att. JFW-2 at 2-4; OCC Br. at 28-29). OCC notes that, when called as-on-cross, Duke's employee who sponsored the discovery response could not properly support the Duke OVEC analysis (OCC Br. at 29-30, 32-34; OCC Ex. 4; Tr. IX at 2455-2456, 2458-2460, 2467-2468; Tr. X at 2833-2934).

OCC and GCHC note that, under Duke's estimate, the cumulative net cost to customers of Duke's OVEC entitlement over the ESP period would be \$22 million, and it would reach \$29 million by the end of 2018 (OCC Ex. 43 at 7, 17; OCC Ex. 4; OCC Br. at 37; GCHC Br. at 6; Tr. I at 256; Tr. II at 590, 671-672; Tr. IX at 2515; OEG Ex. 1 at Att. AST-2; Sierra Ex. 4 at 7). According to the Duke OVEC analysis, the annual net revenue is forecast to become positive in 2019 and remain positive through 2024, with the cumulative total net revenue over 2015 through 2023 being zero. If future costs and revenues are discounted on a present value basis using a 5 percent discount rate, the cumulative net revenue remains negative, at negative \$7 million, through 2024, according to the Duke OVEC analysis. (OCC Ex. 43 at 7, 17, Att. JFW-1.) Sierra states the Duke OVEC analysis shows, for the first four years of the PSR, customers would be charged \$26.4 million and, in years

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5 through 10, customers would receive credits totaling \$18.4 million. Thus, Sierra offers that, through 2024, the cumulative net present value of the PSR is negative. (Sierra Ex. 4 at 4, 7; Sierra Br. at 6; OCC Ex. 4.)

OCC offers the following regarding the Duke OVEC analysis: any analysis of a resource's future costs and market revenues relies on uncertain assumptions; some of the assumptions are out of date; some of the information suggests that a simplified model was used in the analysis; Duke's share of the OVEC unforced capacity is not properly reflected; there are questionable aspects to the assumed outage; because of the multiple sponsors under the ICPA, inefficiencies are introduced that lead to additional costs that were ignored; and costs for carbon reductions were not reflected (OCC Ex. 43 at 9-10, 19-24, 37; OCC Br. at 14, 34-42; Tr. V at 1374; Duke Ex. 14 at 34). In fact, as-on-cross witness Mr. Brodt from OVEC agreed that OVEC's revenues and cost forecast beyond five years would not be very reliable (OCC Br. at 38; Tr. V at 1213). Thus, according to OCC, the Duke OVEC analysis is an unreliable estimate of the potential future net costs to customers (OCC Ex. 43 at 24; OCC Br. at 13).

In support of its assertion that Duke's projected capacity revenue generated from OVEC has problems, IGS notes that neither Clifty nor Kyger participates in the base residual auction (BRA) as typical capacity resources. Clifty is located in Indiana, in what is referred to as part of the Midcontinent Independent System Operator (MISO), and Kyger, while in Ohio, is not considered a PJM plant. Thus, because these resources are considered external resources, there is a risk they may not be permitted to participate in the BRA, or PJM energy markets, and receive capacity compensation. According to IGS, removal of this revenue stream would negatively impact the cash flow of these plants, because MISO, the most likely alternative market, does not have a comparable capacity market and generally has lower energy prices. (IGS Ex. 12 at 12-13; IGS Ex. 14 at 14-15; IGS Br. at 31.) IGS submits Duke's cash flow projections understate the cost of the PSR, because it overstates OVEC's generation output, and the capacity revenue is overstated (IGS Br. at 28-30; IGS Ex. 12 at TH-5). IGS also notes that there is a significant balloon payment that comes due in 2040, thus, there is potential additional liability that may be assigned to customers in the future (IGS Br. at 31; IGS 12 at 15-16, Ex. TH-9). Sierra agrees Duke's view of the energy and capacity markets is likely too optimistic and inflates the value of the OVEC plants, stating that, if any of Duke's assumptions turn out differently and lead to reduced revenues and/or costs, it is likely customers would never break even (Sierra Reply Br. at 4, 7-13; Sierra Ex. 4 at 8-21, Att. SEJ-8). Kroger agrees the benefits alleged by Duke are dependent on assumptions several years into the future, including market price assumptions and costs from proposed environmental rulemakings (Kroger Ex. 1 at 7; Kroger Br. at 11).

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RESA contends there is no guarantee the PSR will be a credit during the term of the ESP, pointing out the costs for OVEC power have increased and, if such costs are more than what the market is willing to pay, OVEC's power may not be purchased in the market; however, Duke will still incur costs from OVEC under the ICPA, but there will be no offsetting revenues (RESA Br. at 9-10; IEU Exs. 8-13; Tr. III at 660). Moreover, RESA notes that, if one of the OVEC plants were to retire, the ICPA obligated the sponsoring companies to pay decommissioning costs as part of the demand charges and, under the PSR, Duke would pass along the decommissioning costs to customers. RESA submits that, if the Commission approves the PSR and commits ratepayers to the remaining life of these 60-year old plants, it should specifically order that Duke's shareholders alone pay for decommissioning and mitigation costs. (RESA Reply Br. at 10.)

OCC, OP&E, and Exelon agree that treating the OVEC net costs in this manner would eliminate Duke's incentive to minimize costs and maximize the operation of the resource and the net revenues, and may eliminate regulatory oversight (OCC Ex. 43 at 11, 33-34; OP&E Br. at 12; OCC Br. at 23-24; Exelon Br. at 6). OCC argues that, since Duke's relationship to the OVEC plants, including the ICPA and its partial ownership of OVEC, are essentially equivalent to partial ownership of the OVEC plants, such costs, other than fuel, associated with the plants are typically subject to traditional regulation. OCC notes that the fixed costs, and variable operations and maintenance costs, are under the utility's control and they are not unpredictable or volatile; thus, they are not appropriate for recovery from customers under a cost tracker mechanism such as the PSR. (OCC Ex. 43 at 34; OCC Br. at 24-25.)

According to OCC, since customers under the SSO will be served under one- to three-year full-requirement contracts that would reflect forward prices, they would not be exposed to substantial market price volatility. However, the OVEC net cost will reflect potentially volatile PJM market revenues, netted from relatively stable OVEC plant costs. OCC notes that the OVEC output would generally be offered into the PJM day-ahead and real-time markets and such prices can reflect extreme weather, unexpected outages, and other unanticipated circumstances. Thus, the PSR would add a potentially volatile element to customers' bills. (OCC Ex. 43 at 12, 28-29; OCC Br. at 12-13; OP&E Br. at 10.) Customers choosing CRES could choose offerings that hedge prices and provide greater stability; however, the PSR could move contrary to, or in the same direction as, the market-based prices (OCC Ex. 43 at 12, 30-31). Therefore, to the extent the PSR affects the volatility of the rates paid, it would be a very modest impact, according to OCC (OCC Ex. 43 at 13, 30-31; OCC Br. at 16). Moreover, IEU explains that, if it is a hedge, the PSR, based on Duke's 9 percent OVEC entitlement, would hedge no more than 8.67 percent of Duke's total retail sales (IEU Br. at 6, 29; Tr. II at 461-462; Tr. III at 607-608).

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RESA submits the costs for Kyger and Clifty have not been stable and, in fact, have been above market over the last five years, with approximately a 53 percent increase over that period. Thus, RESA disagrees with Duke's assertion that the units have stable capacity costs that will not rise as quickly as other PJM generation. RESA offers that there is no record evidence that, starting with the next BRA, the two OVEC units will clear the auction, let alone be profitable. (RESA Reply Br. at 8-9.) According to IEU, the average cost of power by OVEC under the ICPA to sponsoring companies is sensitive to the total output of the plants. IEU states that, although the average costs charged to all OVEC sponsoring companies was \$62.86/MWh in 2012, up from \$50.86/MWh in 2011, Duke's average cost of generation under the ICPA was substantially higher at \$70.92/MWh for 2012, and over \$70.00/MWh in 2013. (IEU Br. at 4, 27; IEU Ex. 5 at 2; IEU Ex. 6 at 2; IEU Ex. 13.) In addition, IEU points out the demand portion of OVEC is far from stable, noting that, due to Duke's reduction in the amount of energy service it scheduled with OVEC, its demand-related costs increased from \$24.36/MWh in 2009 to \$41.62/MWh in 2012, or by 71 percent (IEU Br. at 5, 27; IEU Ex. 13; Tr. V at 1356-1357; Duke Ex. 14, Sch. 1 at 2).

Since the OVEC entitlement results in a net cost to customers over the ESP period, OCC asserts the analysis calls into question whether the OVEC plants, or some units, should instead be retired or repowered (OCC Ex. 43 at 25). Moreover, OEC offers that, if the PSR is approved and customers subsidize the OVEC units, this would allow the units to remain operational even though their actual operating costs would exceed the revenues earned in the competitive market. The units would remain open, even though they are noneconomic, and wholesale prices would be kept artificially lower, thus, discouraging other market participants from investing in new generation resources. (OEC Reply Br. at 6.) In response to Duke's assertion that the PSR will achieve retail rate stability when wholesale capacity rates spike upward in the next few years due to PJM's projection of generation being retired, RESA notes that Duke only focuses on retirements and fails to mention the amount of capacity being added. According to RESA, considering the strong level of additional capacity being added, there is no factual support that PJM is on the verge of a capacity shortage. (RESA Reply Br. at 8; IGS Ex. 1.)

Staff submits there is no way to determine if Duke's proposal is the best option for customers, noting the Commission should have the ability to compare different options. However, the Commission does not have that ability because Duke is not proposing any request for proposal or CBP. An auction or request for proposal would allow the Commission to make an informed decision about the value of the PSR proposal and to establish a base price that customers will pay in generation-related costs. (Staff Reply Br. at 16-17.)

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(v) Hedge

ELPC, Constellation/RESA, and OMA argue the PSR is not a hedge against market price volatility (RESA Ex. 3 at 6; OMA Br. at 22; RESA Br. at 7, 9; ELPC Br. at 5; ELPC Reply Br. at 2-3). ELPC states the PSR provides a hedge that is only as valuable as the return to customers from the market, and it is subject to swings in the market, including the potential for substantial losses if the OVEC facilities underperform or are subject to severe regulatory restrictions. ELPC asserts there are better hedges available, e.g., renewables and demand response face less risk, and Duke would have found them if it had conducted a competitive process. (ELPC Br. at 5-7.)

RESA and Sierra note that 23 percent of Duke's customers are served under the SSO auctions and are not served with market-priced generation (RESA Br. at 8; Staff Ex. 1 at 10; Sierra Reply Br. at 4-5). Since those SSO customers are not subject to the potential market price volatility the PSR is allegedly intending to hedge, RESA submits it cannot be a market hedge for Duke's SSO customers. As for shopping customers, RESA points out the fixed-cost CRES contracts in effect, without a pass-through provision, will not experience volatility, yet the PSR would be an additional component on their bills. (RESA Br. at 7-8, 11; Tr. II at 472-475; RESA Ex. 3 at 13.) Exelon agrees the PSR introduces volatility that does not currently exist for customers on competitive fixed-price contracts (Exelon Br. at 9). RESA also explains that customers that self-generate would have to pay for the PSR, but they are not subject to the potential market price volatility (RESA Br. at 8). In addition, RESA notes customers could buy options from a financial institution or install distributive generation to achieve long-term retail electric service cost stability (RESA Reply Br. at 11). IEU agrees that the price spikes that may occur due to decreased fuel diversity and changes in PJM and FERC regulations, which Duke mentions to support the PSR, are largely irrelevant to retail customers because retail customers purchase power through the SSO or CRES contracts (IEU Reply Br. at 9). Moreover, GCHC and Wal-Mart note that, to the extent CRES providers have hedged against price volatility, the cost of those hedges is built into their costs (GCHC Br. at 7; Wal-Mart Ex. 1 at 9). Thus, GCHC argues Duke's proposal would require customers of CRES providers to pay Duke for a second hedge (GCHC Br. at 7; Tr. III at 676-677).

GCHC submits the value of OVEC as a hedge is de minimis, as OVEC represents only about 7 percent of Duke's native load, which is too small to be an effective hedge (GCHC Br. at 7; Tr. I at 461-462; Tr. XII at 3404). GCHC submits the OVEC contract is a poor hedge mechanism and the PSR is a pretext to justify shifting responsibility for the OVEC losses to customers. According to GCHC, a typical hedge contract has a known cost and known benefit, wherein there is usually a premium cost to obtain the contract and a strike price, so that the terms of the hedge are clear and it is known when the hedge is in the money. However, in the case of the OVEC entitlement, the hedge concept depends on the notion that, if market prices increase, OVEC would be profitable and would yield

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positive cash flow. GCHC notes, in this case, it is indefinite under what conditions that would occur, as there is no strike price. Compared to an express hedge product, use of the OVEC entitlement is inferior, according to GCHC. It is speculative when, if ever, those conditions will exist and Duke's projections do not show that happening until well beyond the term of this ESP. (GCHC Br. at 5-6; Tr. VII at 2016-2017.) OPAE submits, given that the entire analysis beginning in 2019 is speculative, there is no evidence upon which the Commission can base a factual decision on the impact of the OVEC subsidy on Duke's distribution customers beyond the negative impact during the term of the ESP (OPAE Br. at 12). Cincinnati agrees there is no empirical evidence on the record to support Duke's claim the PSR will act as a hedge against price volatility (Cincinnati Br. at 3). GCHC notes that, when Duke proposed this hedge, it had no projections of its value and it chose to rely entirely on intuition that it would act as a hedge (GCHC Br. at 6; Tr. II 589; Tr. III at 652-653, 670).

RESA further notes that the PSR does not encourage resource diversity, as Duke's OVEC entitlement will continue to be sold into the PJM market (RESA Br. at 12; Tr. I at 99). OEC points out there is no proposal in Duke's ESP for more energy efficiency, demand side management, or renewable generation, even though the influx of diverse resources into the market could have an even greater hedging benefit if coupled with the coal plants (OEC Br. at 14; Tr. I at 118-119). According to OEC, Duke's proposed hedge is not about an insurance policy for customers, but for shareholders who would otherwise be holding the bag for the cost of an aging coal fleet facing increasing costs from environmental regulations. OEC submits the potential environmental costs will undermine any potential ability for the aging OVEC coal plants to serve as a volatility hedge. (OEC Br. at 14-16.)

Finally, IEU asserts the PSR would place unregulated generation providers at a competitive disadvantage (IEU Br. at 15). IGS and IEU agree allowing Duke's generating units to receive guaranteed recovery of costs from all customers would harm all other generators that do not have guaranteed cost recovery (IGS Ex. 12 at 6; IEU Reply Br. at 12-13). In addition, OCC asserts Duke's claim that the PSR arrangement is competitively neutral is not a benefit, as it simply means the arrangement is benign with respect to retail competition. If the PSR is approved, OCC recommends it be modified to be cost-neutral, thus, reducing the cost and risk to customers and restoring some incentive for Duke to control costs and maximize operation and revenue. OCC offers this could be accomplished by setting a benchmark for the PSR net cost and using a sharing mechanism for net costs or benefits relative to the benchmark. (OCC Ex. 43 at 13-14, 42; OCC Br. at 42.) RESA does not support OCC's proposal, stating it could still result in additional costs for Duke's customers (RESA Br. at 22).

While Staff agrees that energy prices in the PJM footprint have been volatile recently, it believes that a more effective approach for mitigating price volatility is the

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staggering and laddering approach adopted in past SSO procurement auctions (Staff Ex. 1 at 12-13; Staff Br. at 6). RESA, OEC, OPAE, and OCC agree the staggering of auctions and laddering of products provides a more effective hedge against price volatility (RESA Br. at 11; OEC Br. at 13; OPAE Br. at 10; OCC Br. at 2).

OEG responds that, while staggering and laddering may help mitigate price volatility for nonshopping SSO customers, they are limited by the fact that all of the auction results that make up the blended price stem from the PJM wholesale market, wherein market price is significantly higher than OVEC costs over a long period of time. OEG submits the PSR is a cost-based hedge, which is not available through the SSO auction or a fixed-price contract with a CRES provider, that protects both SSO and shopping customers. The PSR is a unique hedge that reflects the difference between the relatively stable OVEC costs and the relatively volatile PJM market. (OEG Br. at 10-11.)

Duke acknowledges that, while an auction format has a price smoothing effect in that resulting SSO prices reflect, at times, combined auction clearing prices, the laddering format cannot counteract increasing wholesale capacity market prices. Duke asserts Staff disregards the fact that events influencing the wholesale market also influence retail rates. Although reliance on a basic laddering approach may have functioned well in the past, Duke contends, circumstances are changing and it would be unreasonable to reject an option to counter the impending consequences. (Duke Reply Br. at 67.)

(vi) Reliability

RESA and OEC agree the PSR will not assist with generation reliability for Ohioans (RESA Br. at 12-13; OEC Br. at 5; Tr. I at 98; Tr. II at 412-413; Duke Ex. 41 at 4, 8). Constellation/RESA note, to the extent reliability is truly an issue, PJM has a process for studying reliability and providing a reliability must run contract for any units necessary (RESA Ex. 3 at 15). IEU and IGS agree reliability concerns do not support the PSR, noting that PJM has more generation in the construction queue than the amount expected to retire and, if there is a concern the generation will not serve the balance of the region that includes Ohio, such concern is being addressed by new generation resources sited in Ohio (IEU Br. at 15; Tr. I at 78-81; IEU Exs. 3-4; Tr. X at 2697; IGS Reply Br. at 11). GCHC notes Duke's primary claim that OVEC would protect against price spikes was the 2014 polar vortex; yet, the OVEC units had outages during that event and retail customers were not directly exposed to daily price volatility caused by such events (GCHC Br. at 7; Tr. III at 621-622). Moreover, IEU points out PJM survived the 2014 polar vortex storm and is addressing the effects of adverse weather conditions on system reliability and volatility of prices (IEU Br. at 15).

Staff notes that all the necessary resources required for reliability during the term of this ESP have already been procured for the entire PJM footprint, including Duke.

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Therefore, granting the PSR will not increase the reliability of the grid in the PJM footprint. (Staff Br. at 10; RESA Br. at 13; Tr. XVI at 4263.) Moreover, Staff submits the Commission has the tools necessary to address other potential reliability needs in the future, i.e., the Commission could approve a nonbypassable rider to fund construction of a new generating facility. Staff submits this process is more effective than the PSR because it requires proof that a capacity need exists, construction would involve a CBP, and the facility would actually supply power to Duke's customers. (Staff Br. at 10; Tr. XII at 3393-3396.)

(vii) Other Statutory Provisions

RESA argues the PSR is contrary to Ohio's restructuring paradigm set forth in R.C. 4928.03, which separates electric service into open-market competitive services and regulated utility services, noting the statute specifically lists generation as a competitive service. According to RESA, since the alleged purpose of the PSR is to moderate the price of generation, it is a competitive service, not a utility service. In addition, RESA submits the PSR violates R.C. 4905.22, which prohibits unreasonable charges by a utility. (RESA Br. at 17-19.)

Kroger submits the PSR would make all customers, including shopping customers, responsible for Duke's legacy generation costs long after the period for transition cost recovery ended, which was December 31, 2010, pursuant to R.C. 4928.40 (Kroger Ex. 1 at 4, 6; Kroger Br. at 13-14). IEU asserts the PSR is barred by R.C. 4928.38 and the stipulation approved in *In re Cincinnati Gas and Elec. Co.*, Case No. 99-1658-EL-ETP, et al., (ETP Case) Opinion and Order (Aug. 31, 2000). IEU states, under R.C. 4928.32 to 4928.40, an EDU had a single opportunity to collect transition revenue from customers if it could demonstrate it had transition costs and the EDU had a limited time during which it could collect such revenue. According to IEU, in 2000, Duke sought, but gave up, any claims it had to secure generation-related transition revenue through its settlement in the ETP Case. IEU claims Duke is seeking to recover additional transition revenue through the PSR when the revenues it recovers from PJM are less than the amounts it pays OVEC. Since Duke did not present a claim for transition revenue that complies with the statutory requirements, the time for recovery of transition revenue has expired, and Duke stipulated that it would not seek generation-related transition revenue in the ETP Case, the PSR cannot lawfully be authorized. (IEU Br. at 16-19.) OMA, OCC, OPAE, and ELPC agree the Commission cannot grant additional transition revenues, as such would be contrary to R.C. 4928.38 (OMA Br. at 20; OCC Br. at 18; OPAE Br. at 9; ELPC Br. at 15).

Duke responds that, as the PSR was not proposed pursuant to R.C. 4928.32 or 4928.40, IEU's argument that Duke has not supported its request for transition revenue is not helpful. According to Duke, the PSR is proposed as a financial hedge as permitted

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under R.C. 4928.143, and the PSR is not proposed pursuant to the transition statutes and nothing about the rider is designed to recover stranded costs. (Duke Reply Br. at 66.)

(viii) Entitlement/Corporate Separation

GCHC notes that Duke proposed the PSR continue as long as it holds its OVEC entitlement. GCHC offers that Duke has the ability to sell or transfer its interest in OVEC by satisfying the conditions of the ICPA. As long as Duke's investment in OVEC is cash flow negative, Duke has incentive to keep the PSR, thus, shifting the losses to distribution customers. If the OVEC investment turns positive, Duke would have incentive to monetize its investment by selling or transferring the investment out of the reach of the Commission. (GCHC Br. at 7-8; RESA Br. at 14; Tr. I at 117-118.) RESA agrees, noting that Duke already has authority from FERC to transfer the OVEC entitlement to another entity (RESA Br. at 14; Tr. II at 492).

GCHC contends Duke's corporate separation plan (CSP) prohibits the PSR, noting that, heretofore, Duke has treated OVEC as a part of its unregulated business (GCHC Br. at 12; Duke Ex. 12; Tr. II at 385; Tr. III at 673-675). In fact, Duke's CSP lists OVEC as an affiliate (GCHC Br. at 12; Tr. IV at 954, 957, 1023). GCHC asserts that, for purposes of Duke's CSP, OVEC is an affiliate and Duke cannot condition the provision of distribution service to customers assuming financial responsibility for OVEC. Even though Duke claims the OVEC interest is a minority interest, GCHC states there is no reason why a majority and minority interest in affiliates should be treated differently for purposes of the prohibition on tying arrangements. (GCHC Br. at 13.)

Duke contends GCHC's argument that OVEC is an affiliate of Duke has no legal basis. According to Duke, FERC has agreed that no sponsoring company of OVEC is an affiliate of OVEC, as they do not have the necessary control. *Citing* FERC Case No. ER 11-344, (May 23, 2011). (Duke Reply Br. at 64; Duke Ex. 14.) Duke witness Hollis confirmed Duke does not own any part of OVEC, has no control over OVEC, and OVEC is not an affiliate of Duke (Duke Reply Br. at 65; Tr. IV at 969, 971, 975). Moreover, Duke notes that its current CSP was adopted pursuant to R.C. 4928.17 and fulfilled the requirements of Ohio Adm.Code Chapter 4901:1-35 (Duke Reply Br. at 65).

(ix) Allocation/Rate Design

Constellation/RESA believe that, when a customer takes supply from a CRES supplier, the customer is receiving all of the generation-related service from that company. Direct Energy, OEC, and OPAE agree, if a customer is forced to continue to pay Duke for generation-related supply charges, like the PSR, plus pay the CRES provider for generation service, the customer is effectively paying twice for the same service. (RESA Ex. 3 at 10; Direct Energy Ex. 1 at 5-6; OEC Br. at 10; OPAE Br. at 14.) If some form of a

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PSR is approved, IGS asserts it should be limited to just OVEC costs (IGS Ex. 12 at 19; IGS Br. at 32). In addition, Kroger, IGS, and Wal-Mart recommend it be a bypassable rider (Kroger Ex. 1 at 8; IGS Ex. 12 at 19; Wal-Mart Ex. 1 at 3). OCC disagrees, noting that Duke's proposed allocation of the PSR is on a \$/kWh basis to all customers. OCC believes this would be the only reasonable basis to allocate this profit or loss sharing mechanism, since no capacity or energy is actually utilized to serve any customer. According to OCC, allocating the charge to just SSO customers or just shopping customers would improperly suggest the charge is associated with serving either the SSO or non-SSO market. (OCC Ex. 46 at 24; OCC Br. at 99-100; OCC Reply Br. at 45.) OCC contends, unless all customers are given the right to choose whether to take the PSR, all customers should have to pay for the PSR (OCC Reply Br. at 46).

If the PSR is approved as a nonbypassable rider, Kroger recommends if have an allocation and rate design approach that reflects the fixed cost component of the PSR, claiming Duke's recommendation to allocate and design the entirety of the PSR on the basis of energy does not reflect cost causation. However, as the PSR represents the difference between the demand and energy costs OVEC allocates to Duke, and the revenue from wholesale capacity and energy sales of Duke's OVEC entitlement, the PSR is not strictly energy related. Thus, Kroger offers two options. First, calculate the difference between the demand-related OVEC costs allocated to Duke and the revenue from the sale of Duke's OVEC capacity entitlement, which would be allocated to customer classes on the basis of demand and designed as a per kW rate for demand customers. The difference between energy-related OVEC costs allocated to Duke and the revenue from the sale of Duke's energy entitlement would be allocated to customer classes on the basis of energy and designed as a per kWh rate. Alternatively, the net difference between the total OVEC costs allocated to Duke and the total revenues generated from the sale of Duke's entitlement could be apportioned into demand- and energy-related components, based on the demand and energy proportions of OVEC costs allocated to Duke. The demand- and energy-classified portions of the PSR would be allocated and designed based on their respective classifications. (Kroger Ex. 1 at 4, 8-9.)

Direct Energy recommends that, if any of the OVEC costs are shifted to consumers, it should first be applied to service for percentage of income payment plan (PIPP) customers. According to Direct Energy, this would ensure the power paid for is actually used by the customers who pay for it and that customers who have no other choice receive the power to avoid interrupting CRES customers' contracts. In addition, PIPP is a fairly consistent load, so concerns of over- or under-supply should be minimal. In addition, PIPP load is not likely to leave the utility and is, therefore, suitable for long-term commitment to OVEC power. Direct Energy explains that the PIPP share would be approximately one-third of Duke's OVEC supply and the remainder would be the responsibility of shareholders and sold to the market. (Direct Energy Ex. 1 at 9-10; Direct

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Energy Br. at 13-14.) According to Direct Energy, its proposed mechanism would not usurp the authority of ODSA to aggregate PIPP load and set the price for PIPP load, because the Commission's decision to procure PIPP load in this manner would only apply until ODSA exercised its statutory right to aggregate PIPP customer load for generation service. Once ODSA's procurement was effective, the PSR would go away and Duke would be free to sell that power into the markets. (Direct Energy Br. at 15; Direct Reply Br. at 6-7; Tr. IX at 2664-2665.)

ODSA argues Direct Energy's proposal should be rejected because it is unreasonable, unlawful, and indefensible. ODSA submits Direct Energy's proposal is unlawful as it eliminates ODSA's ability to aggregate PIPP customers pursuant to R.C. 4928.54, because it would commit PIPP customers to take OVEC power through 2040, thus, eliminating ODSA's statutory right to aggregate. ODSA notes that Direct Energy admitted its recommendation cannot be implemented without ODSA's consent; however, no evidence is offered to support that the proposals are consistent with ODSA's statutory directive and Direct Energy presents no rationale to lead ODSA to accept the proposals. According to ODSA, Direct Energy's proposal would violate the statutory directive that ODSA ensure that energy services be provided to low-income consumers in an affordable manner under R.C. 4928.02 and 4928.58. (ODSA Br. at 4-6; Tr. IX at 2618-2619.)

(x) ESP 2 Case

Staff, IGS, OMA, and OCC assert that Section VIII of the stipulation approved in the *ESP 2 Case* required that all generation assets be transferred out of Duke no later than December 31, 2014 (Staff Ex. 1 at 6; Staff Br. at 2, 11; Tr. XII at 3420-3423; IGS Ex. 12 at 6; OMA Br. at 25-26; IGS Br. at 24; OCC Br. at 44). Thus, regulated cost-of-service recovery for Duke's generation assets should cease to exist at that time; however, Staff notes that Duke is now proposing to reregulate some of its generation assets, its 9 percent OVEC interest (Staff Br. at 3-4). Whether Duke owns directly or owns equity/stock in a generating asset, it is Staff's opinion that Duke owns entitlement to all energy and capacity that comes out of the generating asset (Staff Ex. 1 at 6; Staff Br. at 11). Staff notes, and OMA agrees, that, contrary to the assertions of Duke, there was no provision in Section VIII of the stipulation in the *ESP 2 Case* that specifically excluded from the transfer requirement Duke's entitlement in the OVEC generating station (Staff Ex. 1 at 6-7; OMA Br. at 18). Therefore, Staff opines that Duke should either transfer or sell its OVEC entitlement by December 31, 2014, or file a request for waiver similar to the one AEP filed in *In re Ohio Power Co.*, Case No. 12-1126-EL-UNC (Staff Ex. 1 at 7; Staff Br. at 14).

OCC emphasizes that, under the stipulation in the *ESP 2 Case*, Duke's wholly-owned generating assets, as well as its contractually-owned interests, were to be transferred, with specified exceptions, which are not alleged by Duke in this case, i.e., if substantial increased liabilities would result from the transfer of Duke's interest in OVEC

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or if the terms of the OVEC contract prevented Duke's interest from being transferred (OCC Br. at 47-49). In response, Duke avers that, upon review of the relevant provision of the stipulation in the *ESP 2 Case* referred to by OCC, it is clear that the contractual obligations at issue here are those that relate to the legacy generation assets being transferred (Duke Reply Br. at 73-74; OCC Ex. 2 at 25-26). According to Duke, the language, taken as a whole and read in context, confirms the intent was to avoid any conduct that would be perceived as violating corporate separation. To allow any other interpretation yields the irrational conclusion that Duke would be required to transfer most contracts, e.g., labor contracts related to its utility business. Even if the Commission agrees Duke must transfer the ICPA, Duke points out there is no obligation to do so, because the terms of the ICPA provide that Duke could only transfer the ICPA to an affiliate if the affiliate is creditworthy or if Duke remains financially liable for all obligations under the ICPA. (Duke Reply Br. at 74.)

OCC states that the record reflects Duke did not make a good faith effort to transfer its interest in OVEC to an unregulated affiliate or third party under the terms of the ICPA. OCC espouses that, in light of Duke's failure to pursue consent of the OVEC sponsoring companies to transfer, the Commission should direct Duke to take measures to obtain such consent. (OCC Br. at 48-55.) Although Duke claims the directive to divest in the *ESP 2 Case* does not extend to the OVEC entitlement, IEU notes that Duke sought and received authority from FERC to transfer its OVEC entitlement to a subsidiary, Duke Energy Piketon. However, Duke later reported that it did not intend to transfer the OVEC entitlement, which leaves Duke obligated to pay its portion of the costs of operations of OVEC. See *Cinergy Corp., et al.*, 140 FERC ¶61,180, Order (Sept. 5, 2012). (IEU Br. at 3; OCC Br. at 48; Tr. X at 2731.)

IGS points out that the stipulation in the *ESP 2 Case* required Duke, the EDU, to cease providing CRES and to operate solely as an EDU in the business of providing noncompetitive service, and to implement separate accounting requirements for services other than Duke's noncompetitive service. However, the PSR does not relate to noncompetitive service, it relates to generation service, which is a competitive service under Ohio law, and would allow Duke to continue to account for OVEC-related costs and revenues on the books of the EDU. IGS asserts, and OEC and Exelon agree, Duke is obligated to transfer its generating assets and entitlements out of the EDU to achieve full legal corporate separation as contemplated by R.C. 4928.17(A). (IGS Br. at 25-26; OEC Br. at 8-9; Exelon Br. at 4-5.)

Staff notes that, as part of the stipulation in the *ESP 2 Case*, Duke was permitted to collect \$330 million from customers for its Electric Stability Service Charge (ESSC), thus, settling Duke's capacity revenues issue. According to Staff, the ESSC was an important element that would ensure Duke achieved a fully-established competitive electric market

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where market forces dictate the success or failure of Duke's former generation assets, not the Commission. (Staff Br. at 3.)

Duke explains that the stipulation in the *ESP 2 Case* required Duke to transfer its generating assets, which were defined in the stipulation as encompassing those assets directly owned by Duke. The stipulation was silent with regard to Duke's contractual entitlement in OVEC. Duke believes this is understandable, since Duke does not directly own the Kyger or Clifty facilities. Thus, Duke contends the stipulation in the *ESP 2 Case* cannot reasonably be interpreted as necessitating the transfer of Duke's interest in OVEC. In addition, Duke points out that, if OVEC were an affiliate, as GCHC contends, Duke would have no obligation to transfer it under the stipulation in the *ESP 2 Case*, because generation owned by affiliates was expressly and intentionally excluded from the assets to be transferred pursuant to the stipulation. (Duke Reply Br. at 71-72; OCC Ex. 2 at 9; FN 9, 25.)

Duke further states the Commission does not have the authority to compel Duke to transfer its contractual entitlement in OVEC. The rules for corporate separation limit a utility's ability to compete for retail generation service in its own territory but it has the right to participate in wholesale generation markets by owning generation, owning entitlements to generation, and competing for retail generation service in service territories other than its own. Duke believes the entitlement to OVEC's generation under the ICPA is similar to the entitlement Duke has under the contract for SSO supply. (Duke Reply Br. at 75.)

(xi) Federal

IGS submits that states lack authority to authorize contracts for differences, which provide supplemental compensation in addition to the amounts a generation resource can obtain from participating in PJM wholesale markets. Citing *PPL Energy Plus v. Solomon*, 766 F.3d 241 (3d Cir. 2014) (*Soloman*). (IGS Ex. 12 at 8.) Staff, IEU, OP&E, OCC, Exelon, Cincinnati, and OMA point to a United States (U.S.) Court of Appeals decision that held Maryland's scheme to subsidize generators participating in PJM markets was preempted by the Federal Power Act (FPA) for their position the PSR is likewise preempted. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) (*Nazarian*). (Staff Br. at 18-21; IEU Br. at 21-22; OP&E Br. at 13; OCC Br. at 5-6; Exelon Br. at 6-7; Cincinnati Br. at 4-5; OMA Reply Br. at 6-8.) IEU, IGS, and Cincinnati expound that attempts by states to increase the compensation of a generation owner for wholesale capacity and energy services are preempted because they invade a field of regulation within the exclusive jurisdiction of FERC. *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372 (D.N.J. 2013) (*Hanna*), *aff'd*, *Solomon*, 766 F.3d 241 (3d Cir. 2014). (IEU Br. at 20-24; IGS Br. at 22-23; Cincinnati Br. at 6-7.) Exelon explains that, in *Nazarian*, the Maryland Public Service Commission (PSC) ordered EDUs to enter into 20-year contracts with a generation plant owner and ordered

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the EDUs to pay the difference between the generator's sale of power in the PJM wholesale market and the contract price; the difference was to be passed on to ratepayers. In *Nazarian*, the federal court decided the Maryland PSC fixed a value for the generator's wholesale capacity and energy and that was not within the commission's authority, as it was in the exclusive jurisdiction of FERC. In *Hanna*, the New Jersey legislature passed a law allowing the New Jersey Board of Public Utilities to order the EDUs to enter into contracts with a generation plant owner to pay the difference between the new generator's sale of power in the wholesale market and the contract price. The federal court found the statute null and void, stating it was preempted by federal law. Exelon asserts *Nazarian* and *Hanna* are factually similar to Duke's PSR, in that the financial risk of the wholesale generator is being transferred to state retail customers via an order of the Commission, and because Duke will be receiving a full hedge and guaranteed cost return on the OVEC power, with no incentive to offer this generation into the market. The main difference is that, in Maryland and New Jersey, the state sought to build a new power plant to improve reliability. (Exelon Br. at 6-7.)

According to OCC, Duke's proposed PSR would violate the Supremacy Clause of the U.S. Constitution Article VI, upon which FERC's preemptive authority is based (OCC Br. at 6). Moreover, IEU notes the Ohio Supreme Court acknowledges such preemption. *Mkting Research Services, Inc. v. Pub. Util. Comm.*, 34 Ohio St.3d 52, 517 N.E.2d 540 (1987). (IEU Br. at 6, 20-24.) OMA and Sierra agree the Commission is prohibited from approving the PSR, which would increase Duke's total compensation for wholesale electric service, since the Commission is preempted from regulating the wholesale price of capacity and energy by the FPA (OMA Br. at 21; Sierra Br. at 21-22).

Conversely, Duke and OEG submit the PSR will not violate the FPA and it is not similar to the situations in *Nazarian* and *Hanna* (OEG Br. at 11; Duke Reply Br. at 46). According to OEG, in *Nazarian* and *Hanna*, the state commissions attempted to establish supplemental wholesale rates and mechanisms to true-up costs at the wholesale levels, which they cannot do as that is the province of FERC. With the PSR, the true-up function would be solely at the retail level between Duke and its customers, pursuant to state law, and the rate paid by Duke to OVEC would be pursuant to a cost-of-service rate filed with FERC. The PSR structure does not alter or modify the FERC-filed rates. In addition, the state commissions in *Nazarian* and *Hanna* were attempting to establish state methods to subsidize the construction of new generation, which undermined the price signals provided by the FERC-approved Reliability Pricing Model (RPM) market construct; however, the PSR is not to encourage new generation, but to stabilize rates by acting as a hedge. Duke points out that, unlike the generating assets at issue in *Nazarian* and *Solomon*, the generation underlying the PSR has been in existence and is not controlled by Duke. In addition, unlike the federal cases, there is no set amount Duke will receive; rather, the capacity revenues in the PSR will be determined by PJM's competitive auction process.

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(Duke Reply Br. at 50-51.) Moreover, OEG and Duke assert that, unlike in *Nazarian* and *Hanna*, PJM's FERC-approved minimum offer price rule (MOPR), set forth in *PJM Interconnection, LLC*, 143 FERC ¶61,090, Order (May 2, 2013), does not apply to the PSR because the MOPR applies to new gas generation, not existing coal resources such as the OVEC units (OEG Br. at 12-13; Duke Reply Br. at 51). IGS submits it is irrelevant that the PSR pertains to existing generation resources not subject to the MOPR, as the violation of federal law occurs by establishing a supplemental rate for a generation resource, thus, the Commission enters into FERC's jurisdiction (IGS Reply Br. at 14).

IGS, Staff, and OCC state that, if the PSR is approved, the Commission will have limited authority to effectively audit OVEC-related costs (IGS Br. at 31; OCC Br. at 26; Staff Reply Br. at 11). IGS notes that, as admitted by Duke's witness, if the Commission evaluates the prudence of OVEC's costs, the Commission would not have the authority to interject what Duke pays OVEC, as it would be preempted by FERC (IGS Br. at 31-32; Tr. III at 645). While the Commission may have authority to disallow costs for imprudence, such a decision would only reduce Duke's ROE (IGS Br. at 32).

Duke maintains the claims of preemption by Staff and intervenors are meritless. The scope of jurisdiction of FERC over the electric industry is not so absolute that it eliminates the Commission's authority to approve the PSR. According to Duke, with the FPA, Congress vested federal control with FERC to regulate the sale of electricity at wholesale in interstate commerce, but preserved state authority over many aspects of the electric energy industry. Therefore, states retain jurisdiction over local matters. Citing *Solomon* at 246-247. Duke opines that preemption concerns a comparison of federal and state laws and the basic assumption is the Congress did not intend to displace state law. See *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2570, 180 L.Ed.2d 580 (2011); *Farma v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010). (Duke Reply Br. at 44-45.)

Duke submits R.C. Title 49, specifically R.C. Chapter 4928, is limited in its scope to retail energy matters; thus, it does not run afoul of the FPA or FERC's jurisdiction over the wholesale electricity market. Moreover, Duke maintains the PSR does not and cannot set wholesale capacity prices. The PSR is structured to have no impact on clearing prices for new, wholesale capacity, the amounts paid by Duke under a FERC-approved agreement, or other market participants' motivation to add new or retire old generation, which are under FERC's jurisdiction. (Duke Reply Br. at 49-50.) Duke emphasizes nothing about the PSR can or will determine the wholesale prices for capacity or energy, as its PSR proposal does not undermine the BRA process or Duke's intention to offer its share of energy into the PJM day-ahead and real-time markets every day. Therefore, Duke asserts the PSR is materially different than the state programs at issue in *Nazarian* and *Solomon*, both legally and technically. (Duke Reply Br. at 53-54.)

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(xii) Other Concerns

Staff, Sierra, and Kroger opine that granting the PSR shifts the risk associated with the OVEC generating stations to Duke's customers (Staff Ex. 1 at 11; Sierra Ex. 4 at 3; Kroger Br. at 10, 12). RESA agrees that the real purpose of the PSR is to provide Duke with revenue certainty (RESA Br. at 15; Tr. I at 106-107; Tr. II at 519-520). Constellation/RESA submit that the possibility that OVEC generation may produce a gain does not change the fact that it is a generation risk (RESA Ex. 3 at 11). Given that Staff recommends denial of the PSR, Staff submits that, since the risks associated with that generation would be borne by the owners of Duke, the owners should also receive the rewards. Thus, Staff also recommends that all expenses and revenues associated with Duke's interest in OVEC be excluded from the significantly excessive earning test (SEET) calculation. (Staff Ex. 1 at 12; Staff Br. at 5.)

While Duke has requested the right to terminate the ESP one year early, OCC contends that, if the PSR is approved, Duke should only be allowed to terminate the PSR if authorized by the Commission, after all parties have the opportunity to be heard. Allowing Duke to terminate the PSR early would potentially allow Duke to impose the net cost of OVEC plants on customers for some period and then, if conditions change and the plants are anticipated to become economic, terminate the PSR and retain the net benefits. Early termination would also create an incentive to maximize capital and maintenance expenses while such costs are being passed on to customers. (OCC Ex. 43 at 44-45.)

Staff notes that Duke proposes that the PSR "could be expanded to include similar financial arrangements with other generators to provide further protection for Ohio customers." However, with the September 11, 2014 filing with FERC to sell all of Duke Energy Commercial Asset Management's (DECAM) generators to Dynegy Resource I (Dynegy), expanding Rider PSR is no longer an option for Duke. (Staff Ex. 1 at 4-5; Duke Ex. 2 at 10.) Constellation/RESA, Direct Energy, and Exelon are likewise concerned about Duke's proposal to expand the PSR to include additional PPAs, stating that, even if the PSR is approved, Duke's request to potentially expand for other PPAs must be rejected (RESA Ex. 3 at 6; Direct Energy Ex. 1 at 8; RESA Br. at 19). IGS agrees, since Duke has indicated it has transferred its other generating assets and there is a definitive purchase agreement to sell the remaining generating assets to Dynegy, there is no reason to leave the door open for Duke to include additional PPAs in the future (IGS Br. 32-33).

If the PSR is approved, Staff sets forth areas of concern and recommended conditions that could mitigate Staff's concerns. Since Duke has filed an application with FERC to sell the DECAM assets to Dynegy, Staff's concern for expanding the PSR to include other Duke-owned generation assets is no longer applicable. However, as for Duke's interest in the OVEC generating stations, Staff recommends the Company be required to request, in its corporate separation docket, a waiver for the requirement set

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forth in Section VIII of the stipulation in the *ESP 2 Case*. Next, if the Commission grants Duke's waiver from the requirement to transfer its interest in OVEC to an affiliate and grants the PSR, the term of the rider should be no longer than the term of this ESP. In addition, as proposed by Duke, the fixed and variable expenses will be components of a wholesale contract between Duke and the entity managing Duke's interest in OVEC; thus, the contract would be under the jurisdiction of FERC. If the Commission believed any of those expenses were not prudent, it would have to file at FERC to challenge the items and the burden would be on the Commission. Therefore, Duke should be required to accept that all fixed and variable expenses could be audited by the Commission and accept a Commission finding to the extent there is disagreement between Duke and the auditor. Further, all revenues from Duke's interest in OVEC will be components in the wholesale contract; thus, to mitigate Staff's concern, Duke would not have an incentive to use a profit-maximizing bidding strategy, Staff would periodically monitor/evaluate the bidding strategies used for the OVEC units with those used by other generation owners in PJM. (Staff Ex. 1 at 13-16; Staff Br. at 7-8, 25-26.)

In response to Staff's proposals, RESA notes that limiting the term of the PSR to the term of the proposed ESP would simply reward Duke for not having divested the OVEC entitlement, while requiring customers to pay for the entitlement and receive none of the credits. Second, while Staff is not concerned with additional arrangements being proposed for the PSR because Duke has filed an application with FERC to sell all of the DECAM assets to Dynegy, Staff has overlooked that the Dynegy transaction has not gone through and may not go through.¹ Moreover, there is nothing to stop a Duke affiliate from acquiring other generation assets and Duke proposing additional arrangements during the lengthy period proposed by Duke for the PSR. In addition, RESA submits the monitoring and evaluations proposed by Staff will open up new and complicated evaluations of wholesale bidding, which is better avoided by rejecting the PSR. (RESA Br. at 21-22.)

(c) PSR Conclusion

The Commission thoroughly considered Duke's request for approval of the PSR, which, as proposed by Duke, would extend beyond the term of the ESP to June 30, 2040, and flow through to customers, on a nonbypassable basis, the net benefit or cost from Duke's sale of its OVEC contractual entitlement into the PJM market less all associated costs. Duke also seeks approval to expand the PSR in the future to include similar financial arrangements. The PSR, according to Duke, provides three primary benefits. First, it provides a financial hedge against market volatility and tempers the prices customers will see in generation rates, thereby adding price stability and certainty and

¹ On March 27, 2015, FERC authorized Dynegy's acquisition of the DECAM assets. *In re Dynegy, Inc. et al.*, 150 FERC ¶61,231, Order (Mar. 27, 2015).

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allowing customers to take advantage of market opportunities. Second, Duke submits the OVEC proposal is competitively neutral and will not impact the CRES market or CRES providers' ability to compete for customers. Finally, the proposal benefits Ohio by providing reliable power from the OVEC generating assets. (Duke Ex. 1 at 13-14; Duke Ex. 6 at 13-15.) In reviewing Duke's proposed PSR and the considerable evidence of record offered by Duke, Staff, and intervenors with regard to the proposal, the Commission has been guided by two key considerations, specifically whether the PSR may be authorized under R.C. 4928.143(B)(1) or (B)(2) and, if so, whether Duke's proposal would provide the purported benefits or otherwise further the policy of the state.

Initially, the Commission must determine whether the proposed PSR mechanism may be considered a permissible provision of an ESP, in accordance with R.C. 4928.143(B)(1) or (B)(2). The Commission has the authority to approve, as a component of an ESP, only items that are expressly listed in the statute. *Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. Duke focuses primarily on R.C. 4928.143(B)(2)(d) as its statutory basis for the PSR.

Under R.C. 4928.143(B)(2)(d), the Commission can approve, as a component of an ESP, 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. Thus, considering the plain language of the statute, we find that there are three criteria with which the PSR must comply. Specifically, an ESP component approved under R.C. 4928.143(B)(2)(d) must first be a term, condition, or charge; next, relate to one of the enumerated types of terms, conditions, and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service. *See, e.g., In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., (*AEP ESP 3 Case*), Opinion and Order (Feb. 25, 2015); *AEP ESP 2 Case*, Entry on Rehearing (Jan. 30, 2013) at 15-16; *In re Dayton Power & Light Co.*, Case No. 12-426-EL-SSO, et al. (*DP&L ESP Case*), Opinion and Order (Sept. 4, 2013) at 21-22.

The Commission finds that the first requirement of R.C. 4928.143(B)(2)(d) is met, as the PSR would consist of a charge incurred by customers under the ESP. The PSR, as proposed by Duke, would appear as a charge on customer bills, and there is no dispute among the parties on this point. Although Duke projects that the PSR would provide a net charge over the course of the ESP term, the Company estimates that the rider would result in a net credit to customers by the beginning in 2019 (OCC. Ex. 4). Thus, the record indicates that the PSR would consist of a charge to customers.

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Taking the requirements of R.C. 4928.143(B)(2)(d) somewhat out of turn, the Commission will next address the third criterion, which is whether the PSR charge would have the effect of stabilizing or providing certainty regarding retail electric service. We find that the PSR, as a financial hedging mechanism, is proposed to have the effect of stabilizing or providing certainty regarding retail electric service. Duke explained 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 (Duke Br. at 24). Duke witness Henning surmises that, in a rising price environment, Duke's margins from its OVEC contractual entitlement will be positive and the net amount passed through the PSR should similarly increase (Duke Ex. 2 at 10). The PSR, therefore, is intended to mitigate, by design, the effects of market volatility, providing customers with more stable pricing and a measure of protection against substantial increases in market prices.

Although several intervenors dispute the value of the proposed hedging mechanism and its use as a means to promote rate stability, there is no question that the PSR would produce a credit or charge based on the difference between wholesale market prices and OVEC's costs, offsetting, to some extent, the volatility in the wholesale market. 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 wholesale prices for energy and capacity in the PJM markets. Because Duke has demonstrated that the proposed PSR would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service, the Commission finds that the third criterion of R.C. 4928.143(B)(2)(d) has been met.

Finally, to meet the second requirement of R.C. 4928.143(B)(2)(d), the proposed PSR must relate to at least one of the following: 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. While Duke argues the PSR mechanism addresses bypassability, Duke submits the Ohio Supreme Court has confirmed that R.C. 4928.143(B)(2) allows for unlimited inclusion of the items listed in the statute, as the statute merely delineates the types of categories that may be included in an ESP. *Citing Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶33. (Duke Br. at 18-19; Duke Reply Br. at 56.)

The Commission finds that R.C. 4928.143(B)(2)(d) authorizes electric utilities to include, in an ESP, terms related to "bypassability" of charges to the extent that such charges have the effect of stabilizing or providing certainty regarding retail electric service. *DP&L ESP Case*, Opinion and Order (Sept. 4, 2013) at 21. As discussed above, both

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shopping and SSO customers may benefit from the PSR because it would have a stabilizing effect on the price of retail electric service, irrespective of whether the customer is served by a CRES provider or the SSO. Therefore, the Commission agrees with Duke that the proposed PSR, if approved, should be nonbypassable, as authorized by the second criterion of R.C. 4928.143(B)(2)(d). However, we also agree with Staff 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).

Nonetheless, the Commission agrees that the proposed PSR is a financial limitation on customer shopping for retail electric generation service. Although the proposed PSR would impose no physical constraints on shopping, the rider does constitute, as OEG explained, a financial limitation on shopping that would help to stabilize rates (OEG Br. at 5; Tr. VII at 1875). Under Duke's PSR proposal, shopping customers will still purchase all of their physical generation supply from the market through a CRES provider. Although the proposed PSR would have no impact on customers' physical generation supply, the effect of the PSR is that the bills of all customers would reflect a price for retail electric generation service that is approximately 3 percent based on the cost of service of the OVEC units and 97 percent based on the retail market (OEG Br. at 6). Effectively, then, the proposed PSR would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. In light of our determination that the PSR is a financial limitation on customer shopping pursuant to R.C. 4928.143(B)(2)(d), we find that the second criterion of R.C. 4928.143(B)(2)(d) is satisfied.

Having determined that R.C. 4928.143(B)(2)(d) provides the requisite statutory authority, we next consider, based on the record evidence, whether Duke's PSR proposal is reasonable and whether customers would, in fact, sufficiently benefit from the rider's financial hedging mechanism. At the outset, the Commission notes that the power generated by the OVEC units will not be used to supply electricity to Duke's SSO customers. Rather than provide a physical hedge, i.e., providing generation, the OVEC units, in conjunction with the PSR, are intended to function purely as a financial hedge against market price volatility. Although Duke and OEG argue that the PSR would protect customers from price volatility in the wholesale market, there is no question that the rider would impact customers' rates through the imposition of a new charge on their bills. What is unclear, based on the record evidence, is how much the proposed PSR would cost customers and whether customers would even benefit from the financial hedge.

The Duke OVEC analysis reflects that the net cost to customers of Duke's OVEC entitlement over the course of the ESP period would be approximately \$22 million rising to \$29 million by the end of 2018, with net benefits from 2019 through 2024 of approximately \$28 million (OCC Ex. 4). It is undisputed that Duke's projections are based

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on data assumptions that attempt to predict OVEC's costs and revenues, as well as PJM prices for energy and capacity, over the three-year period of the ESP and beyond. In light of the uncertainty and speculation inherent in the process of projecting the net impact of the proposed PSR, the Commission is unable to reasonably determine the rate impact of the rider.

Although the magnitude of the impact of the proposed PSR cannot be known to any degree of certainty, the Commission agrees with OCC, IEU, and other intervenors that the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility. On balance, the record reflects that, during the three-year period of the ESP, the PSR would result in a net cost to customers and that, only over a longer timeframe, would customers perhaps benefit from a credit under the rider. Duke, however, proposes a three-year ESP term and seeks to reserve the right to terminate the ESP after two years, as discussed further below. However, Duke proposes that the PSR extend beyond the term of the ESP, stating that the PSR is structured as a long-term hedge to June 2040, emphasizing that the OVEC commitment is reciprocal and Duke is committing to its customer the net benefits. According to Duke, any shorter termination date does not work. (Duke Reply Br. at 69.)

The Commission must base our decision on the record before us. *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. Also, as Staff and several intervenors point out, there are already existing means, such as the laddering and staggering of SSO auction products and the availability of fixed-price contracts in the market, that provide a significant hedge against price volatility (Staff Ex. 1 at 12-13; RESA Br. at 11; OEC Br. at 13, OPAC Br. at 10; OCC Br. at 2).

In sum, the Commission is not persuaded, based on the evidence of record in these proceedings, that Duke's PSR proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost. 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). Nevertheless, the Commission 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

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volatility in the wholesale market. We recognize 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 (Duke Ex. 2 at 4-5, 9-10; OEG Ex. 1 at 16). A review of the record in Duke's previous ESP proceedings, as well as the ESP proceedings of other EDUs, reflects that rate certainty and stability are essential components of an ESP. *See, e.g., In re Duke Energy Ohio, Inc., Case No. 08-920-EL-SSO, et al. (ESP 1 Case), Opinion and Order (Dec. 17, 2008) at 38; ESP 2 Case, Opinion and Order (Nov. 22, 2011) at 46; AEP ESP 2 Case, Opinion and Order (Aug. 8, 2012) at 32, 77; AEP ESP 3 Case, Opinion and Order (Feb. 25, 2015) at 25.*

Accordingly, the Commission authorizes Duke to establish a placeholder PSR, at an initial rate of zero, for the term of the ESP. We note that the Commission has, on prior occasions, approved a zero placeholder rider within an ESP. *ESP 1 Case, Opinion and Order (Dec. 17, 2008) at 17; ESP 2 Case, Opinion and Order (Nov. 22, 2011) at 51; AEP ESP 2 Case, Opinion and Order (Aug. 8, 2012) at 24-25; AEP ESP 3 Case, Opinion and Order (Feb. 25, 2015) at 25; In re Ohio Edison Co., et al., Case No. 08-935-EL-SSO, et al., Second Opinion and Order (Mar. 25, 2009) at 15.* The Commission emphasizes that we are not authorizing, at this time, Duke's recovery of any costs through the placeholder PSR. Rather, Duke will be required, in a future filing, to justify any requested cost recovery. All of the implementation details with respect to the placeholder PSR will be determined by the Commission in that future proceeding. In its filing, Duke should, at a minimum, address the following factors, which the Commission will balance, but not be bound by, in deciding whether to approve Duke's request for cost recovery: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. The Commission also reserves the right to require a study by an independent third party, selected by the Commission, of reliability and pricing issues as they relate to the application. Duke must also, in its PSR proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both Duke and its ratepayers. Finally, Duke must include a severability provision that recognizes that all other provisions of its ESP will continue, in the event the PSR is invalidated, in whole or in part, at any point, by a court of competent jurisdiction.

The Commission finds that our adoption of a PSR, to the limited extent set forth herein, is consistent with the state policy specified in R.C. 4928.02 and, in particular, with our obligation under R.C. 4928.02(A) to ensure the availability to consumers of reasonably

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priced retail electric service. In response to the arguments raised by various intervenors that the PSR would violate R.C. 4928.02(H), which requires the Commission to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies, we find that, contrary to intervenors' claims, the rider would not permit the recovery of generation-related costs through distribution or transmission rates. As discussed above, the PSR, whether a charge or a credit, would be considered a generation rate. Moreover, we disagree with the assertion that the PSR would permit Duke to collect untimely transition costs in violation of R.C. 4928.38. As discussed above, the PSR constitutes a rate stability charge related to limitations on customer shopping for retail electric generation service and may, therefore, be authorized pursuant to R.C. 4928.143(B)(2)(d), although, on other grounds, we do not find it reasonable to approve the PSR as proposed by Duke in these proceedings. Some of the parties have also raised the issue of federal preemption. The Commission declines 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.

Finally, the Commission notes that our decision not to approve, at this time, Duke's recovery of any costs, including OVEC costs, through the PSR is based solely on the record in these proceedings, and does not preclude Duke from seeking recovery of its OVEC costs in a future filing.

Further, the Commission notes Staff and intervenors have raised the issue of whether Duke was required under the stipulation in the *ESP 2 Case* to transfer its OVEC entitlement out of Duke. While the record reflects arguments supporting both sides of this issue, the Commission finds that, in light of the fact that the stipulation and the current ESP are coming to an end, it is not necessary for us to evaluate the intent of the stipulating parties in the *ESP 2 Case*. Rather, suffice it to say, it was not the Commission's intent in adopting the stipulation in the *ESP 2 Case* to exempt Duke from pursuing the divestiture or transfer of the OVEC contractual entitlement. Therefore, at this time, we direct Duke to pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of the OVEC asset. Duke should file a status report regarding the transfer or divestiture of the OVEC asset, in these dockets, by June 30 of each year of the ESP, with the first such filing to occur by June 30, 2015.

2. Generation Service Supply

(a) Competitive Bid Process Proposal

Duke proposes to procure all of the supply needed for its SSO customers, including Duke's PIPP customers, via a CBP that is consistent with the procurement methodology employed by Duke in the *ESP 2 Case* (Duke Ex. 2 at 5; Duke Ex. 3 at 6). The CBP entails descending-price clock auctions, with: the first two auctions being conducted prior to the

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delivery period commencing June 1, 2015; an additional two auctions prior to the delivery period commencing June 1, 2016; and the final auctions prior to the delivery period commencing June 1, 2017 (Duke Ex. 1 at 6). Duke witness Lee asserts multiple procurements reduce the risk that SSO prices will be significantly impacted by short-term market conditions at the time an individual procurement is conducted (Duke Ex. 3 at 8-9). Mr. Lee notes that, although load caps may place upward pressure on the auctions' clearing prices, supplier diversity provides some risk mitigation benefits to Duke and the customers. Thus, Duke proposes to adopt an 80 percent load cap on an aggregated load basis across all auction products for each auction date, such that no bidder may bid on and win more tranches than the load cap. (Duke Ex. 3 at 30.) The auction product would be an hourly, load-following, full-requirements tranche of the Company's SSO load for full-requirements service, where a tranche is equal to 1.00 percent of Duke's total SSO load obligation, i.e., Duke's nonshopping load, which includes Duke's PIPP customers. Full-requirements service consists of capacity, energy, ancillary service, and market-based firm transmission services, as defined in the Master SSO Supply Agreement (MSA). (Duke Ex. 1 at 7; Duke Ex. 3 at 8.) Duke reserves the right to terminate the ESP at the conclusion of the second year of the ESP. Thus, Duke explains the bidding process timeline may need to be truncated if the Company elects to pursue this option. (Duke Ex. 1 at 7.)

According to Duke witness Lee, the CBP plan is designed to promote open, fair, and transparent competitive solicitations with clear product definitions, standardized bid evaluation criteria, oversight by an independent third party, and evaluation of the submitted bids prior to the selection of the least-cost bid winner(s) (Duke Ex. 3 at 6). Duke explains that the CBP plan provides for the equal and nondiscriminatory exchange of information and the application of bidding requirements. All prospective bidders will be subject to the same pre-bid requirements and all successful bidders must adhere to the same contractual commitments. Duke retained CRA International, d/b/a Charles River Associates, to design, administer, and oversee the CBP. The CBP plan also contemplates Commission review through the production of a post-auction report and retention of a separate consultant. (Duke Ex. 1 at 6-7.)

Generally, Staff believes Duke's CBP is appropriate and consistent with what Duke and other EDUs have used in the past (Staff Br. at 49). However, Staff recommends Duke's CBP include the potential for modification during the ESP period, as the Commission deems necessary, in order to respond to any unforeseen conditions that may otherwise detrimentally impact the auction process. Staff states this is similar to the requirement in the *DP&L ESP Case*, wherein the Commission retained the right to modify and alter the load cap or any other feature of the CBP for future auctions based on the Commission's continuing review of the CBP, including its review of the reports on the auction provided to the Commission by the independent auction manager. *DP&L ESP*

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Case, Opinion and Order (Sept. 4, 2013) at 16-17. (Staff Ex. 3 at 6; Staff Br. at 51.) Exelon supports Staff's proposal (Exelon Br. at 19.).

Staff recommends that, rather than allowing 100 percent of the SSO supply to be terminated at the end of the currently proposed ESP period, in order to transition from the currently proposed ESP to the next ESP without a rate volatility impact, the auction laddering and blending process should continue past the end date of the proposed ESP period (Staff Ex. 3 at 5, Att. RWS-1; Staff Br. at 49-50). While Exelon agrees Staff's suggestion could allow for better transitions between ESPs, Exelon believes that, rather than just extending the laddering and blending process indefinitely, there should be an opportunity for modifications or adjustments based on issues that arise. Exelon states a more appropriate middle ground could be developed and suggested in the future. (Exelon Br. at 18.)

According to Staff, it is not clear from the application that the CBP auctions will be advertised. Therefore, Staff recommends Duke or the auction manager be required to place at least one advertisement in an appropriate publication for each auction. (Staff Ex. 3 at 6; Staff Br. at 51.) Exelon agrees with Staff's suggestion, as long as a well-circulated publication is utilized, stating that it will promote the auction and provide a greater opportunity for participation by diverse bidders (Exelon Br. at 19).

Duke submits that the recommendations of Staff and Exelon, which are allegedly aimed at reducing risk and uncertainty, would only serve to inject more risk and more uncertainty, which yields higher auction prices. Specifically, Duke argues extending the procurement period beyond the ESP term is unsubstantiated, invites risk, and deprives Duke of its right to propose the structure of its future SSOs. Therefore, to mitigate against the risk that is likely to result from undefined circumstances, the Commission should consider identifying the conditions pursuant to which future changes to the CBP plan may be made. With regard to Staff's proposal for advertisements, Duke notes Staff provided conjecture, but no proof, concerning the potential value of this recommendation. To the extent the suggestion would yield more bidder participation and, thus, it is cost justified, Duke does not object. However, at this time, Duke believes it is premature given the lack of effectiveness and detail offered by Staff. (Duke Reply Br. at 8-11.)

IGS proposes the Commission conduct a retail auction, rather than wholesale auctions, to procure SSO service, so that CRES suppliers could serve SSO customers directly. In the alternative, IGS proposes a retail price adder (RPA), which is a fee charged to suppliers of SSO service that reflects the cost of providing retail electric service in the market, be adopted. According to IGS, both of these proposals will encourage customers

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to engage in the retail market and tilt the anticompetitive advantage away from the SSO service. (IGS Ex. 10 at 21-22.)

In response to IGS's proposal, Duke points out that, in the stipulation in the ESP 2 Case, IGS agreed to use a wholesale auction structure similar to that proposed by Duke in these cases (Duke Reply Br. at 5-6; OCC Ex. 2 at 4-5). According to Duke, IGS offers no justification for deviating from such commitment. Duke argues the proposal by IGS runs afoul of Commission precedent and the law. Citing *In re Investigation of Retail Elec. Serv. Mkt.*, Case No. 12-3151-EL-COI, (CRES Market Case) Finding and Order (Mar. 26, 2014) at 19. Moreover, Duke notes IGS failed to introduce any structure for its proposed retail auctions into the record in these cases. Further, Duke contends the retail auction proposal does not encourage competition, as there would be one auction prior to the commencement of the ESP term, thus, ignoring the potential for new load to enter Duke's service territory. With regard to the proposed alternative RPA adder, Duke states this proposal is not fully developed and there is no statutory provision allowing an ESP to include artificial pricing adjustments to benefit CRES providers. (Duke Reply Br. at 6-7.)

Upon consideration of Duke's proposal to implement full auction-based pricing for its SSO customers, including PIPP customers, for the ESP period beginning June 1, 2015 through May 31, 2018, the Commission finds the proposal is reasonable and should be adopted with the following modifications. The CBP process, including the products offered and the timing of the auctions, should be designed to minimize uncertainty and potential rate volatility for SSO customers. Duke's proposed auction schedule, however, places too much emphasis on 12-month products in the later auctions, which may have the adverse effect of higher prices and greater rate volatility. Accordingly, the Commission finds that Duke's proposed auction schedule should be modified. Specifically, the first auction should occur in advance of the end of the current ESP term on May 31, 2015, and offer a mix of 12-month (34 tranches), 24-month (34 tranches), and 36-month (32 tranches) products, with delivery to commence on June 1, 2015. The second and third auctions should occur in November 2015 and March 2016, respectively, and each offer a 24-month (17 tranches) product. Finally, the fourth and fifth auctions should occur in November 2016 and March 2017, respectively, and each offer a 12-month (17 tranches) product. In addition, the Commission finds that Duke should propose its next SSO sufficiently far in advance of the conclusion of this ESP, in order to blend the final procurements of the instant ESP with the initial procurements of the next SSO. Duke is, therefore, directed to file its next SSO application, pursuant to R.C. 4928.141, no later June 1, 2017. If a subsequent SSO is not authorized by the Commission by April 1, 2018, Duke shall procure, through the CBP process, 100 tranches of a full-requirements product for a term that is not less than quarterly or more than annually to be deliverable on June 1, 2018, until a subsequent SSO is authorized.

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Finally, consistent with our determinations in both the *DP&L ESP Case* and the *AEP ESP 3 Case*, the Commission reserves the right to review and modify any feature of the CBP process, as we deem necessary, based upon our continuing oversight of the process, including any reports on the auctions provided to the Commission by the independent auction manager, Duke, Staff, or any consultant retained by the Commission. *DP&L ESP Case*, Opinion and Order (Sept. 4, 2013) at 16-17; *AEP ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 31. As for Staff's recommendation for advertisements of the CBP auction, the Commission directs Duke to work with Staff to develop a protocol for advertising the auction that will promote the auction, with the goal of attracting more participants to engage in the auction. In response to IGS's proposal for a retail auction, at this time, the Commission finds that the SSO auction, as proposed by Duke, with the modifications set forth herein, should be adopted for purposes of this ESP; however, the Commission will continue to explore all options for possible future consideration.

(b) Master SSO Supply Agreement

The MSA sets forth the contractual obligations of successful suppliers and Duke with respect to each auction. Provisions in the MSA include a contingency plan in the event of supplier default and creditworthiness standards. (Duke Ex. 3 at 12-13.) In addition, the MSA includes a provision that enables cancellation of all contractual obligations, without recourse to any party (Duke Ex. 1 at 7).

ExGen states that the MSA largely mirrors what has been used in previous Duke auctions and it strikes the appropriate balance between various interests. However, certain provisions in the MSA have been altered in a way ExGen does not believe benefit the competitiveness of auctions. (Exelon Ex. 1 at 2; Exelon Br. at 15.) ExGen recommends eight changes to the MSA. First, ExGen proposes the phrase "including, without limitation, through participation in the base residual auctions administered by PJM" be deleted in the sixth recital paragraph. ExGen reasons that SSO suppliers will be charged by PJM for capacity to meet their SSO supplier responsibility share; therefore, an SSO supplier's participation, or lack thereof, in the PJM capacity auctions will have no direct impact on its obligations under the MSA. (Exelon Ex. 1 at 3, Att. 1.) Duke responds that the language referenced is a statement of undisputed fact that explains that each SSO supplier will have capacity-related obligations and it does not dictate how the obligations will be met. Duke argues this language has been approved by the Commission and accepted by suppliers and there is no legitimate reason to change it now. (Duke Reply Br. at 11.) The Commission finds, as explained by Duke, the proposed revision is unnecessary; therefore, it should not be adopted.

Second, ExGen proposes paragraph 2.4, referring to Duke's unilateral right to an early termination, be deleted (Exelon Ex. 1 at 3, Att. 1). Staff agrees stating this provision introduces unnecessary risk and uncertainty into the SSO supply procurement process that

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could impact participation levels in the auctions, as well as the winning bid prices. Staff asserts, if this provision is implemented, the entirety of Duke's SSO supply would terminate as of May 31, 2017; thus, introducing unnecessary rate volatility. If this provision is retained, Staff recommends it only be allowed to do so with the concomitant requirements that any subsequent ESP include the same CBP for procurement of Duke's SSO supply and that the auction blending process continue unabated. (Staff Ex. 3 at 3-5; Staff Br. at 49-50.) Duke asserts this recommendation by ExGen and Staff should be rejected (Duke Reply Br. at 12). The Commission will address this issue further below.

Third, ExGen proposes the definition of ESP be modified to reflect that the beginning of the ESP period is June 1, 2015 (Exelon Ex. 1 at 3, Att. 1). Duke agrees with this recommendation (Duke Reply Br. at 13-14). The Commission finds this recommendation is reasonable and should be adopted.

Fourth, ExGen proposes PIPP customers be defined and the definition of SSO customers be modified to include PIPP customers (Exelon Ex. 1 at 3-4, Att. 1). The Commission agrees with Duke that this proposed edit is not necessary and should not be adopted (Duke Reply Br. at 13).

Fifth, ExGen proposes generation deactivation and emergency load response be added back to the list in paragraph 3.2(d)(i) of charges for which Duke will retain responsibility, as it is an unhedgeable risk to SSO suppliers and, therefore, must properly rest with the utility; moreover, striking it creates inconsistency with attachment F of the MSA (Exelon Ex. 1 at 4, Att. 1). Duke disagrees, stating, as a market participant, ExGen must be expected to bear risks, including those associated with providing SSO supply. Further, Duke asserts its proposal is appropriate as it acknowledges that the PJM invoice, presented for illustrative purposes, will need to be consistent with the MSA. (Duke Reply Br. at 12-13.) At this time, the Commission finds that Duke's proposal to eliminate emergency load response from the list of charges in the MSA for which Duke will be responsible is reasonable, as we find that such charges should be the responsibility of the SSO supplier. However, consistent with our determination for other EDUs regarding charges for generation deactivation, the Commission finds that Duke's proposal to eliminate generation deactivation from the MSA list should be denied, as such charges should continue to be the responsibility of the EDU. *See AEP ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 67.

Sixth, ExGen proposes paragraph 3.9 be deleted after the initial sentence; Duke should not be permitted to unilaterally revise the declaration of authority, unless such change is necessary to maintain consistency between the declaration of authority and the parties' obligation under the MSA (Exelon Ex. 1 at 4, Att. 1). Duke maintains the Company has the right to protect its customers as it deems fit and part of that

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responsibility includes ensuring auction participants are properly credentialed. Duke asserts there is value in allowing Duke the appropriate business flexibility to run its auctions in a manner consistent with good business practices. (Duke Reply Br. at 13.) The Commission finds that ExGen's proposal should not be adopted. To the extent Duke exercises this provision to protect SSO customers by ensuring proper credentials by auction participants, the Commission finds that the language is appropriate.

Seventh, ExGen proposes paragraph 6.2(c) be deleted because, to the extent billing adjustment or resettlement is warranted, PJM is in the best position to perform such recalculation, in which case Duke would be the appropriate party to approach PJM with such request (Exelon Ex. 1 at 4, Att. 1). Duke opposes this proposal, stating the language is consistent with that proposed in Duke's certified supplier tariff (CST) and such consistency must be maintained as PJM bills both wholesale suppliers and CRES providers (Duke Reply Br. at 13). The Commission finds that the language set forth in paragraph 6.2(c) is appropriate; therefore, ExGen's proposal should not be adopted.

Eighth, ExGen proposes the values in attachment B, seasonal billing factor, be populated and provided to prospective bidders sufficiently in advance of the deadline for bid submissions (Exelon Ex. 1 at 5, Att. 1). In response, Duke states that, consistent with Duke's last ESP, such values will be supplied at the appropriate time to allow suppliers to bid appropriately (Duke Reply Br. at 13-14). The Commission agrees the information should be provided sufficiently in advance to allow suppliers to bid appropriately; however, Duke's current process satisfies this requirement, thus, revision to the MSA is unnecessary.

Staff recommends a change to the communications protocol in the MSA regarding how the post-auction Commission consultant reports are to be handled. In Duke's application, Attachment E at 6, the protocol provides that the auction manager shall review the consultant's post-auction report and Duke shall also receive a copy of the report. Staff suggests the word "shall" be substituted by the word "may" in the last part of paragraph 3.6. According to Staff, this change would allow for the possibility, but would not require, that the consultant could show the auction report to the auction manager or Duke in order to confirm information used in the report. (Staff Br. at 52; Tr. XIII at 3807-3809; Duke Ex. 1, Att. E.) Duke states this change is acceptable, to the extent Duke and its auction manager retain the right to receive and review the report (Duke Reply Br. at 14). The Commission finds that Staff's recommended change is reasonable and should be adopted.

3. Generation Service Pricing

Duke proposes to continue the following four bypassable generation riders, which were approved in the *ESP 2 Case*: Retail Capacity (Rider RC); Retail Energy (Rider RE);

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Supplier Cost Reconciliation (Rider SCR); and Rider AER-R. Duke explains that it is not proposing any changes to Riders SCR or AER-R; however, minor revisions are being proposed to Riders RC and RE to recognize Ohio's fully-competitive retail market and to align the recovery mechanisms. (Duke Ex. 1 at 8.)

(a) Retail Capacity and Retail Energy Riders

Riders RC and RE recover the cost for capacity and energy, respectively, supplied to the SSO load (Duke Ex. 1 at 8). Duke explains that the clearing price for each competitive wholesale auction is an aggregate number, in terms of \$/MWh. In order to allow for more transparency and comparability into the components of SSO supply, Duke proposes to unbundle the costs of full-requirements service into two separate riders, consistent with its current process. Duke seeks to continue Rider RC for the mechanism to recover capacity costs embedded in the winning auction price, although with limited modifications to the current methodology's allocation and rate design. (Duke Br. at 5, 8.) Duke proposes to change the manner in which capacity costs are allocated in the calculation of Rider RC and to change the rate design for both Rider RC and RE (Duke Ex. 6 at 18).

(i) Retail Capacity Rider Allocation

For Rider RC, Duke proposes to change the allocation factor used for allocating the cost of the underlying capacity in the SSO auction price in order to reflect the manner in which such costs are actually incurred (Duke Ex. 6 at 18). Currently, Duke allocates capacity costs to the rate classes based on a methodology that was stipulated to in the *ESP 2 Case* (Duke Ex. 18 at 9). In the instant cases, Duke proposes to allocate the capacity costs that resulted from the PJM RPM prices based on each class's 5 coincident peaks (CP)² demand, assuming no shopping (Duke Ex. 6 at 18; Duke Ex. 18 at 8-9). Duke believes this revision recognizes the regulatory principle of cost causation (Duke Br. at 6). Duke reasons that, since all of the capacity used to serve retail load during the term of the ESP will be acquired from PJM and the charges for capacity billed by PJM to meet the total load obligation is essentially based on Duke's load at the time of PJM's five highest system hourly peaks, the most equitable method for allocating capacity cost is to base it on how much each customer class contributes to those five PJM CPs (Duke Ex. 6 at 18-19; Duke Ex. 2 at 10; Duke Br. at 6). Moreover, CRES providers pay PJM for capacity based on factors influenced by PJM's 5CP method; therefore, SSO costs should be allocated to customer classes in the same manner to avoid a disparity between SSO rates and CRES offers. In addition, the easiest way for customers to compare a CRES offer to an SSO offer is on a \$/kWh basis; however, the existing combination of demand and energy charges makes that comparison difficult and it has the potential to make the SSO prices disproportionately high for very low-load factor customers. (Duke Ex. 6 at 20.) RESA

² The 5CP method uses the five days with the highest peaks during the year (OCC Ex. 46 at 11).

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agrees that the 5CP method for allocating costs, which is the way PJM determines capacity prices, would be in accordance with the ratemaking principle of cost causation (RESA Reply Br. at 12).

OCC and OPAE advocate that Duke's Rider RC proposal be rejected (OCC Ex. 46 at 17; OPAE Br. at 16). OCC explains that, in the *ESP 2 Case*, Duke initially proposed that generation-related capacity be allocated on the basis of a 12CP method,³ which would have meant a 46.76 percent allocation factor for residential customers. However, the stipulation in the *ESP 2 Case* provided a 39.12 percent allocation factor for residential customers. OCC states that, in the instant cases, Duke is proposing a 5CP method, which results in a 45.37 percent allocation factor for residential customers. (OCC Ex. 46 at 5-6; OCC Br. at 91.) OCC contends Duke has not offered any basis why the allocation of generation-related capacity costs, if it were appropriate, should be treated any differently than in prior cases where the 12CP method was used (OCC Ex. 46 at 12; OCC Br. at 92). OCC submits the rationale in the *ESP 2 Case* to have a capacity cost rider was that Duke was self supplying its own capacity requirements under a fixed resource requirement (FRR) plan. However, in the proposed ESP, Duke is terminating its FRR and fully going to market for both energy and capacity. Therefore, there is no state regulation or specific cost structure and/or allocation that can be made based on demand, as capacity and energy come as a package and are sold on the basis of energy. OCC asserts any attempt by Duke to relate these all-inclusive energy prices to the previous FRR is meaningless. (OCC Ex. 46 at 7; OCC Br. at 90-91.)

OCC argues it is not appropriate to allocate and charge customers SSO supplier charges on a capacity cost basis when such charges are billed to Duke on an energy basis (OCC Ex. 46 at 3; OCC Br. at 89). OCC explains that each winning wholesale supplier in an SSO auction will provide a complete full-requirements SSO supply, including energy, capacity, transmission ancillaries, and other transmission services. The wholesale suppliers combine these generation products in a package and, under the auction format, bid to a single \$/MWh price. Duke pays wholesale supplier counterparties a fixed \$/MWh price for the package of generation products; the individual components, i.e., capacity, energy, ancillaries, are not separately priced. OCC points out the auctions solicit supply for tranches of the aggregated SSO load, not customer class loads. (OCC Ex. 32 at 14-15; Duke Ex. 3 at 8-9.) Since the competitively-bid wholesale rates are charged to customers on an energy basis, there is no reason to split the costs into capacity and energy components and charge customers based on the 5CP method. Moreover, this process is inconsistent with the way wholesale costs are passed through to Duke and the way Duke passes those costs on to customers. Therefore, since capacity costs are charged to Duke on an energy basis and Duke does not pay any directly-billed capacity cost in order to supply

³ The 12CP method uses the peak hour of each month (OCC Ex. 46 at 11).

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its SSO load, it is not appropriate to charge customers for these costs on any basis other than the manner in which they are charged to Duke, i.e., as energy charges, \$/MWh. OCC submits that, even if one accepted the notion Duke incurs capacity costs apart from capacity built into the CBP auction prices, Duke's calculation of such costs is overstated because: Duke calculated the total value for Duke-Ohio and Duke-Kentucky and then allocated those hypothetical dollars only to the Ohio jurisdictional customers; Duke has not demonstrated that the allocation is consistent with cost-causation principles; and the underlying data has not been produced and what was produced in the *Distribution Rate Case* was not reliable and biased. (OCC Ex. 46 at 3, 8, 11-16; OCC Br. at 89, 93-94.) Duke disagrees that the data was not reliable, noting that, in its analysis, OCC is comparing apples to oranges, as the 2012 data, which was weather-normalized, used in the *Distribution Rate Case* was one year later than the 2011 actual data used by OCC for comparison. Moreover, Duke states the evidence on the record discredits OCC's assertions that the Duke-Kentucky load was used in the calculation of Rider RC. (Duke Reply Br. at 20-21; Tr. XII at 3531-3538.)

OCC and OPAE agree that, while the basic methodology for calculating the capacity charge in these cases does not change from what was established in the *ESP 2 Case*, Duke's proposed modified class allocation percentages are highly adverse to the residential class, as the proposal increases the residential share of capacity costs from 39.12 percent, which was established in the *ESP 2 Case*, to 45.37 (OCC Ex. 32 at 15-17; OPAE Br. at 16). The residential capacity charge under Duke's proposal would be 1.52 cents/kWh, compared to a total company charge of 1.22 cents/kWh. OCC offers that Duke's proposed modification would equate to a \$3/MWh cost premium that would translate into an \$11 million per year increase in costs for residential SSO customers. This translates to a 24.5 percent capacity charge cost premium for residential customers compared to about 9.5 percent under the stipulation in the *ESP 2 Case*. OCC and OPAE assert the price premium should not be approved, as there is no showing the premium is required by SSO suppliers to serve residential customers. (OCC Ex. 32 at 18-19; OPAE Br. at 17, OCC Br. at 116.) According to OCC, the cost-causation principle applies to cost-of-service regulation and there is no evidence the winning bidders in the SSO auctions would charge residential classes a cost premium as compared to nonresidential customers. OCC believes this is an assumption on Duke's part, in that Duke's allocation proposal is an administratively-determined price adjustment and not the result of bidding behavior for the wholesale full-requirements contracts that will supply the SSO loads. (OCC Ex. 32 at 19.) OPAE asserts using the 5CP method proposed by Duke simply shifts costs from nonresidential customers to residential customers because it reduces the average rate for customers as their load factors increase. In addition, OPAE notes bidders in the SSO auction are exposed to unpredictable load changes over the term due to customer migration and such risk is priced into bids. Large nonresidential customers have a greater tendency to

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migrate, while half of residential and small commercial customers remain on Duke's SSO. (OPAE Reply Br. at 18, 20.)

OCC acknowledges that the load factor information is important to suppliers and is priced into bids, and states that, all else being equal, the relatively lower load factor for the residential class may merit a capacity cost premium as compared to a higher load factor. However, in its methodology, when setting the class-specific SSO rates, Duke does not consider two critical factors that affect market pricing: the larger size of residential SSO load; and the lower migration risk of residential SSO customers. OCC submits, since the residential class is more than 70 percent of the SSO kWh sales, absent the residential class, Duke's auction would be quite small and much less attractive to potential bidders. OCC points out bidders are exposed to unpredictable SSO load changes over the term due to customer migration and large nonresidential customers have a greater chance to migrate; thus, the risk will be priced into the bids. While all customer classes are permitted, and do, migrate, medium and large nonresidential customers have a greater tendency to shop; thus, those classes are far less certain and potentially volatile. According to OCC, half of the residential and small commercial customers remain on the SSO and these customers are already paying more and would pay more under the PSR. OCC maintains there is no showing that bidders in the auction require a price premium to serve the residential or small commercial classes. (OCC Ex. 32 at 20-21; OCC Br. at 117-118.)

OCC offers two alternative remedies to Duke's allocation proposal. First, OCC's preferred option would be to not include the capacity allocation adjustment in the customer class pricing, thus, reducing the residential SSO price. Second, another market-based alternative would be to have a separate power supply procurement for the residential class. OCC explains, for this option, the auction would be conducted in the normal manner, but with separate residential and nonresidential products identified. (OCC Ex. 32 at 21-22; OCC Br. at 118-119.)

OEG opposes OCC's recommendation, submitting the proposal would socialize capacity costs among all customers and require higher load factor customer classes to subsidize lower load factor customer classes that, on average, use system resources less efficiently. OEG points out that the SSO manager, Mr. Lee, testified the SSO auction requires a bundled bid to attract bidders and minimize the risk that there will be insufficient interest in one or more of the individual products. (OEG Br. at 29-30; Tr. II at 320-321.) OEG asserts OCC's argument that the larger size of the residential SSO load and assumption that residential customers carry lower migration risk to justify the proposal ignores known capacity cost differences between customer classes and is extremely speculative. Finally, OEG submits OCC makes no attempt to quantify the rate impact of the proposal on nonresidential SSO customers. OEG supports Duke's proposed allocation, stating that, like every other Ohio utility, Duke allocates capacity and energy costs to SSO

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customers according to well-established, quantifiable, cost-causation principles. (OEG Br. at 30-31.) Duke agrees with OEG's analysis (Duke Reply Br. at 19-20).

In response to objections to the rate allocation and rate design issues, Duke notes that it is financially indifferent to how the rates for Riders RC and RE are structured, noting that these riders simply pass through to customers costs imposed by wholesale auction winners providing SSO service. Nevertheless, Duke believes it has a responsibility to propose a cost allocation and rate design that is fair to all participants and promotes competition without unfairly advantaging or disadvantaging SSO auction winners or CRES providers. (Duke Reply Br. at 15.)

With regard to the Rider RC allocation, Duke emphasizes that, contrary to the assertions by OCC and OP&E, the calculation is based directly on PJM's market price for capacity. Duke points out that the full-requirements product supplied by SSO auction winners includes a component for capacity and the nature of the capacity market in PJM is such that the capacity price established in the RPM is a reasonable proxy for the actual, even if unknowable, cost. (Duke Reply Br. at 15-16.)

As for OCC's comparison of the methodologies proposed and used in the *ESP 2 Case* versus in the instant cases, Duke explains the difference is that Duke's initial 12CP allocation proposal in the *ESP 2 Case* was based on the assumption that capacity would be provided from Duke's own resources. However, the source of capacity in the current proposal is exclusively from the market. Consistent with the long-standing regulatory principle that costs for utility service should be allocated in a manner consistent with how the costs are incurred, Duke argues it is undisputable that PJM charges its wholesale customers for capacity based on the 5CP method. Since each class's contribution to the 5CP is what determines that overall cost of capacity charged by PJM, it makes sense that the costs to be included in Rider RC should be allocated in a similar manner. Moreover, Duke submits OCC's comparison of the proposal in these cases and the allocation agreed to in the *ESP 2 Case* has no merit and no precedential value, noting that the signatory parties in the *ESP 2 Case* reduced the residential ratepayers' share of capacity costs in the process of arriving at an overall resolution of the larger issues. (Duke Reply Br. at 17-18.)

In response to OCC's assertions referring to the fact that Duke will no longer be an FRR entity, Duke notes that capacity is a necessary component of SSO service and there is a cost to provide that capacity, regardless of whether Duke supplies that capacity as an FRR entity or auction winners supply that capacity as part of their bid (Duke Reply Br. at 18).

Upon consideration of the arguments raised regarding Duke's proposed allocation methodology for Rider RC, the Commission finds that Duke's proposal is reasonable and

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should be approved. While OCC and OPAE point to the Commission's approval of the 12CP method in the *ESP 2 Case* to support their claims, the Commission notes that such approval was in consideration of the stipulation entered into between the parties in those cases. In these cases, however, based on the record, the Commission finds that it is reasonable for Duke to calculate its allocation of Rider RC based on the 5CP method, which is based on PJM's market price for capacity. Moreover, as the record reflects, such methodology is structured to avoid a disparity between SSO rates and CRES offers and provide customers with an effective mechanism to compare SSO and CRES offers.

(ii) Retail Capacity and Retail Energy Riders Rate Design

Duke proposes two rate design changes. First, Duke proposes to modify the rate design for Rider RC such that the retail rates are converted into energy-only rates; thus, generation-related charges would be based on kWh consumption (Duke Br. at 6). Duke asserts this revision is consistent with the rate design approved in *In re Ohio Edison Co., et al.*, Case No. 12-1230-EL-SSO, et al., (*Ohio Edison ESP Case*), Opinion and Order (July 18, 2012), as well as the one proposed in the *AEP ESP 3 Case*, Case No. 13-2385-EL-SSO, et al., Application (Dec. 20, 2013) (Duke Ex. 1 at 9).

For certain nonresidential customers, Duke proposes to replace the demand charges for those customers served under Rates Secondary Distribution (DS), Primary Distribution (DP), and Transmission Voltage (TS) with energy-only rates based on kWh charges (Duke Ex. 1 at 9; Duke Ex. 18 at 8). With this change, all generation-related charges for all SSO customers will be based on kWh consumption (Duke Ex. 6 at 19, 24). According to Duke, these changes to Rider RC will better align the overall SSO rates with offers that customers receive from CRES providers (Duke Ex. 1 at 9). Duke maintains this modification to the rate design for Rider RC will protect very low load factor customers from high Rider RC charges, but it will continue to provide high load factor customers with price benefits similar to those they enjoy under the current rate. According to Duke, all else being equal, most customers will experience little to no change with this proposal for rate design, but it will positively impact customers most at risk for experiencing very high average rates. (Duke Ex. 6 at 19; Duke Ex. 18 at 10; Duke Br. at 6-7.)

RESA/Direct Energy oppose Duke's proposal to replace Rider RC demand charges for nonresidential customers served under Rates DS, DP, and TS with kWh based charges (RESA Ex. 1 at 15). RESA states that, in accordance with the stipulation in the *ESP 2 Case*, Duke uses 1CP to allocate and calculate demand charges to Rates DS, DP, and TS, while the demand charges for the other customer classes are allocated and calculated on a per kWh basis (RESA Br. at 23; Tr. VI at 1592-1593). RESA explains that Duke's proposal requires that each member of a class get an allocation of the class responsibility for capacity costs based on load factor. According to RESA, using load factor is a side step away from actual cost causation. RESA submits load factor is not a surrogate for interval

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data. (RESA Reply Br. at 13.) RESA argues Duke's removal of the demand component in Rider RC for Rates DS, DP, and TS customers, and instead using a 5CP load factor, will result in SSO customers having less granularity in their SSO charges, will thwart an SSO customer's ability to make comparisons, and will not make Duke's rates more like those of CRES providers (RESA Ex. 1 at 17-18; RESA Br. at 23). RESA explains the demand component in Rates DS, DP, and TS is intended to collect capacity costs (RESA Br. at 23; Tr. XIII at 3790). Further, RESA/Direct Energy explain capacity reduction products provide customers with the ability to reduce their peak load contribution (PLC), which is used to determine how much capacity the load serving entity needs to be purchased to serve the retail customer; the higher the PLC number the higher capacity costs to serve that customer. They note that commercial and industrial customers use products to reduce PLC. PJM uses the 5CP where demand is the highest throughout the months of June through September to determine a customer's capacity obligation for the following June to May. If a customer reduces its usage during the 5CP, it reduces its PLC number and its capacity costs. According to RESA, Duke's proposed change will result in a single kWh SSO charge based on a rate-class-specific PLC, not a customer-specific PLC. According to RESA/Direct Energy, Duke's proposal sends the wrong price signals, skews the price to compare, and provides less of an incentive to reduce usage during peak times. RESA notes this proposal comes just as Duke is nearing complete installation of smart meters, and that it is contrary to the purpose of allowing customers to have usage data to control their usage, as well as Ohio and federal energy policy. In addition, RESA offers that Duke's proposal frustrates CRES providers' ability to craft an offer for a customer based on the customer's actual contribution. (RESA Ex. 1 at 15-17; RESA Br. at 20-24.) Therefore, RESA urges the Commission to set the goal that Duke move to pricing capacity on the actual contribution to the PJM 5CP instead of allocating by class and conducting a second level within the class which is not based on peak usage (RESA Reply Br. at 13).

Staff states that the Rider RC rate is an hours-use rate for DS, DP, and TS rate classes; therefore, the customer's demand is instrumental in determining the customer's monthly charge. Staff explains that, although the Rider RC rate is charged as a \$/kWh rate, the rate design includes a declining-block rate structure and the actual kWh rate a customer pays is, in part, based on the customer's demand. Accordingly, Staff submits, as a result, this design should perform as Duke alleges by protecting low-load factor customers and providing benefits for high-load factor customers. Staff disagrees with RESA that the rate design proposed by Duke will eliminate the incentive for customers to reduce usage. Staff espouses that, since the rate design proposed by Duke is an hours-use rate design for customer classes with demand meters, reducing demand and increasing load factor will result in lower customer costs. Therefore, the incentive to reduce the demand will still exist under Duke's proposed rate design. (Staff Reply Br. at 19-20.)

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In response, Duke submits RESA ignores the impact of the current rate design on low-load factor customers, as well as the market itself. According to Duke, the proposed rate design maintains the existing incentives to reduce demand and the proposed rates are designed to reward customers for improving load factors. Duke asserts the rate design ensures that neither CRES providers nor SSO auction winners have an advantage or disadvantage when competing for retail load. (Duke Reply Br. at 21-22.)

The Commission finds Duke's proposal to modify the rate design for Rider RC such that the demand charges for Rates DS, DP, and TS will be replaced with energy-only rates, kWh charges, is reasonable and should be approved. We find that Duke's proposed rate design appropriately takes into consideration the market and balances the interests of all customers, including the low-load factor and high-load factor customers. Moreover, as explained by Staff, this new rate design continues to incent customers to reduce demand and it will not inhibit CRES providers from designing their service offerings as they wish.

Duke's second rate design change addresses the current rate design for residential and small commercial customers for Riders RC and RE, which consist of stepped summer and winter rates. Duke proposes to maintain the current seasonal stepped rates, but modify the design to reduce the differences between the stepped rates. Specifically, this rate design change affects customers taking service under Rates Residential Service (RS), Residential Service - Low Income (RSLI), Residential Three-Phase Service (RS3P), Optional Residential Service with Electric Space Heating (ORH), and Secondary Distribution Service - Small (DM). (Duke Ex. 1 at 9; Duke Ex. 18 at 15-16; Duke Br. at 7.) For example, Rider RC, for Rates RS, RS3P, and RSLI, would change to just one summer rate, regardless of usage; for Rate ORH, would change to just one summer rate and the winter usage level, at which the rate changes would be increased by 50 percent; and, for Rate DM, there would be just one summer rate, instead of three winter rates, and a higher threshold for reaching the second block of the winter rate (Duke Ex. 18 at 15, Att. JEZ-1 at 100-105; Duke Br. at 7). Duke submits these changes better align the SSO rates with the reality of a purely competitive market for retail generation service; thus, facilitating the comparison of SSO rates and CRES offers, which benefits competition (Duke Ex. 6 at 19; Duke Ex. 18 at 15-16; Duke Br. at 7).

RESA/Direct Energy believe Duke's proposal to reduce, but not eliminate, the seasonal differences in the Rider RC rates for residential and small commercial customers is unwise. RESA asserts the compression proposed by Duke does not correspond with developing customer-specific rates by CRES providers, will thwart customer efforts to rely on usage data to control usage, will eliminate the incentive for customers to reduce peak usage, and will not correspond to how rates are developed and offered by CRES providers. Duke's proposal also ignores that PJM bases the capacity obligation on summer

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peaks only; thus, ignoring how the market works and shifting costs between customers. (RESA Ex. 1 at 15; RESA Br. at 25.)

Duke disagrees, stating that customers will have no less access to data under the proposed rate design than they currently have. In addition, Duke notes customers will continue to have incentives to reduce energy consumption. Finally, Duke points out the Apples-to-Apples charts reveal that all of the existing offers from CRES providers for residential and small commercial service are simple flat rates, which are no different than the rates being proposed by Duke. (Duke Reply Br. at 22-23.)

Staff does not oppose the rate design changes for Riders RE and RC in concept. However, Staff notes that, based on the typical bills provided by Duke, it appears that the proposed rate design changes for Riders RE and RC may result in increases to certain customers that could exceed 12 percent (Staff Ex. 3 at 6; Duke Ex. 18, Att. JEZ-3; Staff Br. at 47-48). While Duke is proposing to reduce the differences between stepped rates for certain rate schedules to better reflect rates that are being offered in the competitive retail market, the result is that certain customers, i.e., Rates ORH, DM, and Common Use Residential (CUR), could experience large increases. To mitigate the large increases for customers, Staff recommends a reduction in the difference in rate blocks at a slower pace than is being proposed by Duke. For example, the design could be phased in evenly over two years for any rate class that may receive substantial impacts as a result of the rate design changes. (Staff Ex. 2 at 6; Staff Br. at 47-48.) In response, RESA notes Staff acknowledged that its analysis focused on the specific effect the changes would have on customers and not whether the new rates would reflect the cost of service or properly allocate costs to individual customers. Therefore, RESA submits Staff's agreement in concept should not simply be adopted, as greater review and analysis is required. (RESA Br. at 25-26; Tr. XIII 3791-3792.) In response, Staff states a cost-of-service study is performed during a distribution rate case, and such a study is not necessary to determine the appropriateness of the proposed rate design. Staff believes the 5CP methodology properly allocates capacity costs to the classes and a complicated cost-of-service study is not necessary. With regard to RESA's assertion the rate design does not properly allocate costs to individual customers, Staff acknowledges the rate design does not attempt to individually assign costs to each customer based on each customer's contribution to the 5CPs. Rather, the costs are allocated to the various classes based on the class's contribution to the 5CP. Staff does not believe it would be feasible for Duke to calculate a separate monthly capacity charge for each customer. However, if, in the future, each customer could be accurately measured on each of the 5CPs so that each customer could be accurately billed for the costs it created, and it could be done cost effectively, then it could be explored at that time. (Staff Reply Br. at 20-21.)

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While the Commission is in agreement that Duke's proposal to modify the rate design for Riders RC and RE to reduce the differences between the stepped rates is reasonable in concept, the Commission is concerned the rate design changes for certain customers may result in large increases. Therefore, we find that Staff's proposal to phase in the rate design changes over a two-year period is appropriate. Accordingly, Duke shall file modified rates to be effective for the first billing cycle in June 2015. Duke should submit to Staff a copy of the modified rates 15 days prior to filing.

(b) Supplier Cost Reconciliation Rider

Rider SCR is a conditionally bypassable rider, which means, if certain conditions are satisfied, Rider SCR contains language that turns it into a nonbypassable rider (Duke Ex. 1 at 8; RESA Br. at 27). Rider SCR reconciles and recovers costs related to the competitive auctions for the SSO. Duke is not proposing any modification to Rider SCR. As currently structured, as long as the balance of Rider SCR is less than 10 percent of Duke's overall actual SSO revenue, i.e., all revenue collected for SSO service under Riders RE, RC, RECON (Reconciliation), and AER-R for the most recent quarter for which data is available at the time of the filing, Rider SCR is bypassable. However, if the balance of Rider SCR becomes equal to or greater than 10 percent, Duke will apply to the Commission to modify the rider such that it becomes nonbypassable. (Duke Ex. 1 at 8; OMA Ex. 2 at 12-13.) Therefore, Duke proposes to continue to recover any difference between the payments made to suppliers for SSO supply and the amount of revenue collected under Riders RC and RE, as well as any prudently incurred costs associated with conducting the CBP auctions and any costs resulting from supplier default, plus carrying charges at Duke's overall cost of long-term debt (Duke Br. at 9).

Constellation/RESA believe, in the future, Rider SCR could saddle non-SSO customers with the cost of SSO generation. They point out that Rider SCR, which covers generation costs for the SSO and becomes nonbypassable if there are too few SSO customers left, 10 percent, to pay the full cost of the service, was a negotiated item in the *ESP 2 Case*. To date, the 10 percent cost trigger has not been reached and Rider SCR has not been charged to non-SSO customers. Therefore, Constellation/RESA request the Commission no longer allow an automatic nonbypassable charge simply because of shortfalls in the SSO revenue stream. Constellation/RESA recommend, if there are irreversible shortfalls in the SSO program, Duke, at that time, file an application and present a solution that is in the public interest. (RESA Ex. 3 at 5, 7, 16; RESA Br. at 28.) Thus, if the 10 percent trigger is reached, the Commission could adopt remedies other than making the rider fully nonbypassable (Exelon Reply Br. at 12). RESA contends the conversion provision is not necessary, because a revenue-deficit situation may not arise. RESA submits having only one fix for a revenue-deficit situation preestablished is not reasonable, as it is not known what will cause a future revenue deficit triggering the nonbypassable provision or what will be the best way to solve any future deficit. (RESA

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Br. at 29.) Constellation/RESA point out that a similar rider was proposed in the *DP&L ESP Case* and the Commission rejected the rider, but authorized a bypassable rider for auction-related costs, supplier default costs, and carrying costs (RESA Ex. 3 at 17).

Duke points out that, on cross-examination, Constellation/RESAs' witness agreed that Duke is entitled to recover these costs (Duke Reply Br. at 23; Tr. X at 2694). Duke submits that these are simply pass-through costs and introducing unnecessary litigation has the potential to significantly delay the recovery of costs incurred by Duke in its provision of SSO service. Moreover, Duke asserts allowing an unreasonably large balance, i.e., greater than the 10 percent threshold, of under-recovery to flow through Rider SCR on a bypassable basis while the litigation is occurring, would risk undermining the competitive balance between SSO auction winners and CRES providers. (Duke Reply Br. at 23-24.)

Upon consideration, the Commission finds that Duke's proposal to continue Rider SCR in its current form is reasonable and should be approved. In the event it appears the 10 percent threshold will be reached at some point during the term of this ESP, the Commission will closely monitor the situation and obtain information for consideration in future cases.

4. Riders to be Retained, Eliminated, or Modified

Duke explains that, in the *ESP 2 Case*, the Commission approved the following nonbypassable riders: Rider UE-GEN (Uncollectible Generation Expense), which recovers those expenses from all retail customers, including shopping customers served by CRES providers participating in Duke's purchase of receivables (POR) program; Rider LFA, which reconciles both a demand charge and an energy credit for nonresidential customers served under Rates DS, DP, and TS; and Rider DR-ECF (Economic Competitiveness Fund), which recovers costs associated with interruptible load, as designated by eligible transmission voltage customers. Of these three riders, Duke proposes to continue Rider UE-GEN, and the associated POR program, in substantially the same form approved in the *ESP 2 Case*. However, Duke asserts Riders LFA and DR-ECF are obsolete and should be eliminated. (Duke Ex. 1 at 10.)

In addition to eliminating Riders LFA and DR-ECF, Duke proposes to eliminate the following six riders: Electric Emergency Procedures for Long-Term Fuel Shortages (EEPF), because the provisions are moot since Duke no longer owns generation; ESSC, because it terminates at the end of 2014 pursuant to the stipulation approved in the *ESP 2 Case*; Save-a-Watt Energy Efficiency Program (DR-SAW and DR-SAWR), because these two riders terminated at the end of 2011 and 2013, respectively; PIPP customer discount, because it terminates after May 31, 2015, when the PIPP load will be combined with the other SSO

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load supplied through the SSO auction process; and Energy Efficiency Revolving Loan Program (EER), because it terminated after December 2010. (Duke Ex. 18 at 6-8.)

Duke also proposes to add language to Rider Net Metering (Rider NM) to clarify the billing process for net metering customers. For instance, the tariff states that credits for excess generation shall be calculated based on Rider RE. However, since Duke's generation rate is collected through both Rider RC and Rider RE, the tariff will be clarified to reflect that credits will be based on Riders RC and RE. (Duke Ex. 18 at 17-18.)

The Commission finds that Duke's proposal to continue Rider UE-GEN is reasonable and should be approved. In addition, Duke's proposal to eliminate Riders EEPF, ESSC, DR-SAW, DR-SAWR, and EER, as well as the PIPP customer discount is reasonable and should be approved. Finally, we find that Duke's proposed clarification of Rider NE is appropriate and it should be approved. With regard to Riders LFA, DR-ECF, and the POR, as well as other riders and programs addressed in Duke's application, those items will be discussed below.

5. Distribution Service

(a) Distribution Capital Investment Rider

Duke proposes a nonbypassable Rider DCI, pursuant to R.C. 4928.143(B)(2)(h). Duke is seeking to recover a return on capital investment in order to support 19 programs Duke considers vital to maintaining customer reliability. Duke believes it is only able to meet current reliability standards because of its SmartGrid deployment and that, in order to continue meeting these standards, it needs to be proactive. Duke witness Arnold states that, through surveys and customer interactions, the Company believes its customers have high and increasing expectations regarding how reliable Duke's service should be. He also submits that Duke's current system is aging and vulnerable in certain areas and the Company can prevent future problems by modernizing its infrastructure. He notes that much of the Company's equipment is over 30 years old and becoming obsolete. He explains that the Company also has more difficulty obtaining replacement parts. Mr. Arnold does not believe Duke can continue to meet customer expectations without proactively addressing its infrastructure through this rider. The Company does not guarantee that reliability or customer satisfaction will improve, but asserts customers will benefit from an infrastructure that is more efficient and resilient. (Duke Ex. 21 at 9-10, 17-19.)

In regards to its current reliability performance, the Company conveys it is doing well. Duke notes that the Commission measures reliability using the Customer Average Interruption Duration Index (CAIDI) and the System Average Interruption Frequency

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Index (SAIFI). For both of these criteria, Duke declares that it meets the Commission's standards. (Duke Ex. 21 at 7-8.)

Duke also avers that its expectations are aligned with customer expectations. Mr. Arnold remarks that Duke participates in an annual J.D. Power study of customer satisfaction. He states the Company also conducts a quarterly survey of customers for the Commission, in addition to performing its own assessment. The results of the surveys, according to Mr. Arnold, show that, while most Duke customers are satisfied with the Company's reliability, expectations are rising. He states increased reliability and quicker responses are now in higher demand. The Company submits modernizing its infrastructure as quickly and efficiently as possible is necessary to meet the rising expectations of its customers. Duke calls attention to Staff witness Baker, who also believes Duke's reliability expectations are in alignment with its customers. (Duke Ex. 21 at 11-15; Duke Br. at 13; Staff Ex. 7 at 5.)

According to Duke, Rider DCI will recover the incremental revenue requirement on distribution investment, as well as the associated depreciation and property tax expenses not otherwise recovered through base rates. The Company is not proposing to recover operating and maintenance expenses through this rider, or to recover for its SmartGrid program. Duke witness Laub states that this will be calculated by subtracting the revenue requirement for rate base that is recovered through base rates from the revenue requirement associated with the projected rate base at the end of the quarter. The baseline to measure the incremental costs, according to Ms. Laub, will be the sum of return, income taxes, depreciation, and property taxes. She expresses the rate of return will be 10.68 percent. Further, she explains the revenue requirement contains an ROE component. Duke reasons that a 9.84 percent ROE is appropriate, as that was the approved ROE in the *Distribution Rate Case*. Duke witness Morin suggests that, with the current economic and industry conditions, a reasonable ROE would be between 9.6 and 11.0 percent; thus, Duke's proposal is fair. The Company further submits this ROE is lower than those approved for other utilities with similar riders. Duke says it will allocate the revenue requirement in the same way it does in Schedule E of the *Distribution Rate Case*. The Company offers that it will submit quarterly filings to the Commission and that the rider will be trued-up for actual costs, with an audit completed by the Commission. (Duke Ex. 9 at 3-5; Duke Br. at 15-16; Duke Ex. 40 at 3; Duke Ex. 21 at 35.)

GCHC, OCC, OMA, and OP AE state that Rider DCI should be denied, because it does not meet the requirements under R.C. 4928.143(B)(2)(h). The oppositional parties further assert that Duke has not demonstrated a true need for this rider and the recovery Duke desires should be properly sought through a distribution rate case. (GCHC Br. at 14; OCC Br. at 74; OMA Br. at 9-10; OP AE at 18-19.)

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OCC argues that, while the statute requires Duke to show that the rider is necessary to improve reliability, Duke is currently financially stable and already able to meet reliability demands. OCC witness Mierzwa states that Duke does not currently have reliability issues. He points out that Duke has met the reliability standards set forth by the Commission and has actually shown steady improvement in reliability since 2005. While the Company submits that it is only able to meet reliability standards due to the implementation of its SmartGrid system, OCC notes that Duke was unable to show or quantify what impact the system has on reliability. OPAE, OMA, and GCHC offer similar sentiments, noting that Duke is not in a dire financial situation that necessitates a rider such as this one. (OCC Br. at 74; OCC Ex. 49 at 9-11; Tr. VIII at 2154; GCHC Br. at 14; OMA Br. at 9-10; OPAE Br. at 20-21.)

OCC and OMA also disagree with Duke's assertion that the Company's expectations are aligned with its customers, as statutorily required. Staff, however, agrees with Duke that customers have increasingly higher expectations regarding reliability and, thus, their expectations are in alignment. OCC and OMA argue Duke ignores customers' desires to prevent rate increases. OCC believes Duke's reliance on the JD Power survey is flawed, as that survey was not limited to Duke's Ohio customers and it did not take into account how customers felt about rate increases. OCC looks to the Commission-mandated quarterly surveys and points out, among other details, that roughly half of the respondents were not willing to increase costs in order to prevent a one-hour outage. OCC contends customers place more importance on costs than reliability and, therefore, their expectations are not aligned with the Company's. (OCC Br. at 81-85; OMA Br. at 12-13; Staff Reply Br. at 18; Staff Ex. 7 at 5; Tr. VIII at 2212; OCC Ex. 45 at 16.)

OCC notes that, in determining whether to approve the rider, R.C. 4928.143(B)(2)(h) also requires the Commission examine whether the Company is dedicating sufficient resources to the reliability of its system. OCC and OMA both comment that many of Duke's DCI-supported programs do not go towards modernizing or improving reliability; rather, they just go towards maintaining its current infrastructure. They submit that maintenance costs should be recovered through a rate case, not a rider. The parties further point out that Duke does not guarantee the rider will improve reliability or customer satisfaction. Nor, according to OCC, can Duke point toward any quantitative benefits the rider will produce. (OCC Br. at 75, 78; OMA Br. at 13-14.)

Multiple parties also argue against Duke's proposed ROE. OCC witness Kahal asserts that Rider DCI allows the Company to make frequent and timely rate adjustments and recover costs quicker. OCC points out that both Staff and Duke acknowledge this. Mr. Kahal further explains that this lowers Duke's business risks and is beneficial to shareholders. This recovery mechanism, according to Mr. Kahal, did not exist when the 9.84 percent ROE was created in the stipulated *Distribution Rate Case*. If it had been, he

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suggests, the ROE likely would be lower. He further notes that, as part of the stipulation, the agreed-upon ROE was not to be used as precedent in future proceedings. If the Commission does approve the rider, OCC requests that the ROE be reduced to correlate with the Company's reduced business risks. OP&E and OMA suggest likewise. (OCC Ex. 32 at 10-11; OCC Reply Br. at 34-35; Tr. XIII at 3772; Tr. II at 393; OP&E Br. at 22; OMA Br. at 11.)

GCHC, OMA, and Kroger recommend that, if Rider DCI is approved, the rate design should be changed to a simple equal percentage increase of base distribution rates. Duke's proposal is for each customer class's allocation to be the same as used in Schedule E of the *Distribution Rate Case*. Kroger witness Higgins offers that Duke's proposal is flawed in that the rate design locks in each class's share of the costs and does not account for changes in the relative size of each class's load. Further, Kroger notes that the costs allocated to each class are not proportional to each class's share of the revenue. GCHC states significant changes in the customer classes have occurred since the *Distribution Rate Case* and Schedule E should not be applicable in these cases. Kroger, OMA, and GCHC submit that a fixed percentage of base distribution rates would be fairer to each customer class and would allow the Company to recover the same amount of revenue. (Duke Ex. 9 at 6; Kroger Ex. 1 at 10-11; Kroger Br. at 3-5; GCHC Br. at 14-15; OMA Reply Br. at 28.) OCC offers a separate proposal, noting that Duke's suggested allocation is based off of total distribution revenue, which includes many expenses not included in the rider. OCC witness Yankel recommends going off of an allocation schedule that resulted from a cost-of-service study completed by Duke for the *Distribution Rate Case*. This study, he submits, provides a more accurate representation. GCHC believes OCC's plan should be denied, as the study was previously challenged and ultimately not adopted due to a stipulation. OCC counters that Mr. Yankel's proposal is the only one that is consistent with cost-causation principles. (OCC Br. 94-96; OCC Ex. 46 at 19-20; GCHC Br. at 15.)

Staff does not oppose Rider DCI, but suggests several modifications. First, Staff states the proposed rider should not include general plant. OCC and OMA concur with the modification. Staff witness McCarter testified that assets in the general plant account are more appropriately recovered in a distribution rate case. Staff, OCC, and OMA emphasize that general plant expenditures such as office furniture and security equipment are too far removed from the purpose of the rider, which is increasing reliability of distribution service. (Staff Br. at 27-30; Staff Ex. 6 at 3; OMA Br. at 10; OCC Br. at 79-80; OCC Ex. 45 at 20.) Duke submits that general plant was approved in similar riders from other EDUs and Staff supported its inclusion in those cases (Duke Reply Br. at 33-34).

Staff also suggests that Rider DCI should sunset at the conclusion of the ESP. OMA and Wal-Mart agree with the suggestion. Staff's proposal is that, at the conclusion of the ESP, Duke should file a rate case to recover any incremental plant. (Staff Br. at 32; Staff Ex.

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6 at 5; OMA Reply Br. at 28; Wal-Mart Br. at 7.) Wal-Mart witness Criss expresses concern that Duke could recover a more substantial portion of its distribution revenue requirement. Mr. Criss believes Duke should file a base rate case at the conclusion of the ESP to better analyze the reduction in regulatory lag on Duke's ROE. (Wal-Mart Br. at 6-7; Wal-Mart Ex. 1 at 6.) Duke states that R.C. 4928.143(B)(2)(h) allows for such riders to continue past the conclusion of the ESP under which it was filed and that updating distribution systems is an ongoing and dynamic endeavor. Therefore, Duke submits that a sunset date would be inappropriate and limiting to the goals of Rider DCI. (Duke Reply Br. at 34-36.)

Staff, with agreement from OCC and OMA, further recommends Rider DCI be modified to have a cap on the amount that Duke can recover in a year. OCC witness Mierzwa testified that the rider, as proposed, would collect \$22 million in 2015, \$41 million in 2016, \$20 million in 2017, and \$21 million in the first five months of 2018. The parties are concerned that these totals could increase further without a hard cap. Staff witness McCarter, factoring in Staff's proposal to eliminate general plant from Duke's recovery, proposes a hard cap of \$17 million in 2015, \$50 million in 2016, \$67 million in 2017, and \$35 million for the first five months of 2018. (Staff Br. at 32; OCC Ex. 45 at 8; OCC Br. at 74-75; OMA Reply Br. at 28; Staff Ex. 6 at 5-6.)

Another recommendation from Staff is for plant balances to be based off of actual costs, not projected costs. OCC and OMA also agree that, in calculating the revenue requirement, the Company should be limited to costs that are actually incurred. Mr. Mierzwa posits Duke could overcharge customers if it relied simply on projected costs. Along those lines, OCC requests that property taxes not be included until the property being taxed is recognized as taxable by the appropriate authority. (Staff Br. at 30; Staff Ex. 6 at 3; OCC Ex. 45 at 18-20; OCC Reply Br. at 36, 38; OMA Br. at 10.)

Staff's final requested modification regards filing requirements. With two other major distribution infrastructure riders already in place in Ohio, Staff requests Duke submit quarterly filings on or about February 10, May 10, August 10, and November 10 of each year. In reply, Duke asks for the filing dates to occur at the beginning of the month, to which Staff does not object. After 60 days, according to Staff, the quarterly filings would be automatically approved. Staff asks that the annual audit take place with the August filing. The audit would be completed by either Staff or an independent auditor chosen by Staff. Under Staff's proposal, recommendations or objections to the audit would need to be filed within 120 days of the filing. According to Staff, if, after 150 days, the parties are unable to resolve any issues, the matter would be set for hearing by the Commission. If no one raises any issues, the rates would go into effect without adjustment. In the filings, Staff seeks for Duke to continue to use the jurisdictional allocations and accrual rates for each account and subaccount that were approved in the

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Distribution Rate Case. Each filing, per Staff, should include the same information that was provided in the instant cases for each account and subaccount and contain workpapers that shows jurisdictional allocation, accrual rates, and reserve balances of each account and subaccount. Staff asserts the filings should contain information regarding any rider used to collect costs recorded in the Distribution Plant Accounts, by rider and as a grand total. In order to ensure compliance with revenue caps, Staff proposes Duke provide data showing the revenue collected from the rider by month and to date. In order to review the appropriateness of the rider recovery, Staff recommends Duke highlight and quantify any proposed changes to its capitalization policy prior to implementing the change. (Staff Br. at 30-31, 33; Staff Ex. 6 at 4, 6; Tr. XIV at 3930.)

The Commission finds that Duke's proposed Rider DCI is reasonable, and should be adopted, but modified as set forth below. As authorized by R.C. 4928.143(B)(2)(h), an ESP may include the recovery of capital costs for distribution infrastructure investment to improve reliability for customers. A provision for distribution infrastructure and modernization incentives may, but need not, include a long-term energy delivery infrastructure modernization plan. In deciding whether to approve an ESP that contains any provision for distribution service, R.C. 4928.143(B)(2)(h) directs the Commission, as part of its determination, to examine the reliability of the EDU's distribution system and ensure that customers and the EDU's expectations are aligned and that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

The Commission finds that Duke's expectations and customers' expectations are sufficiently aligned. In examining the reliability of the Company's distribution system, the Commission notes that Duke consistently meets the SAIFI and CAIDI standards. Further, the Commission finds that customers have high expectations regarding the utility's reliability. We do take notice that rising costs affect customer expectations. However, in terms of reliability, the Commission finds that both Duke and customers increasingly expect the Company to meet high standards of reliability.

The Commission further finds that the Company is dedicating sufficient resources towards reliability. Duke is correct to aspire to move from a reactive to a more proactive maintenance program. As we have noted with other, similar programs, we believe it is detrimental to the state's economy to require the utility to be reactionary or allow the performance standards to take a negative turn before we encourage the EDU to proactively and efficiently replace and modernize infrastructure and, therefore, we find it reasonable to permit the recovery of prudently incurred distribution infrastructure investment costs. *AEP ESP 2 Case*, Opinion and Order (Aug. 8, 2012) at 47. The Commission finds the adoption of Rider DCI and the improved service that will come

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with the replacement of aging infrastructure will facilitate improved service reliability and further align the Company's and its customers' expectations.

The Commission accepts Duke's recommended ROE at 9.84 percent and finds it to be fair and reasonable. The *Distribution Rate Case*, where this ROE originated, serves as a useful guide, although it was not precedential. We find that the effect this rider has on Duke's business risk does not have a substantial enough impact to warrant lowering the ROE. The testimony of Dr. Morin shows Duke's proposed ROE is on the lower end of what would be expected (Duke Ex. 40 at 3), and, further, the ROE is lower than what is approved in similar riders for other utilities. *Ohio Edison ESP Case*, Opinion and Order (July 18, 2012) at 10; *AEP ESP 2 Case*, Opinion and Order (Aug. 8, 2012) at 27.

Regarding Rider DCI's rate design, the Commission will adopt the design advocated by Kroger and GCHC which provides an equal percentage increase on distribution rates to all rate classes. This method, compared to those proposed by Duke and OCC, appears to be a better option, as it more accurately reflects the allocation of base distribution revenues from the *Distribution Rate Case*. Further, it generates the same amount of revenue as Duke's proposal.

The Commission agrees with Staff and others that general plant should not be included in the rider. The inclusion of general plant would go beyond the intent of the statute, which is geared towards reliability infrastructure. Such recovery would be better considered and reviewed in the context of a distribution rate case where the costs can be evaluated in the context of the Company's total distribution revenues and expenses, and the Company's opportunity to recover a return on its investment can be balanced against the customers' right to reasonably priced service. The function of Rider DCI is to proactively modernize infrastructure in order to improve reliability; the Commission does not find that the inclusion of general plant furthers that objective. In addition, the Commission agrees with Staff that the calculation of the revenue requirement should be based off of actual plant balances, not, as Duke proposes, projected plant balances. The Commission believes using actual costs instead of projected costs is a more practical approach and prevents overcharging.

The Commission also agrees with Staff and others that there should be a hard cap on how much the Company can recover in a year. This ensures that spending is prudent and not too onerous for customers. The Commission adopts Staff's recommendations for the annual caps. Therefore, the cap in 2015 will be \$17 million, \$50 million in 2016, \$67 million in 2017, and \$35 million for the first five months of 2018. The Commission will also accept Staff's recommendations regarding filing requirements. The filing requirements will be adopted in full, as set forth above, but allowing for Duke to submit its filings on the first of the month, as opposed to the tenth.

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(b) Distribution Storm Rider

Duke also puts forward a nonbypassable Distribution Storm Rider (Rider DSR), which is intended to assist Duke in recovering the financial impact caused by major storms. Currently, the Company has \$4.4 million set aside annually in its base distribution rates for major storm operations and maintenance recovery. Duke's proposal, as outlined by Duke witness Laub, is to defer the costs above and below that amount through a regulatory asset account until the next base distribution case. However, if the yearly balance surpasses \$5 million in either direction, the Company would file with the Commission to recover or return that excess. Duke proposes that any balance in the account would accrue a carrying cost at the Company's long-term cost of debt as approved in the *Distribution Rate Case*. Duke notes that this rider does not include any capital expenses, as those would be addressed in either Rider DCI or a rate case. (Duke Br. at 16-17; Duke Ex. 9 at 6-7.)

OPAE submits that Rider DSR is not necessary and should be denied, as it believes distribution rates should be determined strictly through base rate proceedings. OPAE offers that, if the rider is approved, it should be modified. Staff and OCC also submit modifications to the rider. (OPAE Br. at 23-24.)

Staff, OCC, and OPAE believe Rider DSR should be subject to a substantive review. OCC witness Mierzwa states there should be a separate proceeding where Duke's major storm costs are properly reviewed. He posits that, without such a review, the chances increase of improper costs being included. OPAE echoes these concerns. Staff witness Hecker recommends that, once Duke's deferral amount exceeds \$5 million, Staff should conduct a full audit of the expenses and offsetting revenues. (OCC Br. at 86-88; OCC Ex. 45 at 23-24; OPAE Br. at 23-24; Staff Br. at 37; Staff Ex. 4 at 4.) Duke responds that waiting for such a situation to occur unnecessarily complicates the process, as witnesses may no longer be available and accounts may not be as fresh. Duke believes a yearly audit is more prudent. (Duke Reply Br. at 39-40.)

In regards to what Duke can recover from Rider DSR, Staff makes several propositions. Staff witness Hecker first suggests that recovery should only take place through Rider DSR. Mr. Hecker proffers that only incremental labor should be included in the deferral. According to Mr. Hecker, the straight-time portion of the first 40 hours of work during a week of storm repairs or double-recovery should not be included, whereas any premium time and time above 40 hours used for storm repairs would be allowed to be recovered. Mr. Hecker also submits that overtime accrued by management should not be recoverable, as management is paid to do a specific job, as opposed to work a specific number of hours. Regarding reimbursements that Duke receives for providing mutual assistance, Mr. Hecker states such funds should be offset with what the Company can

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recover. Staff maintains Duke is double-recovering because the Company recovers for the first 40 hours of labor through base rates and recovers again when reimbursed from the other utility. Regarding carrying costs, Staff requests they not start until the end of a year that finishes above or below \$4.4 million. Staff further asks that no carrying charges occur during a recovery period. (Staff Br. at 36, 39-42; Staff Ex. 4 at 3, 5-8.)

Duke has no objection to Staff's suggestion that costs only be recovered through Rider DSR. Duke also agrees that only incremental work should be recoverable, but believes that management overtime should be as well because the Commission has allowed it in the past and the Company has a specific, written policy that compensates management for working overtime on major storm repairs. However, Duke disagrees with Staff's assertions regarding alleged double recovery, stating that workers assisting other utilities must still complete their regular duties. (Duke Reply Br. at 39, 41-42.)

The Commission finds that Duke's Rider DSR is reasonable and should be approved, subject to the modifications described herein. The Commission agrees recovery should be done through Rider DSR and finds that Duke should file an application with the Commission seeking recovery under the rider when the balance of the asset or liability is over \$5 million. The Company will bear the burden of showing that any cost was reasonably and prudently incurred and incremental to any cost recovery through base rates. The application should include a monthly rider charge when the amount is positive or a monthly rider credit when the amount is negative. The Commission finds that Staff should audit the included amounts on an annual basis. In regards to carrying costs, the Commission finds that they should occur at the long-term debt rate approved in the *Distribution Rate Case* and they should not begin until the conclusion of the calendar year that a deferral is determined and they should cease once the recovery begins.

Regarding Staff's recommendations on recoverable costs, the Commission finds that eligible costs must be incremental. When calculating the storm deferral, the Commission directs Duke to exclude employees' straight-time labor from working on storms in the Company's service territory. Consistent with Commission precedent, if Duke seeks to recover the expenses associated with overtime compensation paid to employees, including management, during a major storm event, the Company must demonstrate that, under the specific facts and circumstances of the major storm event in question, the overtime compensation was paid in accordance with the Company's nondiscretionary major storm restoration overtime policy, and was a reasonable and prudent expense associated with safely and efficiently restoring electric service to customers. *In re Ohio Power Co.*, Case No. 12-3255-EL-RDR, Opinion and Order (Apr. 2, 2014) at 25-26. Further, regarding mutual assistance revenues, the Company must show that any such revenues are not a reimbursement of labor hours that are already reflected in base rates. Finally, Duke should maintain and provide to Staff, on an annual basis, a detailed accounting of all

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storm expenses, including incidental costs and capital costs, and should also provide a detailed accounting of expenses incurred and revenues received for providing mutual assistance to other utilities.

(c) Load Factor Adjustment Rider

In its proposal, Duke is not offering several riders that were available under the previous ESP. Among the more contested suggested terminations is Rider LFA, whose immediate termination is opposed by Staff, GCHC, Kroger, OEG, OMA, and Miami/UC. According to Duke, the rider was originally the result of a negotiated settlement in the *ESP 2 Case* and was created in order to incentivize larger customers to reduce their load factor. Duke states that Rider LFA's influence on usage behavior was not market-based and, thus, went against goals of the Company and the Commission. Therefore, the Company seeks to terminate the rider, subject to a final true-up. (Duke Br. at 34; Duke Ex. 6 at 21-22.) Staff witness Donlon agrees with the eventual termination but suggests the rider slowly be phased out. Mr. Donlon submits reducing the rider by 33 percent in the first year, 33 percent in the second year, and 34 percent in the third year, with a final true-up at the end. According to Mr. Donlon, this would prevent the nonresidential customers who benefitted from Rider LFA from having a drastic rate change. (Staff Ex. 5 at 3.) GCHC, Kroger, and OMA agree with Staff's proposal (GCHC Br. at 15; Kroger Br. at 5-6; OMA Br. at 15). OEG's proposal is to have Rider LFA only apply to customers under Rates DP and TS, not DS, and to reduce the demand charge to \$8/kilovolt-amp (kVa) in year one, \$6/kVa in year two, and \$4/kVa in year three. According to OEG witness Baron, Rate DS customers are smaller, more likely to be negatively affected by Rider LFA, and represent over 98 percent of those that were previously affected by the rider. Mr. Baron says the phase down for the other customers creates a more reasonable transition and better allows them to prepare for higher rates. Miami/UC prefers OEG's proposal over Staff's proposal. (OEG Br. at 26-28; OEG Ex. 2 at 20-23; Miami/UC Br. at 2-5.) Duke, however, maintains that Rider LFA should be terminated completely with the conclusion of the current ESP (Duke Reply Br. at 90).

The Commission agrees that Rider LFA should eventually terminate, but concurs with Staff and others that the rider should be gradually phased out. We believe it is reasonable to avoid any major rate shock for customers who were previously given incentive to adjust their load, especially noting that the rider is revenue neutral for the Company. The Commission accepts the recommendations of Staff and finds its proposal preferable. Therefore, the rider will continue as it did under the current ESP, but shall be reduced by 33 percent in the first year, 33 percent in the second year, and finally 34 percent in the third year. After that, the rider shall conclude with a final true-up.

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(d) Backup Delivery Point Rider

Duke proposes to continue multiple riders in this ESP, including its Backup Delivery Point Rider (Rider BDP). Duke submits one modification to the rider that differentiates it from the *ESP 2 Case*, namely the reference on how GCHC member hospitals were to be treated under the rider. Duke states that GCHC was exempted in *ESP 2 Case* due to an agreed-upon stipulation; however, there is no such current agreement in these cases. GCHC says that a hospital with a typical load of 6,000 kW would be charged an additional \$300,000 to \$400,000 per year without the exemption. GCHC believes Duke is already recovering this revenue in its base rates and this increase to the hospitals allows Duke to recover twice. Duke opines the rider is unchanged and it is just the special exemption for GCHC that is being removed, as the stipulation would no longer be in effect. (Duke Reply Br. at 105; Duke Ex. 20; Tr. VI at 1625; GCHC Br. at 15-16.) The Commission understands that the previous exemptions were the result of a bargained stipulation that will no longer be in effect. Therefore, the Commission finds that Duke's proposed modifications to Rider BDP are reasonable and should be approved.

(e) Distribution Decoupling Rider

The Company also aims to continue Rider DDR, which, according to Duke, is intended to adjust rates between rate cases, thus, removing any incentive by Duke to increase volumetric consumption. Duke says it intends to maintain this rider until the next distribution base rate case. Duke offers that the rider should not apply to customers of Rates DS, DP, and TS. NRDC supports the extension of Rider DDR. It believes the rider allows Duke to help customers become more energy efficient. (Duke Br. at 17-18; Duke Ex. 18 at 19-21; NRDC Br. at 1-5.) The Commission finds that Duke's request to continue its Rider DDR is reasonable and should be approved.

(f) Large Customer Interruptible Load Program

Duke is proposing to eliminate its large customer interruptible load program that was established in the *ESP 2 Case*. The end of this program would also result in the termination of the Company's Economic Competitiveness Fund Rider (Rider DR-ECF), through which the program's costs were recovered. The program gave customers a chance to receive an above-market credit for allowing Duke to use interruptible load in Duke's FRR plan. Currently, there are four customers in the program. Duke notes that it will cease being an FRR entity on June 1, 2015, and, thus, will no longer need the demand resources. The Company further explains that stopping this arrangement furthers the development of a competitive electric market by eliminating nonmarket-based incentives. (Duke Br. at 34; Duke Ex. 6 at 22.)

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OCC supports Duke's request to terminate the program. OCC contends the program was created via stipulation and was always intended to end with the conclusion of the current ESP. It asserts that, because Duke is a distribution-only utility, the Company would receive no benefit from the program and the credits given to customers would only serve as a subsidy. (OCC Br. at 97-99; OCC Ex. 46 at 29-30.)

OEG requests the Commission require the program to continue. OEG explains that, while Duke will cease to be an FRR entity, it will then become an RPM entity. According to OEG, the Company could still bid the load it receives from its customers into the RPM market as a capacity resource. With the anticipated retirement of a significant amount of coal capacity, OEG believes that interruptible load will become more valuable for reliability. Further, OEG states interruptible resources can lower market prices during peak times and lower the demand for more capacity resources. OEG asserts that the benefits of the program exist whether Duke is an FRR entity or an RPM entity. OEG also believes the program would give the participating customers rate stability. According to OEG, the capacity market is already unpredictable and, if the program is discontinued, the previously-participating customers may choose not to engage in the PJM demand response programs, thus, depriving other customers of the benefits of that interruptible load. OEG submits the Commission should continue the program, with modifications. Namely, OEG proposes participating customers would be subject to unlimited emergency-only interruptions year round, as opposed to only in the summer, and the level of interruptible credit, 50 percent of net cost of new entry (Net CONE) would remain the same. OEG's proposal would require Duke to continue Rider DR-ECF in order to recover costs. Further, OEG's modification would force Duke to bid the interruptible capacity into the PJM auction and credit the revenue back to customers. (OEG Br. at 16-25; OEG Ex. 2 at 4, 8, 13-14, 19.)

Duke stands by its request to cancel the program, subject to a true-up, when the new ESP term begins (Duke Reply Br. at 91). OCC again asserts there will be no benefit to continuing the program, explaining that, with Duke no longer being an FRR entity, the program does nothing to improve reliability. OCC believes the PJM demand response program is the more appropriate way for customers to evaluate interruption. (OCC Reply Br. at 47-48.)

Upon consideration of the issues raised, the Commission finds that the large customer interruptible load program should continue. As OEG discusses, the program offers numerous benefits and furthers state policy. Although Duke will no longer be an FRR entity, the advantages of the program are still available. We accept the modifications proposed by OEG, which makes participating customers subject to unlimited emergency-only interruptions year round. Furthermore, we find that the level of credit should remain at 50 percent of Net CONE. Rider DR-ECF will also need to continue, through which

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Duke may apply for cost recovery. The Company should also bid the additional capacity resources associated with the program into PJM's BRAs held during the ESP term, with any resulting revenues credited back to customers through Rider DR-ECF.

(g) Demand Response

OEG recommends the Commission ensure that state-established demand response programs for shopping and nonshopping customers remain available, even if PJM is required to change its tariffs as a result of federal proceedings. OEG adds that demand response programs provide both reliability and efficiency benefits. (OEG Br. at 23-24.)

The Commission notes that the U.S. Court of Appeals for the District of Columbia Circuit has vacated FERC Order No. 745, which established a means for regional transmission organizations to compensate demand response resources in wholesale electricity markets. *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014). Specifically, the court determined that demand response is solely a retail matter subject exclusively to state jurisdiction. The U.S. Solicitor General, on behalf of FERC, filed a petition for a writ of certiorari at the U.S. Supreme Court on January 15, 2015.

The Commission agrees with OEG that demand response plays an important role in ensuring reliability, while also encouraging state economic development. We find that, because of the possibility that federal proceedings may significantly alter the jurisdiction of demand response, a new placeholder pilot demand response rider should be established. The Commission emphasizes that this is merely a placeholder rider and that no cost allocation or recovery shall occur at this time. Within 30 days of a final order from the U.S. Supreme Court or an order denying petitions for certiorari, Duke or the Commission may open a new docket to revisit any provisions in these proceedings that relate to demand response and load management mechanisms within the Company's service territory.

6. Rate Structure

Duke asserts that it has properly analyzed and discussed how its ESP, as proposed, will affect rates. The Company affirms that it will have the lowest residential rates and among the lowest nonresidential rates. Duke also submits that its rate structure will further the state's policy regarding retail competition, service reliability improvements, and retail service stability and predictability. (Duke Br. at 24-26; Duke Ex. 18 at JEZ-4; Duke Ex. 2 at 13.)

OCC believes the Company's ESP should be modified in order to produce a reasonably priced SSO. OCC states that, although Duke has the lowest residential rates, the rates are still not affordable for many customers. OCC witness Williams states that

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20.2 percent of Duke's customers are negatively affected by the current rates and 14.3 percent of Duke's customers were disconnected for nonpayment in 2013. OCC notes that the disconnect rate was the highest in Ohio. OCC further explains that 4.6 percent of Duke's customers are enrolled in the PIPP Plus program because they have difficulty paying their utility bill in full. Also, according to OCC, Duke's rates have increased at twice the rate of inflation over the past five years. OCC avers that the Commission should eliminate various riders, in particular Rider DCI, as those riders will negatively affect customer rates and the associated costs are best recovered via a rate case. OCC also proposes the Commission reject the rate allocation methodology for Rider RC. (OCC Br. at 68-73; OCC Ex. 35 at 9, 11.) OPAE offers similar arguments, submitting that Duke's plan does not protect at-risk populations. OPAE believes rate affordability is of particular concern in Duke's service area, as the poverty level there is higher than the national average. OPAE states that affordability is already an issue and Duke's Riders RC and DCI will only increase rates for customers. OPAE requests that the riders be denied or, alternatively, that at-risk populations be exempt from payment. (OPAE Br. at 3-7.)

Wal-Mart believes Duke's rate structure is unnecessarily complex, making it overly difficult for commercial customers to navigate. Wal-Mart submits the Commission should order Duke to file a base rate case, which it says is not only good policy, but in line with statutory goals. (Wal-Mart Br. at 4-6; Wal-Mart Ex. 1 at 5-6.)

The Commission finds that the concerns expressed by OCC and OPAE have been thoroughly addressed through the discussion in this Order regarding Duke's various proposals. The Commission finds that the proposed ESP, with the required modifications, creates a reasonably priced rate structure for customers. The Commission specifically considered the impact the ESP would have on at-risk populations, in line with R.C. 4928.02. As to Wal-Mart's proposal, the Commission declines to require Duke to file a distribution rate case by a specific date, but does encourage Staff and intervening parties to recommend ways to simplify Duke's rate structure in the next rate case.

7. Term of the ESP

Duke's application requests the ESP be approved for a three-year term, with the unilateral option to terminate the ESP one year early. If Duke decides to terminate the ESP early, all MSAs pertaining to delivery between June 1, 2017, and May 31, 2018, would be declared null and void. According to Duke, it would only have the ability to terminate the ESP early if a "substantial change" in state or federal law occurred that affects SSOs or rate plans concerning SSOs. The change could occur via, among other things, statute, rule, court decision, Commission decision, or FERC decision. Duke asserts that the market environment is very dynamic and it is necessary to take such risk-mitigation measures. If such a change occurs and Duke seeks to terminate the ESP early, the Company states it would file a notice with the Commission by September 1, 2016, and, with that notice, also

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submit an application for a new SSO. As stated in its application, the decision to terminate the ESP early would solely be Duke's. (Duke Br. at 35-36; Duke Ex. 1 at 16.)

Numerous parties argue against Duke's ability to terminate the ESP after two years under several rationales. OCC argues, among other things, that the possibility of the ESP being three years or just two years essentially creates two separate ESP requests. Because Duke's application and evidence is primarily geared to the three-year ESP term, OCC submits the Company has not met its burden of proof regarding the two-year ESP term. OCC's position is that the two-year ESP request is invalid because Duke did not provide any analysis in order for the Commission to do the mandated ESP versus MRO comparison. Therefore, according to OCC, the request for a two-year ESP should be denied. The Company submits the Commission is to look at the application as a whole. The conditional option to terminate the ESP early is just a part of its entire application, Duke asserts, and it does not create two different requests. (OCC Br. at 106; Duke Reply Br. at 95-96.)

Kroger, OCC, OMA, and RESA all argue there is no statutory authority that allows Duke to terminate its SSO early. The parties point out that R.C. 4928.143(B)(2) outlines what an ESP may provide. The parties all argue that the statute does not specifically give Duke the authority to terminate the ESP early and, without such authority, Duke's request is legally invalid. OCC avers that there is only one circumstance where an ESP may be terminated early by a utility. In that situation, the ESP must be for three years or less, and the Commission must find that the Company's earnings exceed the SEET ROE threshold. Multiple parties also submit that, if Duke is overly concerned about the environment two years from now, it should have only requested a two-year term. (OCC Br. at 107; Kroger Br. at 7; OMA Br. at 7-8; RESA Br. at 26-27.) The Company responds that R.C. 4928.143 does not require an ESP last for a particular term and, therefore, without any statute particularly precluding such an option, Duke's request for a two-to-three year term is statutorily allowed (Duke Reply Br. at 95).

What defines a substantial change is too nebulous and gives Duke too much leeway to unilaterally terminate the ESP, argue Direct Energy, Exelon, Kroger, OCC, OMA, and RESA. The parties believe Duke could very broadly determine what constitutes a substantial change in law regarding rate plans or SSOs. The Company's request, according to the parties, does not offer any objective criteria or examples for the Commission or interested parties to know what exactly constitutes a substantial change. They argue this allows Duke to find a way to terminate the ESP early if the utility believes the plan is no longer beneficial to the Company. (Direct Br. at 16; Exelon Br. at 14; Kroger Br. at 7; OCC Reply Br. at 52; OMA Br. at 5-6; RESA Br. at 26.) Duke avers that its application is not ambiguous about when the Company can terminate the ESP and that the possibilities are explicitly laid out (Duke Reply Br. at 92-93).

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Exelon, OMA, and RESA think Duke's window of opportunity to file a notice of termination and to get a new ESP approved is unrealistically small. Duke would file its notice of termination on September 1, 2016, and would need to have the Commission approve its new ESP by June 1, 2017, according to RESA witness Campbell. It is impractical to expect a new ESP application to be filed, litigated, and approved in that nine-month period, the parties assert. Because of the impracticalities, the oppositional parties believe the option should not be available to Duke. (RESA Br. at 27; RESA Ex. 3 at 20-21; Exelon Br. at 14; OMA Br. at 7.) The Company disagrees with these assertions (Duke Reply Br. at 93).

Numerous parties contest Duke's termination option because they believe it creates an unnecessary volatility in the markets and could negatively affect various contracts. Staff asserts that, if the Company enacts the termination provision, the entirety of the SSO supply would conclude on May 31, 2017, when all current MSAs would become null and void. Staff points out that all of the supply would then be subject to prevailing market prices. OCC notes that some of the auctions in Duke's CBP plan include products with three-year contracts that would extend into the third year of the ESP period with the potential to be terminated. OCC believes this would create uncertainty for SSO wholesale suppliers, CRES providers, and customers. The increased risk, according to RESA witness Campbell, would cause a decrease in competitive bidding, possibly resulting in increased costs to customers. Further, he states it may prevent customers from entering into beneficial longer-term contracts with CRES providers. Staff, Exelon, Kroger, and OMA second these concerns. (OCC Br. at 108-109; OMA Br. at 6-7; Exelon Br. at 14; Kroger Br. at 9-10; Staff Br. at 49; Staff Ex. 3 at 3-4; RESA Ex. 3 at 20.) Duke argues the risk created by the possibility of an early termination is not quantifiable; there is always a risk in the bidding process and the markets are often volatile (Duke Reply Br. at 93; Tr. XIII at 3815-3816).

The Commission finds that Duke's request for the unilateral option to terminate the ESP a year early is not reasonable, should be denied, and should be removed from the MSA. The conditions under which Duke could terminate the ESP early are overly broad, as what constitutes a substantial change was largely left undefined by the Company. Additionally, with the high number of Commission decisions, FERC decisions, court decisions, rules, and laws that affect SSOs and base rates, the Company would be given excessive discretion to find reasons to terminate the ESP early if conditions were no longer favorable. Further, the tentative term of the ESP would likely create uncertainty in the market, as argued by Staff and other parties. This could lead to unnecessarily higher costs for customers. The Commission notes that Duke can pursue other means to seek relief if there are substantial changes to the law and the Company feels it needs to protect its interest or its customers' interests.

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8. Corporate Separation

As the Company notes, Ohio Adm.Code 4901:1-35-03(C)(4) requires an ESP application to discuss the status of its current CSP. The Company's last amendment to the CSP was filed on April 16, 2014, and has been approved by the Commission, according to Duke witness Hollis. Mr. Hollis reveals that the utility is still in the process of transferring its last legacy generating asset and will file an amended CSP after that transfer is complete. Mr. Hollis explains the Company's CSP was audited in 2009-2010 by an independent auditor and the results of the audit were approved by the Commission. He also notes that no waivers of the plan have been granted and that, in his opinion, the CSP is in compliance with all rules and laws. Specifically, he looks at the state policies espoused in R.C. 4928.02(H) and (I). In regards to R.C. 4928.02(H), Mr. Hollis notes that Duke does not use any revenues from its distribution business towards any affiliate that operates in the CRES market. As to R.C. 4928.02(I), he states Duke ensures it complies with all of the Commission's consumer protection rules for both distribution utilities and CRES providers. For purposes of the ESP application, Duke believes it has met the burden of proof for the Commission requirements regarding corporate separation. (Duke Br. at 39; Duke Ex. 11 at 3-5; Tr. IV at 845-846.)

IGS and RESA believe Duke is in violation of the CSP due to what they believe are unfair and unlawful billing practices by the Company. IGS witness White states that Duke Energy One, an affiliate of Duke, currently places charges for noncommodity services, Strike Stop and Underground Protection Service, on the EDU bill. He says placing noncommodity charges on the EDU bill is not an option that is afforded to CRES providers such as IGS. RESA and IGS argue this constitutes preferential treatment for a Duke affiliate, and is, thus, a violation of R.C. 4928.02(H). Although Duke currently has an approved CSP, the parties submit it would be unreasonable for the Commission to knowingly approve an ESP for a utility violating CSP requirements. (IGS Br. at 10-11; IGS Ex. 10 at 11-14; RESA Br. at 5-6.)

In reply, Duke avers that this is not the proper forum for these concerns by IGS and RESA. Duke states their issues most resemble a complaint under R.C. 4905.26. According to the Company, only the current status of the CSP is what is relevant in these proceedings and the Company's current CSP has been approved by the Commission. Regarding preferential treatment towards an affiliate, Duke explains that Duke Energy One is not a CRES provider and, thus, its treatment should not be compared to one. Further, Duke says it has not completely rejected offers by other providers to allow noncommodity charges on the EDU bill. (Duke Reply Br. at 103-105.)

The Commission finds that Duke has met its burden of proof regarding the CSP as it pertains to the Company's ESP application. Regarding IGS's and RESA's concerns, the

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Commission affirms that, as discussed further below, this is not the proper forum to address those issues.

9. Operational Support Plan

Ohio Adm.Code 4901:1-35-03(C)(5) requires the utility to demonstrate whether an operational support plan (OSP) has been implemented and whether there are any problems with that implementation. The OSP is required under R.C. 4928.13(A)(3) as part of the utilities' transition towards deregulation. Duke submits that its OSP was most recently approved in 2008 and has been implemented. Since implementation, Duke reports there have not been any notable problems. (Duke Br. at 39-40; Duke Ex. 13 at 3-4.) The Commission agrees that the Company has fulfilled its obligations regarding its OSP.

10. Government Aggregation

An ESP applicant must submit, pursuant to Ohio Adm.Code 4901:1-35-03(C)(6) and (C)(7), a description of how the utility will address governmental aggregation and a description of how large-scale generation will effect any proposed generation charge. Duke witness Wathen states that Duke is currently not seeking any deferrals under R.C. 4928.144 and, therefore, R.C. 4928.20(I) is not applicable to the ESP application. Mr. Wathen further explains that R.C. 4928.20(J) is also not applicable to the Company's application, as it is not seeking a charge for standby service. Regarding R.C. 4928.20(K), Mr. Wathen says Duke's application does not result in rules that would encourage or promote aggregation. No intervenor contested this issue. Duke thusly avers that it has fulfilled the filing requirements for government aggregation. (Duke Br. at 40-41; Duke Ex. 6 at 30-31.) The Commission agrees.

11. Significantly Excessive Earnings Test

Duke notes that, in its two previous ESP cases, the Commission approved the manner in which the SEET would be applied to the Company, which is completed on an annual basis in a separate proceeding. Duke proposes to continue operating the test in the same fashion as the past two ESPs, where the SEET ROE threshold was held at 15 percent. (Duke Br. at 32-33.)

OCC asserts that the SEET threshold should not be established in an ESP proceeding. OCC submits that the threshold should be established in the separate annual proceedings regarding the SEET. OPAE agrees with OCC. According to OCC, it is unlawful to establish a prospective, forward-looking SEET threshold. Further, OCC believes that the previous ESP cases should not be binding for these proceedings, as those ESPs were the results of stipulations that specifically stated that the findings were not to be relied on for future cases. OCC also asserts Duke's reliance on previous ESPs is

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insufficient to meet the burden of proof to establish a SEET threshold. (OCC Br. at 110-111; OPAE Br. at 25.)

If the Commission does rule on the SEET threshold, OCC believes Duke's proposal of 15 percent is too high. OCC witness Kahal asserts Duke's proposed riders and its divestment of generation decrease the utility's business risks and, thus, the ROE threshold should also decrease. OCC recommends the threshold be set at 12 percent, which is the same that was set for DP&L in the *DP&L ESP Case*. OPAE also believes such a threshold would be more appropriate than what Duke is proposing. On rebuttal, Duke witness Morin offers that the Company's new riders will not reduce business risks. He further explains that the Company's business risks should not affect what the threshold is and that 15 percent for the ROE threshold is appropriate. (OCC Br. at 111-114; OCC Ex. 32 at 31-32.)

The Commission finds that, since we have not authorized or renewed a service stability rider, it is not necessary to establish a SEET threshold in these ESP proceedings. Accordingly, Duke's SEET threshold for each year of the ESP will be determined within the context of each annual SEET case.

12. Service Reliability

OEC proposes that, with Duke's successful SmartGrid infrastructure implementation, the Company should be required to report annually on various performance metrics. OEC witness Munson outlined 21 metrics that he believes the utility should report on. The metrics would cover administrative, cost-related, and environmental statistics. He reports similar findings are required in Illinois. Mr. Munson believes this reporting would be beneficial to the Commission, customers, and Duke. Duke would benefit, according to Mr. Munson, by being able to demonstrate savings to customers. Further, he says the resulting information would assist Duke in complying with new environmental legislation that is likely to pass soon. Mr. Munson does not believe these reports would be burdensome to the Company, because he says Duke has to report similar performance metrics to fulfill a federal grant requirement. (OEC Br. at 17-22; OEC Ex. 1 at 3-5.) Duke responds that OEC's witness does not fully understand what is already required in Ohio and that how things are done in Illinois is not applicable to Ohio. Therefore, Duke requests OEC's proposal be disregarded. (Duke Reply Br. at 105-106; Tr. XII at 3357-3358.)

The Commission finds that, at this time, it will not require Duke to file the various performance metrics, as requested by OEC. The Commission understands the Company's SmartGrid infrastructure could yield useful information, but does not find this is the proper time or forum to address those concerns.

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13. Other Issues

(a) Market Energy Plan

RESA submits a proposal for a market energy plan (MEP) that would introduce shopping to eligible customers. RESA witness Pickett outlined the plan, explaining that, if a residential or small business customer who is not being serviced by a CRES provider calls Duke for any reason other than an emergency or for termination, that customer will be offered a three percent discount on the price-to-compare for six months if that customer enrolls in the MEP. If that customer chooses to participate in the MEP, that customer would be immediately enrolled with either the CRES provider of his or her choosing or with an assigned CRES provider. Customers could leave the program at any time, without a termination fee, and could also switch providers, if they desired. RESA submits Duke would offer a start-up and maintenance plan to the Commission to determine costs. Customers benefit from the program, according to Mr. Pickett, by getting access to competitive products, by being guaranteed a discounted rate, and by being educated about available products. He further mentions the program benefits the state policy of promoting competition and diversity. Mr. Pickett notes a similar plan was created in Pennsylvania and is successful. He also states that many of the details still need to be developed. (RESA Br. at 31-33; RESA Ex. 4 at 8-13.)

OCC and OP AE believe RESA's proposal should be denied. OCC notes that many of the details of the program are vague and that there is little analysis to back-up the current proposal. According to OCC, the proposal weakens the benefit of an SSO. OCC believes CRES providers want the utility to market their services for them and this distorts the line between utility and commodity. OCC further says the three percent discount may not actually be the best discount a customer could obtain and, thus, it goes against the desired effect to encourage shopping. Rather, OCC suggests, it merely gets a customer locked into a rate that will later auto-renew without the discount. This could result in higher costs and customer confusion, according to OCC. OP AE believes the proposal only succeeds in getting customers to leave the SSO, and does not encourage competition, as RESA claims. (OCC Br. at 100-103; Tr. XIII at 3662-3663; OP AE Br. at 29-30.)

At this time, the Commission will not adopt the MEP. As admitted by RESA, many of the details of the proposal still need to be properly developed (RESA Ex. 4 at 12). Thus, as it stands, it is not clear exactly how the MEP would operate. Beyond that, the Commission finds that this is not the proper venue for such a proposal to be introduced. The Commission directs interested parties toward the Market Development Working Group (MDWG), which was created in the *CRES Market Case, Finding and Order* (Mar. 26, 2014) at 23. We believe the MDWG is the better forum to evaluate the proposed MEP and to determine whether such a proposal should be brought before the Commission in a separate case.

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(b) Unbundling

IGS asserts Duke's ESP application does not fulfill the requirements of R.C. 4928.02(B), because the Company does not ensure the availability of unbundled and comparable retail electric service. IGS avers that, in order to provide retail services, Duke incurs a significant amount of noncommodity costs that it improperly collects through distribution rates instead of the SSO price. IGS states Duke limits its SSO cost to just a pass-through of wholesale capacity and electric costs even though providing electric service also requires a company to incur, among other things, technology costs, call center costs, and overhead costs. IGS explains that CRES providers sustain the same noncommodity costs as Duke, but they are unable to recover those costs through distribution rates. Therefore, IGS believes shopping customers end up paying for those noncommodity charges twice. IGS notes that other states, including New York, Illinois, Maryland, and Pennsylvania, have unbundled certain costs from the distribution rates and instead attached them to the default supply service. Although Ohio statutorily requires that services be unbundled, IGS argues the state is lagging. (IGS Br. at 13-17; IGS Ex. 10 at 22-23.) At this time, the Commission believes these issues are better suited for another forum, such as a distribution rate case, and, therefore, we decline to adopt the proposal from IGS.

(c) Enroll From Your Wallet

RESA, believing there are still numerous obstacles preventing customers from shopping, proposes a program titled Enroll From Your Wallet that would allow customers to enroll with a CRES provider without presenting a utility account number. RESA witness Picket states that, currently, customers wishing to enroll with a CRES provider must furnish a utility account number and that many willing customers are unable to find the number or remember the number. He proposes a pilot program where the customer would give the CRES provider authorization to find the account number. The CRES provider would use a portal created by Duke to get the account number and enroll the customer. The provider would maintain records of the authorization and the customer contract, and would produce the documents if any claims arose. RESA believes this program is more convenient for customers and makes it easier for them to shop. RESA requests the Commission start the pilot and create a working group with Staff, Duke, RESA, OCC, and other interested parties to complete details of the pilot. According to RESA, that working group would then submit a final proposal for approval by the Commission. (RESA Br. at 30-31; RESA Ex. 4 at 6-8.)

OCC and OPAE are both against the Enroll From Your Wallet proposal. OCC notes that RESA did not provide any information showing that shopping is being hindered by customers' inability to find a customer account number. OCC further submits that

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requiring an account number provides a level of protection for customers against slamming. OPAE argues similarly. OCC believes that many customers use their utility bill to find their account number and that the bill contains useful information that will assist customers in making informed decisions regarding whether they want to enroll with a CRES provider or not. (OCC Br. at 104-105; Tr. XIII at 3656; OPAE Br. at 29.)

The Commission declines to authorize RESA's Enroll From Your Wallet program at this time. A similar proposal was made in the Commission's *CRES Market Case* and the Commission, at that time, decided against starting such a program. The Commission continues to have concerns regarding slamming and customer privacy. Further, it appears many key details are still unknown and few stakeholders are in agreement with the proposal. The Ohio Electronic Data Exchange Working Group was previously directed by the Commission to cooperate together on working out the specifics of a website registration system. Here, the Commission encourages those stakeholders involved to continue to work together to create a more fully developed plan. *CRES Market Case, Finding and Order* (Mar. 26, 2014) at 35.

(d) Purchase of Receivables and Billing

Duke currently operates a POR program, where it purchases the accounts receivable of CRES providers and processes the collection efforts on its own. Duke avers this program has been extremely successful and is used by all but two of 55 CRES providers in its service territory. The Company seeks to make the POR program mandatory for all CRES providers that intend to use Duke's consolidated billing services. Duke further proposes that providers in the POR program be limited to providing only commodity services on their bills. Duke asserts this ensures purchases are for their intended purposes. (Duke Br. at 33, 36-37; Duke Ex. 13 at 6-7.)

OPAE believes the entire POR program should be invalidated and terminated. OPAE submits the program subsidizes CRES providers and unfairly raises the distribution costs for customers. According to OPAE, the program prevents competition and, therefore, goes against state policy. In the alternative, OPAE asks that Duke be required to implement a discount rate that completely covers the CRES providers' bad debt. This would prevent the need for Rider UE-GEN, through which Duke collects the bad debt expenses. (OPAE Br. at 25-26.)

Direct Energy, IGS, and RESA are opposed to the suggested change to the POR program. Direct Energy believes what constitutes a commodity charge is vague. Considering that, if a CRES provider puts an inapplicable charge on the bill, it would violate its obligations under the accounts receivable purchase agreement, Direct Energy explains Duke is given too much discretion. Direct Energy further argues that, because many customers do not want separate bills, CRES providers are limited from offering

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innovative noncommodity services. Direct Energy believes this harms the competitive market and does a disservice to customers. Duke customers in particular, according to Direct Energy, are set up for innovative, cost-saving programs because of the SmartGrid system that allows customers to examine and manage their energy use efficiently. IGS and RESA argue, similarly, that state policy encourages the expansion of innovative, useful products for customers and this proposed change restricts that. (Direct Energy Br. at 6-11; IGS Br. at 6-8; RESA Br. at 4-5.)

With regard to billing, Direct Energy, IGS, and RESA also argue that Duke's proposal to exclude noncommodities from consolidated billing is unfair and preferential to Duke affiliates. They note that the Company's affiliate, Duke Energy One, currently has noncommodity charges on its bill, i.e., Strike Stop Service and Underground Protection Service. IGS believes this contravenes Ohio law that prevents a utility from giving an undue advantage to an affiliate. Further, as discussed earlier, the parties believe this violates the Company's CSP. IGS and RESA submit that, although Duke claims it does not have the technology, because Duke Energy One is able to place noncommodities on Duke's bill, it is feasible for Duke to separate the commodity charges from the noncommodity charges in order to delineate POR program purchases. At a minimum, the opposing parties request the Commission deny the proposed tariff amendment. IGS goes further and asks for the tariff to be changed to specifically allow noncommodities on the bills. IGS also requests the Commission direct Duke to allow CRES providers to be able to be customers' single billing entity. This would allow CRES providers to offer more products and services to customers and further the competitive market, according to IGS. (Direct Br. at 6-11; IGS Br. 5-13; IGS Ex. 10 at 6-15; RESA Br. at 4-5; RESA Ex. 1 at 6-8.)

Duke explains it is necessary to exclude noncommodities from the bill because it would otherwise be unfair to other ratepayers. Duke states that the unpaid bills obtained through the POR program are collected through a rider attributed to all Duke customers, Rider UE-GEN. According to the Company, it would be unfair to force customers to pay various CRES providers' noncommodity charges. Duke also asserts it does not have the technology to separate commodity and noncommodity charges on its POR program purchases. Regarding Duke Energy One, Duke explains that its affiliate is not a CRES provider and does not provide retail electric services. Because Duke Energy One's charges are purely noncommodity, Duke says, those charges are naturally separated for the Company's billing department. Duke also avers that the requirement to have consolidated billing applies only to electric services. In sum, Duke asks the Commission to allow its requested tariff amendment and deny the requests of Direct Energy, IGS, and RESA. (Duke Reply Br. at 96-100.)

The Commission finds that Duke's request to amend its CST to make POR mandatory for CRES providers using the consolidated billing service should be denied.

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Although a high percentage of CRES providers using the consolidated bill service choose to also enroll in the POR program, the Commission does not feel it is reasonable at this time to force the decision. Duke's main rationale for making POR mandatory is to develop operational consistency and to prevent spending additional administrative costs. At this time, very few providers choose not to enroll in POR; however, situations and markets can change and the burden on Duke to allow such an option currently does not rise to a level that should restrict freedom of choice. (Duke Ex. 13 at 6-7.)

The Commission further finds that, at this time, the Company's assertion that bill-ready billing should be limited to only electric commodity charges is reasonable. The Commission notes that the tariff defines what "commodity" means and later provides examples of what is considered "noncommodity." Because all customers must bear the cost of unpaid bills, and because the evidence in these cases reflects that Duke does not have the technology to separate commodity and noncommodity charges, the Commission does not find it reasonable to allow various noncommodities to be added to the bills. In regards to the Company's affiliate, Duke Energy One, the Commission points out that, because it does not provide retail electric service, the entity is not parallel to a CRES provider. For the above reasons, the Commission finds that Duke's request to amend the tariff is reasonable.

(e) Usage Data

Duke also submits a proposal to change the definition of an "interval meter" as it appears in the CST. The Company notes that, when the tariff was originally filed, only one type of interval meter existed: solid state recorders (SSRs). These meters were primarily installed with commercial customers to provide data to PJM. Since then, Duke reports it deployed its SmartGrid program which has advanced meter infrastructure (AMI). Duke asserts that, due to Commission rules regarding data compilation, it was necessary for the Company to differentiate between the two meters because they each have different capabilities. Therefore, as it pertains to the CST, Duke seeks to have the interval meter definition refer specifically to the older meters, the SSRs. (Duke Br. at 37-38; Duke Ex. 13 at 8, Att. DLJ-1 at 3.)

RESA believes this change seeks to prevent Duke from needing to supply CRES providers with usage data and requests the Commission deny the change. RESA states that, if this tariff change is approved, CRES providers will only be able to access usage data from SSRs. RESA notes the utility was previously ordered to provide usage information from interval meters to CRES providers and Duke is trying to avoid the Commission's Order in the *CRES Market Case* by altering how an interval meter is defined. (RESA Br. at 34-35; Tr. IV at 1053-1054; RESA Ex. 1 at 9-10.) Duke is aware that CRES providers are seeking more usage data, however, the Company does not believe this is the proper forum to address those concerns. Duke states that, because the two meters have

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different capabilities, it wanted to clear up the definitions. The Company asserts ongoing proceedings already exist where the CRES provider access to usage data is being discussed, and Duke believes those concerns are better addressed in those proceedings. (Duke Reply Br. at 101-102; Tr. IV at 1054-1056.)

Also in regards to usage data, OEC proposes that the data be made available to customers and third parties. OEC avers the owner of consumption data is the customer and customers should have full access to that data. OEC witness Munson proposes an Open Data Access Framework. Mr. Munson submits the access would allow customers, and third parties with authorization, to better analyze their energy usage and to spark innovation. He notes that a similar framework was implemented in Illinois. (OEC Br. at 22-25; OEC Ex. 1 at 3.) Duke responds that the proposal is not applicable for an ESP case and that the proposal, as described, does not fit into the structure of the Commission's regulations (Duke Reply Br. at 105-106).

At this time, the Commission declines to accept Duke's request to change the tariff's definition of an interval meter. With Duke's deployment of its SmartGrid program, it is the Commission's expectation that, as adopted in our Order in the *CRES Market Case*, the provision of usage data would likewise progress. *CRES Market Case*, Finding and Order (Mar. 26, 2014) at 36. However, in light of the fact that the issues regarding the Company's usage data and, specifically, the definition of an interval meter are being addressed *In re Duke Energy Ohio, Inc.*, Case No. 14-2209-EL-ATA, we find that it is more appropriate to address Duke's proposal in that proceeding, rather than this one, in the hopes of resolving the issues. Likewise, OEC's proposal concerning the reporting of usage data should be addressed in that same proceeding.

(f) Resettlement

The Company requests another change to the CST where, if Duke seeks to pursue settlement with PJM, all suppliers will agree to participate. PJM would still control the resettlement process, according to Duke, but the process will be smoother and more predictable if participation is not discretionary. (Duke Br. at 38; Duke Ex. 13 at 9.) RESA disagrees with the proposed change, arguing that it is one-sided. RESA believes the Company or CRES provider should be able to initiate resettlement, not just Duke. Further, RESA says CRES participation in resettlement should remain discretionary. (RESA Br. at 36.) The Company counters that the proposed change is actually beneficial for CRES providers. Currently, according to Duke, if a provider initiates resettlement, it must obtain the voluntary cooperation of all other CRES providers. Duke states it is trying to simplify the resettlement process for the interested parties. (Duke Reply Br. at 101-102.)

The Commission declines to adopt Duke's proposed amendment. The Commission understands that it can be burdensome to acquire all of the necessary consents in order to

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pursue resettlement, but we find it is not reasonable to force a CRES provider's consent where it may not exist.

(g) Economic Development

The Commission notes that R.C. 4928.143(B)(2)(i) authorizes the inclusion of economic development programs in ESPs, and we find it prudent to modify Duke's ESP to include an economic development program, which will create private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio. Accordingly, the Commission finds that Duke should implement an economic development fund, which will be funded by shareholders at \$2 million per year, or a portion thereof, during the term of this ESP. This funding is consistent with our directives in the *ESP 2 Case*, as well as our treatment of other EDUs and shall not be recoverable from customers. *ESP 2 Case*, Opinion and Order (Nov. 22, 2011) at 43; *AEP ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 69-70; *DP&L ESP Case*, Opinion and Order (Sept. 4, 2013) at 42-43. Any funds that are not allocated during a given year shall remain in the fund and carry over to be allocated in subsequent years.

III. IS THE PROPOSED ESP MORE FAVORABLE IN THE AGGREGATE AS COMPARED TO THE RESULTS THAT WOULD OTHERWISE APPLY UNDER R.C. 4928.142?

Duke asserts that its proposed ESP is more favorable in the aggregate than the results that would otherwise apply under R.C. 4928.142. Duke acknowledges that, in accordance with R.C. 4928.143(C)(1), it has the burden of proving that its proposed ESP, including the pricing, terms, and conditions, "****is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." According to Duke, this comparison takes into consideration the quantifiable elements, as well as the unquantifiable benefits of an ESP. *Citing Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958 945 N.E.2d 501, at ¶27. As for the quantitative benefits, Duke asserts the ESP is necessarily equivalent to the results from an MRO, noting that both the ESP and an MRO employ a CBP plan that would yield competitively-priced, market-based generation service, and Riders DCI and DSR are available under either scenario. (Duke Ex. 1 at 14-15; Duke Ex. 6 at 25; Duke Br. at 27.) Moreover, the ESP is better qualitatively, because it: enables timely investment in Duke's distribution system, thus, improving the safety and reliability of the system, while protecting Duke's financial integrity; provides customers with price stability and certainty for both shopping and nonshopping customers, affording them the benefits of Duke's OVEC entitlement through the competitively neutral PSR; modifies the rate design that will result in costs for SSO supply being charged consistent with the manner in which they are incurred and in a manner that is reflective of the offers customers may receive from

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CRES providers; eliminates nonmarket based riders or arrangements; and establishes generation-related costs based on market forces (Duke Ex. 1 at 15; Duke Ex. 6 at 27; Duke Br. at 27-32; Tr. II at 544).

Staff believes that, when all provisions of the ESP are considered, along with Staff's proposed recommendations, the ESP is more favorable in the aggregate than an MRO. Staff states that, given the generation rates for 100 percent of the SSO load are based on market-based auction prices, there should be no difference in quantitative benefits between an ESP and MRO. Staff notes that it did not perform an analysis as to whether the ESP, as proposed by Duke without Staff's modifications, would pass the MRO test; therefore, if the Commission approves the PSR, Staff would need to perform the test again. (Staff Ex. 2 at 3; Staff Br. at 57-58.)

As for the qualitative benefits, Staff considered the new Rider DCI, which provides an economical and efficient process for the Company to make investments in its distribution system; thus, improving the safety and reliability of the distribution system. In addition, an ESP, as opposed to an MRO, provides a mechanism where Duke's tariff can be further refined to be more reflective of the current competitive environment; thereby providing more benefits for customers than may be available under an MRO. For example, Duke proposes to modify the rate design of its generation rates to better reflect what customers could expect to see in the competitive market; however, under an MRO, the generation rates charged to customers would be the market rates that result from an auction and there would be no ability to phase out the current rate design, which could subject customers to substantial rate impacts. An ESP also allows for flexible ratemaking, providing a process for utilities to propose riders that may provide a more efficient method of cost recovery, and for all stakeholders to provide input on proposed riders. (Staff Ex. 2 at 3-4.)

OCC offers that the traditional analysis of the ESP versus MRO test requires consideration of three elements: the SSO price of generation; other quantitative provisions; and qualitative provisions. OCC asserts Duke argues that, because the SSO generation price is the same under either an ESP or MRO and, because no other provisions of the ESP are quantifiable, its ESP must be approved based solely on the qualitative benefits. However, OCC maintains Duke's claimed qualitative benefits are either not beneficial or could be provided if the SSO were in the form of an MRO. (OCC Reply Br. at 14-15.)

GCHC, OCC, IEU, and Kroger submit that the ESP does not meet the statutory test for an ESP, as it is not more favorable in the aggregate than an MRO (OCC Ex. 48 at 4; GCHC Br. at 17; IEU Br. at 2; Kroger Br. at 15; OCC Br. at 59). GCHC states that R.C. 4928.142, authorizing an MRO, does not permit the inclusion of single-issue ratemaking, noting that Duke acknowledges that the PSR and Rider DCI could not have been proposed

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under an MRO (GCHC Br. at 17-18; Tr. I at 147; Tr. II at 446, 449, 557). While Duke submits these riders are neutral because they could exist under an ESP or MRO, GCHC disagrees, as these riders could not be approved in a standalone MRO proceeding, without a separate base rate case (GCHC Br. at 18; Tr. II 439-441, 445, 536; Tr. XIII at 3793). GCHC asserts, since the PSR and Rider DCI could not be approved in an MRO proceeding, the only proper comparison is between the ESP proposal Duke made, with the riders, and an MRO using a CBP that does not include the riders. GCHC argues Duke's comparison of its ESP to what could be done in an MRO plus a base rate case is contrary to statute. GCHC points out Staff agrees that, if the value of the PSR is negative, then an ESP with the PSR would be less favorable than an MRO. (GCHC Br. at 18-19; Tr. XIII at 3796.) GCHC submits Duke attempts to lay claim to intangible benefits of the riders, while ignoring the costs of the riders to ratepayers; however, R.C. 4928.143(C), which authorizes an ESP, requires consideration of the entire plan, including pricing. GCHC offers that the price of Duke's ESP with riders is necessarily higher than the price of an MRO without the riders. Therefore, Duke's ESP fails the comparison with an MRO. (GCHC Br. at 19.)

OMA contends Duke's analysis of the ESP versus an MRO failed to consider the effects of many provisions in the proposed ESP (OMA Reply Br. at 34). OMA submits the costs of the PSR and Rider DCI must be considered as quantifiable costs in the MRO analysis, because these are costs that would not be paid under an MRO scenario (OMA Br. at 28). OMA notes Rider DCI will result in a net rate increase to customers compared to current rates, and it is not available under the MRO statute. As described by OMA, Duke alludes to the benefits of Rider DCI, but does not quantify such benefits. Moreover, OMA notes in the *Ohio Edison ESP Case*, Opinion and Order (July 18, 2012) at 55-56, the Commission determined that no such quantifiable benefits exist between recovering distribution investment through a rider, rather than a distribution rate case, and Duke has not committed to refrain from filing a distribution rate case during the term of the proposed ESP. (OMA Reply Br. at 35; Tr. XIII at 3784.) IEU maintains the costs of the PSR, which are estimated to be at least \$22 million, must be included on the ESP side of the ESP versus MRO test (IEU Br. at 33-34). OCC agrees that Duke's proposed ESP produces results that are less favorable in the aggregate than the expected MRO results by \$22 million. While OCC understands the customers would pay the same for generation under an ESP and an MRO because they both use the CBP, if the PSR is approved, then customers would pay \$22 million more in costs over the ESP period than they would under an MRO. Therefore, OCC and IEU submit the quantitative test under the statute is not met and the ESP can not be deemed more favorable in the aggregate than an MRO. (OCC Ex. 48 at 4, 7-8; OCC Br. at 59-60; IEU Br. at 34, 39-40.)

OCC argues the measurement of quantitative rate impacts of an ESP as compared to an MRO is critical to Duke's ability to meet its burden of proof. However, OCC points out that Duke failed to present any evidence in its case in chief regarding the projected rate

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impact of the PSR. Therefore, OCC contends Duke failed to carry its burden to quantify an essential part of its proposal and one that significantly affects the results of the MRO test. Accordingly, OCC argues Duke failed to meet its burden of proof in accordance with R.C. 4928.143(C)(1). (OCC Br. at 28-29.) OCC asserts the Commission's precedent dictates that, when an ESP provision is quantifiable and not available under an MRO, the provision must be included as a cost of the ESP. *Citing Ohio Edison ESP Case, Opinion and Order* (July 18, 2012). Even if the Commission found some measure of qualitative benefits to Duke's application, considering the qualitative benefits are insufficient to overcome the significant costs the PSR would impose, OCC asserts Duke's application must be denied or modified to comply with the statutory test. (OCC Reply Br. at 15.)

As for qualitative benefits, OCC believes, to the extent those benefits exist, they would be equally available under the scenario of an ESP or an MRO (OCC Ex. 48 at 5, 10). Contrary to Duke's assertions, OCC and IEU argue Rider DCI cannot be considered a qualitative benefit because Duke admits in its application that it is also available under an MRO, as Duke could seek approval of a rate increase for investments in its distribution systems by filing a distribution rate case (OCC Ex. 48 at 11; Duke Ex. 1 at 15; IEU Br. at 38; OCC Br. at 64). OCC notes that Duke projects that, during the term of the ESP, it would collect \$272 million in revenue through Rider DCI. Under an ESP, Duke's revenue collection under Rider DCI is accelerated, as compared to collection under an MRO scenario. OCC also states that the PSR should not be considered a qualitative benefit to the ESP because the PSR will not provide price stability and certainty, but instead will impose costs and risks onto customers. (OCC Ex. 48 at 13; OCC Br. at 60-61.) Moreover, OCC notes that Duke's analysis of the benefits of an ESP versus an MRO are really just a comparison of the proposed ESP to the ESP approved in the *ESP 2 Case*. OCC asserts that most of the benefits claimed by Duke should not be considered as a benefit under the ESP that is not also available under an MRO. Specifically, OCC notes that changes to the rate design of SSO generated-related rates for Riders RC and RE, and elimination of certain riders are benefits over the current ESP. Moreover, such changes are available under an MRO. Therefore, these changes should not be considered as benefits of the ESP that are not available under an MRO. (OCC Ex. 48 at 16; OCC Br. at 61, 65-68.) IEU agrees the rate design changes espoused by Duke in its alleged nonquantitative benefits are also available under an MRO and, therefore, are not nonquantitative benefits of the proposed ESP when compared to an MRO (IEU Reply Br. at 25).

OCC points out Duke recognizes in its brief that a provision must fall within R.C. 4928.143(B)(2) to be included in an ESP; however, Duke relies on R.C. 4928.02 as authority for including alleged qualitative benefits in the ESP, namely, modifications to Riders RC, LFA, DR-ECF, and NM, as well as retention of the POR (OCC Reply Br. at 24-25; Duke Br. at 10). Because the modifications to these riders and the retention of the POR do not fall within the nine items listed in R.C. 4928.143(B)(2), OCC contends they cannot be

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considered in the ESP versus MRO test. Moreover, OCC points out that, even if these alleged qualitative benefits did fall within R.C. 4928.143(B)(2), they would be excluded from the test because they can also be offered under an MRO (OCC Reply Br. at 25). OCC also states that the POR cannot be considered a benefit of the ESP, because it is already being offered. (OCC Reply Br. at 25-26.)

IEU and OMA agree that Duke has failed to demonstrate that the proposed ESP provides any nonquantifiable benefits to customers that outweigh the substantial quantitative costs when compared to an MRO. According to OMA, neither the PSR, Rider DCI, or Duke's unilateral early termination right provide any qualitative benefits. Thus, IEU asserts Duke has failed to sustain its burden of proof. (IEU Br. at 35-37; OMA Br. at 29.)

Kroger states that, in the event the Commission determines it is in the best interest of Duke and its customers to modify and approve the proposed ESP, Kroger recommends the Commission: reject Duke's proposed allocation methodology for Rider DCI; adopt Staff's proposal for Rider LFA; reject Duke's reservation of the right to terminate the ESP one year early; and reject the PSR. To the extent the Commission adopts these proposals, Kroger would then agree that the ESP would be more favorable in the aggregate than an MRO. (Kroger Br. at 17.)

Duke asserts the intervenors' arguments are without merit. Specifically, Duke disagrees with OCC's assertion that the Ohio Supreme Court requires a strictly quantitative analysis of the MRO test. Duke advocates the Commission should follow its past precedent and perform a thorough analysis of the proposed ESP in the aggregate considering both quantitative and qualitative factors. In addition, while agreeing the state policies set forth in the statute are a guide to be considered by the Commission, Duke disputes OCC's insistence that each element of the proposal must be consistent with state policies, averring such consistency is not part of the MRO test. (Duke Reply Br. at 76-78.)

In response to the arguments that the comparison must include the PSR, Duke points out that the opposition's position is based on the PSR being quantifiable. However, Duke states the impact of the PSR is entirely based on future events outside of Duke's control and, in response to discovery, Duke projected future cost or benefit based on numerous assumptions about future events. Duke states forecasts are not the same as estimates, and the Commission has previously recognized there is a limit as to how speculative quantification can be and still be included in the MRO test. *AEP ESP 2 Case*, Opinion and Order (Dec. 14, 2011) at 31. Duke states that, in the instant cases, it intentionally excluded the PSR from consideration in the test, because the forecasts were too speculative to rely on. Therefore, Duke maintains the impact of the PSR is inappropriate for inclusion in the quantitative aspect of the MRO test. Duke also states the

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Commission has previously found that qualitative benefits have significant value and can outweigh even quantitative detriments. Therefore, even if the Commission were to conclude that the forecasted financial impact of the PSR must be considered, the Commission could and still should find that qualitative benefits exceed any costs, making the ESP more favorable in the aggregate. *See AEP ESP 2 Case, Opinion and Order (Aug. 8, 2012) at 75-77.* With regard to OCC's argument that the cost of Rider DCI should have been included in the MRO, Duke states the Commission has clarified in other cases that the cost of Rider DCI should not be included in a comparison of the ESP and MRO, as recovery under such a rider would be a wash when compared to the recovery available under traditional rate cases if Duke was operating under an MRO. *See Ohio Edison ESP Case, Opinion and Order (July 18, 2012).* (Duke Reply Br. at 79, 81-82.)

Pursuant to R.C. 4928.143(C)(1), the Commission must determine whether the proposed ESP, as modified, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. The Ohio Supreme Court has determined that R.C. 4928.143(C)(1) does not bind the Commission to a strict price comparison, but rather instructs the Commission to consider pricing, as well as all other terms and conditions. *Columbus S. Power Co., 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501.* Therefore, we must ensure that the modified ESP as a total package is considered, including both a quantitative and qualitative analysis. Upon consideration of the modified ESP, in its entirety, we find that the ESP is, in fact, more favorable in the aggregate than the expected results under R.C. 4928.142.

Initially, the Commission finds that the modified ESP is more favorable quantitatively than an MRO. Under the ESP, the rates to be charged customers will be established through a fully auction-based process; therefore, it will be equivalent to the results that would be obtained under R.C. 4928.142. We would note that, in light of our determination to set the PSR at zero, it is not necessary to attempt to quantify the impact of the PSR in this ESP versus MRO analysis. Regarding Rider DCI, and other approved distribution-related riders, we find 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. We agree that Rider DCI, specifically, provides an economic and efficient process for Duke to make investments in its distribution system; thus, improving the system's safety and reliability. Moreover, the Commission finds the modification to the rate designs to better reflect what the competitive market provides for customers. However, under an MRO, the generation rates charged to customers would be market rates and there would be no ability to phase-out the current rate design, which could result in substantial rate impacts for customers. (Staff Ex. 2 at 3-4.) Therefore, the

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Commission finds that, quantitatively, the modified ESP is better in the aggregate than an MRO.

The evidence in the record reflects that there are additional benefits that make the ESP, as modified by the Commission, more favorable in the aggregate than the expected results under R.C. 4928.142. The Commission notes that many of the provisions of the modified ESP advance the state policy enumerated in R.C. 4928.02, as discussed above. The modified ESP also continues to enable Duke to move more quickly to market rate pricing than would be expected under an MRO. In fact, under this ESP, Duke will implement fully market-based prices beginning on June 1, 2015. The Commission continues to believe that the more rapid implementation of market-based rates possible under an ESP is a qualitative benefit that is consistent with R.C. 4928.02. Additionally, the Commission's approval of the distribution-related riders should enable Duke to hold base distribution rates constant over the ESP period, while making significant investments in distribution infrastructure and improving service reliability.

IV. CONCLUSION

Upon consideration of the ESP application filed by Duke, the Commission finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, as modified by this Opinion and Order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. Therefore, the Commission finds that the proposed ESP should be approved, with the modifications set forth in this Opinion and Order. As modified herein, the ESP provides rate stability for customers and revenue certainty for Duke. To the extent that intervenors have proposed modifications to Duke's ESP that have not been addressed by this Opinion and Order, the Commission concludes that the requests for such modifications should be denied.

Duke is directed to file revised tariffs consistent with this Opinion and Order, to be effective with the first billing cycle in June 2015.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a public utility as defined in R.C. 4905.02 and an electric utility as defined in R.C. 4928.01(A)(11) and, as such, is subject to the jurisdiction of this Commission.
- (2) On May 29, 2014, Duke filed an application for an SSO in accordance with R.C. 4928.141. The application is for an ESP in accordance with R.C. 4928.143.

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- (3) On June 12, 2014, a technical conference was held in these proceedings.
- (4) In total, at the four local public hearings that were held in these cases on September 8, 9, 10, and 18, 2014, 27 witnesses testified.
- (5) The following entities were granted intervention: IEU, OEG, OP&E, Kroger, OEC, FES, GCHC, Exelon, OCC, Wal-Mart, OMA, RESA, AEP, Cincinnati, PWC, ELPC, EnerNOC, Direct Energy, Miami/UC, NRDC, IGS, EPO, DP&L, Sierra, and ODSA.
- (6) The evidentiary hearing in these proceedings was held on October 22, 2014, through November 12, 2014, with the rebuttal on November 20, 2014.
- (7) Proofs of publication of the hearings were submitted on the record.
- (8) Briefs and reply briefs were filed on December 15, 2014, and December 29, 2014, respectively.
- (9) In accordance with the attorney examiner's ruling at the hearing and the rulings herein, the following documents should be granted protective treatment for a period of 24 months: Duke Exs. 16A-17A, 21A; OCC Exs. 4A-5A, 7A-8A, 10A-27A, 29A-31A, 39A, 41A, 43A-44A; OEG Ex. 1A; IGS Exs. 4A, 7A-8A, 12A; Sierra Ex. 4A; OMA Exs. 3A-8A; Transcripts III, V-VII, IX-XII, and XV; and the briefs filed by IGS, Sierra, and OCC.
- (10) The proposed ESP, as modified pursuant to this Opinion and Order, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

ORDER:

It is, therefore,

ORDERED, That Duke's application is approved, subject to the modifications set forth in this Opinion and Order. It is, further,

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ORDERED, That the Commission declines to rule on the merits of the parties' arguments regarding OCC's October 27, 2014 interlocutory appeal; however, the information shall remain under seal. It is, further,

ORDERED, That, in accordance with our ruling herein, Duke conduct a review and provide IGS and Sierra with the revised redacted versions of their briefs by April 15, 2015, and, upon receipt of the revised redacted versions of their briefs, IGS and Sierra file the revised redacted versions in these dockets by April 20, 2015. It is, further,

ORDERED, That, in accordance with the above, the briefs filed by IGS, Sierra, and OCC be afforded protective treatment, to the extent set forth herein, and the attorney examiner's rulings with regard to the motions for protective order for portions of the exhibits and transcripts are affirmed. These documents will be subject to this protective order for 24 months from the date of this Opinion and Order, or until April 3, 2017. It is, further,

ORDERED, That OCC's requests that the Commission reverse the attorney examiner's rulings regarding disclosure of the OVEC entities and rebuttal testimony are denied. It is, further,

ORDERED, That Duke file a status report regarding the transfer or divestiture of the OVEC asset, in these dockets, by June 30 of each year of the ESP, with the first such filing to occur by June 30, 2015. It is, further,

ORDERED, That, consistent with this Opinion and Order, Duke file proposed tariffs, subject to review and approval by the Commission. It is, further,

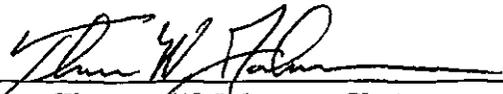
ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

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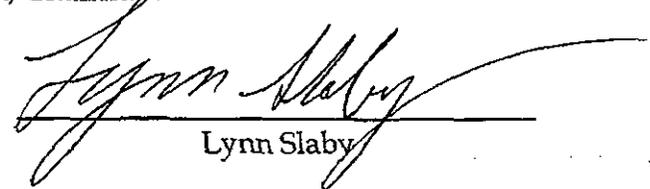
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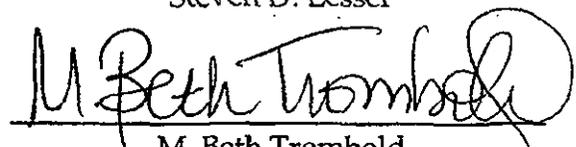
ORDERED, That a copy of this Opinion and Order be served upon each party of record.

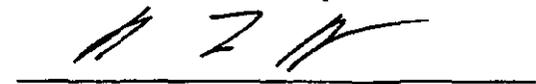
THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser


Lynn Slaby

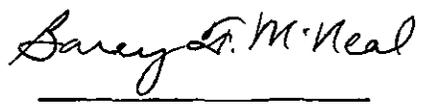

M. Beth Trombold


Asim Z. Haque

CMTP/NW/vrm

Entered in the Journal

APR 02 2015



Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

ENTRY ON REHEARING

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke) is an electric distribution utility (EDU) as defined by R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.
- (2) R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.
- (3) In Case No. 14-841-EL-SSO, et al., the Commission modified and approved Duke's application for an ESP for the period beginning June 1, 2015, through May 31, 2018, pursuant to R.C. 4928.143. *In re Duke Energy Ohio, Inc., Case No. 14-841-EL-SSO, et al. (ESP 3 Order), Opinion and Order (Apr. 2, 2015).*
- (4) R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

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- (5) On May 1, 2015, and May 4, 2015, applications for rehearing of the *ESP 3 Order* were filed by: Duke; Industrial Energy Users-Ohio (IEU); The Ohio Energy Group (OEG); Ohio Partners for Affordable Energy (OPAE); Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (jointly, Exelon); Ohio Consumers' Counsel (OCC); Ohio Manufacturers' Association (OMA); Retail Energy Supply Association (RESA); city of Cincinnati (Cincinnati); Environmental Law & Policy Center (ELPC); Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy); Interstate Gas Supply, Inc. (IGS); and Sierra Club (Sierra). On May 14, 2015, memoranda contra the various applications for rehearing were filed by Duke, IEU, OEG, OPAE, Exelon, OCC, OMA, ELPC, RESA, IGS, and Miami University and The University of Cincinnati.
- (6) The Commission believes that sufficient reason has been set forth by Duke, IEU, OEG, OPAE, Exelon, OCC, OMA, RESA, Cincinnati, ELPC, Direct Energy, IGS, and Sierra to warrant further consideration of the matters specified in the applications for rehearing. Accordingly, the applications for rehearing by Duke, IEU, OEG, OPAE, Exelon, OCC, OMA, RESA, Cincinnati, ELPC, Direct Energy, IGS, and Sierra should be granted.

It is, therefore,

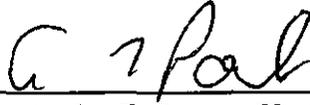
ORDERED, That the applications for rehearing filed by Duke, IEU, OEG, OPAE, Exelon, OCC, OMA, RESA, Cincinnati, ELPC, Direct Energy, IGS, and Sierra be granted for further consideration of the matters specified in the applications for rehearing. It is, further,

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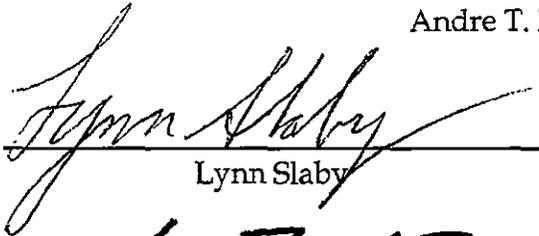
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ORDERED, That a copy of this Entry on Rehearing be served on all parties of record.

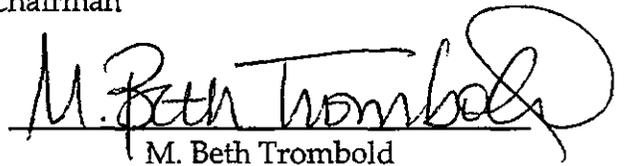
THE PUBLIC UTILITIES COMMISSION OF OHIO



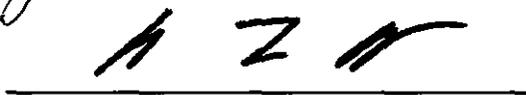
Andre T. Porter, Chairman



Lynn Slaby



M. Beth Trombold



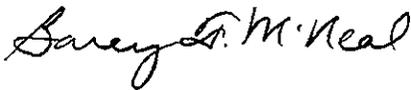
Asim Z. Haque



Thomas W. Johnson

NW/CMTP/vrm

Entered in the Journal
MAY 28 2015



Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF 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 NO. 14-841-EL-SSO

**IN THE MATTER OF APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
AUTHORITY TO AMEND ITS CERTIFIED
SUPPLIER TARIFF, P.U.C.O. No. 20.**

CASE NO. 14-842-EL-ATA

SECOND ENTRY ON REHEARING

Entered in the Journal on March 21, 2018

I. SUMMARY

{¶ 1} The Commission grants, in part, and denies, in part, the applications for rehearing of the April 2, 2015 Opinion and Order.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services (CRES) necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On May 29, 2014, Duke filed an application for an SSO, in the form of an ESP, pursuant to R.C. 4928.143.

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{¶ 5} On April 2, 2015, the Commission issued its Opinion and Order approving Duke's proposed ESP, with certain modifications (ESP 3 Order).

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 7} On May 1, 2015, and May 4, 2015, applications for rehearing of the ESP 3 Order were filed by: Duke; Industrial Energy Users-Ohio (IEU); Ohio Energy Group (OEG); Ohio Partners for Affordable Energy (OPAE); Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (ExGen) (jointly, Exelon); Ohio Consumers' Counsel (OCC); Ohio Manufacturers' Association (OMA); Retail Energy Supply Association (RESA); city of Cincinnati (Cincinnati); Environmental Law & Policy Center (ELPC) and Ohio Environmental Council (OEC) (the Environmental Advocates); Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy); Interstate Gas Supply, Inc. (IGS); and Sierra Club (Sierra Club). Memoranda contra the various applications for rehearing were filed by: Duke; IEU; OEG; OPAE; the Environmental Advocates; Exelon; OCC; OMA; RESA; Miami University and The University of Cincinnati (Miami/UC); and IGS.

{¶ 8} By Entry on Rehearing dated May 28, 2015, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing.

III. DISCUSSION

{¶ 9} The Commission has reviewed and considered all of the arguments raised in the applications for rehearing. Any argument that was raised on rehearing and that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

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A. Price Stability Rider

{¶ 10} In these proceedings, Duke requested approval of a Price Stability Rider (PSR) that, as proposed, would flow through to customers the net benefit or cost from the Company's sale of its Ohio Valley Electric Corporation (OVEC) contractual entitlement into the PJM Interconnection, LLC (PJM) market less all associated costs. In the ESP 3 Order, the Commission concluded that the PSR proposed by Duke met the requirements of R.C. 4928.143(B)(2)(d) to be included in an ESP and authorized the establishment of the PSR mechanism, as a zero placeholder rider. However, after thoroughly considering the record evidence, the Commission found the PSR proposal, as put forth in these proceedings, would not provide a sufficiently beneficial financial hedge, or other commensurate benefits, to Duke's customers to justify approval of the OVEC PSR. Further, the Commission offered factors that it will consider, but not be bound by, in its evaluation of future requests for a PSR. ESP 3 Order at 47.

{¶ 11} Duke argues the Commission's conclusion on the PSR unreasonably prohibits the Company from offering its customers a hedge against volatile wholesale prices. Duke submits there are significant changes in the wholesale market, including PJM's proposal of a new capacity product, proposed environmental regulations, reliable coal plants, and pending federal litigation. According to Duke, these uncertainties, coupled with the volatile wholesale market, render retail rates unpredictable and unstable. Therefore, to protect against some of the volatility of the cost of energy and capacity, Duke proposes to provide customers with a financial hedge, in the form of the PSR. Duke argues the Commission's decision cannot be substantiated by the evidence in the record. Duke contends the Commission's reliance on the uncertainty and speculation in projecting the net impact of the proposal is misplaced and runs afoul of established regulatory practice, disregards the 25-year duration of Duke's proposal, and ignores the purpose of the rider. Further, Duke asserts reliance on the availability of other means to hedge volatility is misplaced. Duke argues that the laddering and staggering approach for SSO auction

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products, as well as fixed-price CRES contracts, noted by the Commission are general methods to smooth price changes and do nothing to prevent customers from feeling the full effect of increasing market prices.

{¶ 12} The Commission finds, that Duke has raised no new arguments on rehearing and that we already considered and evaluated Duke's arguments in the ESP Order. In our decision, we reasonably concluded that the evidence of record demonstrates that, as proposed, the PSR may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility. In doing so, we thoroughly considered the testimony presented by Duke and the other parties regarding the PSR's projected costs and rate stability benefits. Further, we recognized Duke's concerns regarding rate stability, noting that a properly designed proposal to recover OVEC costs could help protect customers from price volatility in the wholesale market. However, we also noted significant hedges against rate volatility already exist, such as fixed-price contracts and the laddering and staggering of SSO auction products. ESP 3 Order at 45-47.

{¶ 13} Therefore, we affirm our decision in the ESP 3 Order not to approve Duke's recovery of any OVEC costs in this proceeding. In that decision, which was based solely on the record in these proceedings, we recognized the uncertainty associated with PJM market reforms, environmental regulations, and federal litigation. Further, we specifically noted our decision did not preclude Duke from seeking recovery of OVEC costs in a future filing. In sum, our decision to not approve the PSR was reasonable and supported by the record. ESP 3 Order at 45-47. Duke's request for rehearing on this issue should be denied.

1. ADOPTION OF A PLACEHOLDER PRICE STABILITY RIDER

{¶ 14} OP&E, Exelon, and OMA assert it is unlawful and unreasonable for the Commission to allow Duke to establish a placeholder PSR and to encourage Duke to file another PSR proposal. OCC, Exelon, and OMA note that the Commission found Duke failed in its burden to show that the proposed PSR would provide rate stability and certainty for

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customers as required by R.C. 4928.143(B)(2)(d). OMA argues the PSR may not be properly established unless and until Duke demonstrates that it will have the effect of stabilizing or providing certainty regarding retail electric service. OCC and RESA contend that the Commission approved the placeholder PSR under the theory that a properly conceived PSR proposal in a future filing could meet the statutory requirements; however, the placeholder PSR was not supported by facts admitted into the record in these proceedings. According to RESA, if the proposal submitted by Duke was not approved and Duke must present more information before the PSR can take effect, then the Commission did not have any evidentiary basis to establish and approve the placeholder PSR. Exelon agrees, stating it is unjust and unreasonable to conclude that a placeholder PSR satisfied the statutory requirements.

{¶ 15} IEU offers that R.C. 4928.143(B) sets forth the terms that the Commission may authorize as a provision of an ESP, and none of those terms authorizes a placeholder rider. Cincinnati agrees there is nothing that authorizes the Commission to establish an undefined placeholder PSR based on a theoretical benefit not found in the record.

{¶ 16} OCC opines that the Commission violated R.C. 4903.09 by not basing its decision on the record. According to OCC, residential consumers are prejudiced by the Commission's approval of the placeholder PSR because they are denied the factual information upon which to contest approval of the rider. In addition, with the PSR set at zero and the Commission's intent to permit cost recovery in a future proceeding, consumers are precluded from considering the PSR's costs and other attributes in contesting whether the ESP is more favorable than an MRO. Moreover, IEU claims that by approving a placeholder rider with authorization for cost recovery in a future filing, the Commission has permitted Duke to evade its burden to prove that the ESP is more favorable in the aggregate than an MRO, as required in R.C. 4928.143(C)(1).

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{¶ 17} Duke responds that the Commission's decision was based on the evidence of record. According to Duke, the Commission, in reaching its decision, may rely on the arguments of any party and all evidence of record.

{¶ 18} We affirm our decision from the ESP 3 Order authorizing a placeholder PSR. As noted in the Order, we have previously approved placeholder riders, with an initial rate of zero, within an ESP. ESP 3 Order at 47, citing *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Opinion and Order (Dec. 17, 2008) at 17; *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al. (ESP 2 Case), Opinion and Order (Nov. 22, 2011) at 51; *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Aug. 8, 2012) at 24-25; *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO (AEP ESP 3 Case), Opinion and Order (Feb. 25, 2015) at 25; *In re Ohio Edison Co.*, et al. Case No. 08-935-EL-SSO, et al., Second Opinion and Order (Mar. 25, 2009) at 15. The basis for our decision to authorize the placeholder rider was explained in the Order and based on the evidence of record, consistent with R.C. 4903.09. In the ESP 3 Order, the Commission concluded that Duke's proposed PSR rider would not provide customers with sufficient benefits. Accordingly, the Commission denied Duke's specific PSR proposal. However, we found that a properly designed and implemented PSR rider proposal has the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions; protect customers from market price volatility; and provide value for consumers through a significant financial hedge that truly stabilizes rates, particularly during periods of extreme weather. ESP 3 Order at 46-48. As discussed in greater detail below, R.C. 4928.143(B)(2)(d) provides the statutory authority for the PSR and nothing in the statute precludes the Commission approving a placeholder rider, with cost recovery determined at a future date.

2. STATUTORY REQUIREMENTS OF R.C. 4928.143(B)(2)(D)

{¶ 19} R.C. 4928.143(B)(2)(d) provides that the Commission can approve, as a component of an ESP, terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or

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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.

{¶ 20} The Environmental Advocates, Sierra Club, OMA, RESA, and IGS submit the Commission erroneously concluded it has the authority under R.C. 4928.143(B)(2)(d) to approve the PSR. IGS contends, pursuant to R.C. 4928.143, the only time the Commission may authorize a nonbypassable generation-related rider is where generating facilities are under construction or constructed after 2009. IEU contends the ESP 3 Order is unlawful because it authorizes a nonbypassable generation-related rider that is not included in the list of permissive ESP provisions authorized by R.C. 4928.143(B)(2). The Environmental Advocates assert the Commission's conclusion authorizes Duke to force all distribution customers to cover the costs of its generating plants even though the plants are uneconomic in the competitive market, resulting in an anticompetitive subsidy in contravention of R.C. 4928.02(H). The Environmental Advocates reason that R.C. 4928.06 requires the Commission to ensure the policy in R.C. 4928.02 is effectuated; therefore, approval of the PSR in contravention of R.C. 4928.02(H) was unlawful and unreasonable regardless of the scope of its authority under R.C. 4928.143(B)(2)(d).

{¶ 21} OCC asserts, and IEU agrees, the Commission's approval of a placeholder for the PSR is unreasonable and unlawful because the determination that the PSR may be included in an ESP and charged to all distribution customers under R.C. 4928.143(B)(2)(d) lacks record support, violating R.C. 4903.09, and contravenes legislative intent. Sierra Club agrees that approval of the PSR was not supported by the record evidence. While OCC, Sierra Club, and IGS acknowledge that, in accordance with the statutory provisions in R.C. 4928.143(B)(2)(d), the PSR would be a charge to customers, they contest that the PSR relates to "limitations on customer shopping." According to OCC, "customer shopping" is synonymous with the term "customer switching." OCC opines that the General Assembly intended R.C. 4928.143(B)(2)(d) only to permit provisions in an ESP that would physically

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limit customer switching to a CRES provider, as opposed to the Commission's interpretation that permits a "financial" limitation on customer shopping. Sierra Club agrees that R.C. 4928.143(B)(2)(d) does not speak of the pricing for retail electric generation service, but of shopping for such service. Likewise, Cincinnati states that the statute speaks of charges relating to limitations on customer shopping, rather than financial limitations on customer shopping.

{¶ 22} In its reply, Duke contends that OCC is erroneously conflating "customer shopping" and "customer switching." Duke avers a customer that examines competitive offers and chooses to remain with the SSO still shopped for an offer, even though a switch did not occur. As to the intervenors' assertion that the limitation on customer shopping must be physical, the Company states the intervenors are wrongly inserting words and intent into the statute.

{¶ 23} OMA submits the PSR does not function as a limitation on customer shopping, financially or otherwise. In finding that the PSR would effectively "function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service," OMA believes the Commission overlooked that many customers have fixed-price contracts or service under the SSO and thus do not rely on the fluctuations of the spot energy market for their retail electric generation service. Further, OMA states that Duke did not allege in its application that the PSR would have the effect of preventing, limiting, or inhibiting customer shopping for retail generation service, financially or otherwise, nor did Duke request a waiver of Ohio Adm.Code 4901:1-35-03(C)(9)(c), which requires Duke to provide such information in its ESP application.

{¶ 24} According to IEU, the Commission relied on the testimony of OEG's witness to support the position that the PSR stabilizes rates, not on Duke's application. Therefore, IEU contends Duke failed to carry the burden of proof to establish that the PSR is a limitation on shopping and the manifest weight of the evidence contradicts the Commission's finding.

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{¶ 25} RESA notes the Commission found that the PSR would be a generation rate and, in Ohio, generation is a competitive retail electric service under R.C. 4928.01(A)(27) and 4928.03. In addition, RESA asserts that the EDU is limited to providing noncompetitive utility services, with the exception of competitive services provided as part of a bundled, default electric retail service. RESA points out that the PSR does not bundle generation to any Duke customers; rather, under the PSR, OVEC generation is sold wholesale into the PJM market. Moreover, the PSR, as a nonbypassable rider, applies to both shopping and nonshopping customers and mandates that all customers pay for the costs of competitive retail electric service, even though the shopping customers did not use the generation from OVEC. Therefore, according to RESA, the PSR is not authorized by R.C. 4928.143(B)(2)(d), because the rider is for generation and involves competitive services.

{¶ 26} Duke disagrees with RESA, asserting that the statutes specifically designed ESPs as a mechanism through which a utility may provide generation service. Thus, because the PSR relates to generation, Duke contends an ESP proceeding is the appropriate proceeding to establish such a rider.

{¶ 27} OCC and OP&E offer that, without its express inclusion in the items listed in R.C. 4928.143(B)(2)(a) through (i), a financial limitation on customer shopping is forbidden. OCC and OP&E submit the Commission relied entirely on OEG's theory on brief that the PSR represents a financial limitation on shopping; however, there is no evidence on the record to support this claim.

{¶ 28} OCC, Sierra Club, OMA, IEU, and IGS argue the PSR does not provide rate stability or certainty as required by R.C. 4928.143(B)(2)(d). IGS submits the PSR does not serve as a hedge against rising electricity prices. OCC notes the PSR will not function as a countercyclical hedge by rising and falling in the opposite direction of the market, as asserted by Duke. OCC and IEU believe the ESP 3 Order is inconsistent in finding that the PSR would, in theory, have the effect of stabilizing retail service, yet also finding it was

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unclear, based on the record, how much the PSR would cost customers and whether customers would benefit from a financial hedge. OP&A, IEU, and RESA assert the purpose of the PSR is to shift the business risk associated with the OVEC generating plants to Duke's distribution customers. Further, OCC and OP&A note that shopping customers already have solutions to hedge against price volatility available to them through the SSO auctions, such as laddering and staggering. In addition, OP&A notes customers receiving service under the SSO are served under one- and two-year full requirement contracts established through periodic auctions. Therefore, OCC asserts the PSR is not needed because CRES providers can provide products that allow customers to elect the amount of risk they want to take. IEU asserts the PSR will alter fixed-price contracts and inject price instability into the SSO. OP&A further advocates that the PSR does not give Ohio customers any greater reliability than any other customer in PJM.

{¶ 29} Sierra Club and IGS state that rate stability and certainty under R.C. 4928.143(B)(2)(d) refers to the provision of retail electric service; the PSR, however, does not impact retail electric service and has nothing to do with supply of retail electric service to Duke's customers in Ohio, as defined in R.C. 4928.01(A)(27). According to Sierra Club, what customers will be paying for under the PSR would not be used to serve those customers. Rather, with the PSR, Duke would sell 100 percent of its OVEC share into the wholesale market and default customers will still receive their own energy supply through an SSO auction process. Sierra Club avers Duke's proposal would essentially require customers to become merchant generators, paying for all of the costs of producing energy for sale in to the wholesale energy market and receiving whatever revenue might accrue from such sales. IGS asserts approval of the PSR would inject uncertainty and instability into the retail electric market, stating that requiring customers to subsidize uneconomic generation will discourage market entry and development of the competitive market.

{¶ 30} After considering the applications for rehearing, we affirm our decision that R.C. 4928.143(B)(2)(d) permits the authorization of the PSR. In the ESP 3 Order, we

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determined Duke's PSR would satisfy the three requirements of the statute. Specifically, the PSR would: consist of a charge, constitute a financial limitation on customer shopping for retail electric generation service, and have the effect of stabilizing or providing certainty regarding retail electric service. ESP 3 Order at 43-46. In finding that the second criterion was met, we noted that the PSR rider would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. In finding that the PSR is a financial limitation on customer shopping, we relied on, among other evidence, the testimony of OEG witness Taylor. ESP 3 Order at 45 (Tr. VII at 1875). The argument that Duke did not meet its burden of proof because Mr. Taylor was not a Duke witness has no merit. All evidence in the record may be used to satisfy a statutory burden, just as the Commission may rely on all evidence in the record to reach its decision. We also determined that the third criterion was satisfied, because a properly conceived PSR rider would provide a generation-related hedging service that stabilizes retail electric service, by smoothing out the market-based rates paid by all customers. ESP 3 Order at 44.

{¶ 31} We do not find that the language of R.C. 4928.143(B)(2)(d) prevents the Commission from authorizing a non-bypassable generation-related rider. Further, R.C. 4928.143(B)(2)(d) references only "limitations on customer shopping" and, therefore, does not preclude authorization of a charge constituting a financial limitation on customer shopping, contrary to OCC's assertion. Additionally, although Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i) requires an ESP application to include a descriptive rationale and other information for any component of the ESP that would have the effect of limiting customer shopping, at the time of the filing of its ESP application, Duke did not propose the PSR rider as a limitation on customer shopping for retail electric generation service and, therefore, the Company was not required to comply with the rule. We also reject the arguments questioning the potential rate stabilizing effect of the PSR. In declining to approve the specific rider proposed to us, we did determine, after a careful and balanced consideration of the record, that there may be value for consumers in a properly conceived PSR proposal.

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In doing so, we found the evidence suggested that the right proposal could provide a significant financial hedge that stabilizes rates and protects all customers from market-based price volatility, including shopping customers with fixed-rate contracts. ESP 3 Order at 44-45. Thus, we have already fully considered the opposing intervenors' arguments regarding rate stability, as well as our analysis of R.C. 4928.143(B)(2)(d). Accordingly, we find that the requests for rehearing on these issues should be denied.

3. CORPORATE SEPARATION PROVISIONS OF R.C. 4928.17

{¶ 32} RESA argues the PSR violates R.C. 4928.17 because it allows Duke to contract with its affiliate without any direct approval from the Commission. RESA contends, and Exelon agrees, that Duke is not permitted to supply noncompetitive distribution service and a competitive generation service without a corporate separation plan under R.C. 4928.17. RESA and Exelon also note that, in the ESP 2 Case, Duke was required to separate its generation assets from its distribution assets by the end of 2014, citing ESP 2 Case, Opinion and Order (Nov. 22, 2011) at 44-46.

{¶ 33} According to IGS, the PSR could provide Duke with above-market compensation for unregulated generation assets. Thus, IGS argues the PSR allows Duke to evade the corporate separations requirements contained in R.C. 4928.17 by providing an undue preference and a competitive advantage to Duke in the form of a guaranteed cost recovery for an unregulated service. In addition, IGS submits approval of the PSR facilitates the abuse of market power.

{¶ 34} We find the intervenors' arguments regarding the corporate separation requirements of R.C. 4928.17 to be without merit. The requirements of R.C. 4928.17 are applicable "[e]xcept as otherwise provide in sections 4928.142 or 4928.143 *** of the Revised Code." R.C. 4928.17(A). In our decision, we determined a PSR may be approved pursuant to R.C. 4928.143(B)(2)(d), making the corporate separation requirements inapplicable.

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Therefore, we find the intervenors' arguments are misplaced under the circumstances and should be denied.

4. STATE POLICY OF R.C. 4928.02

{¶ 35} R.C. 4928.02(A) provides that it is the policy of the state to ensure reasonably priced retail electric service. OPAE asserts that, because the Commission denied approval of the proposed PSR on the basis that it did not benefit customers, the Commission cannot find that the PSR would ensure reasonably priced retail electric service in accordance with R.C. 4928.02(A).

{¶ 36} R.C. 4928.02(H) provides that it is the policy of the state to ensure effective competition "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." OCC, OPAE, IEU, and IGS state the PSR provides an anticompetitive subsidy funded by customers and that R.C. 4928.02(H) prohibits the recovery of noncompetitive generation-related costs through distribution rates paid for by utility customers. RESA and Exelon agree the PSR would violate R.C. 4928.02(H) because it would recover generation-related costs through distribution and transmission rates. According to OCC, Exelon, IEU, and RESA, although the Commission characterizes the PSR as a generation rate, it is actually a distribution rate and Commission precedent supports that R.C. 4928.02(H) prevents the recovery of generation-related costs from all distribution customers, citing *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR, Finding and Order (Jan. 11, 2012). OPAE contends that, under Ohio law, Duke's shareholders, not the distribution customers, should bear the risk of OVEC's profits or losses in the market. RESA and Exelon note that, since all ratepayers will pay the OVEC generation costs, the PSR creates a subsidy for generation service and OVEC will have an advantage over other competitive generators because the OVEC units will be guaranteed to recover their costs, including a return on equity. In addition, RESA and

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Exelon offer that the PSR will free Duke from any market/price risk associated with the OVEC generation.

{¶ 37} The Environmental Advocates submit the language in R.C. 4928.02(H) is only one specific example of a type of anticompetitive subsidy barred by state policy. Thus, the Environmental Advocates assert the Commission should have inquired as to whether the PSR effects an invalid anticompetitive subsidy by other means when it allows the transfer of money from a noncompetitive retail electric service to support the competitive generation service provided by OVEC. Because the PSR was approved for both shopping and nonshopping customers, without the possibility for CRES providers to offer competing options to address price volatility, the Environmental Advocates state the PSR's purported financial hedging service constitutes a noncompetitive retail electric service supplied to ratepayers. The Environmental Advocates note that Duke will then use the revenue from that noncompetitive service to cover its share of the costs for the OVEC plants, plants that would otherwise have to compete in the free market as a source of generation for retail customers. This economic support to the OVEC plants will be provided by Duke without any competitive process to ensure the best service to customers at the least cost. According to the Environmental Advocates, the Commission should ensure that competitive and noncompetitive retail electric service stand on their own when applying the statute. OCC agrees the PSR creates an anticompetitive subsidy by requiring Duke's customers to *underwrite the costs of OVEC's generation, which is a benefit that other competitive retail or wholesale generation providers do not have.* In addition, OCC notes, the record reflects that the PSR 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.

{¶ 38} Sierra Club offers that the PSR is contrary to state policy and would reverse the transition to a competitive marketplace because it requires customers to subsidize potentially uneconomic generation and guarantees income to generation regardless of market performance; unfairly subjects customers to the risk of owning generation over the

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long term without any control over the decisions that affect costs and revenues; and is an inappropriate mechanism to manage volatility in a competitive environment.

{¶ 39} Duke responds that the PSR complies with state policy and would be beneficial to ratepayers. According to Duke, the PSR does not create a subsidy. Duke notes its contractual responsibility with OVEC continues whether the PSR is approved or not and OVEC would not receive more or less revenue from Duke as result of the PSR. Duke asserts the PSR would only serve a countercyclical hedge for ratepayers against volatile energy rates.

{¶ 40} In the ESP 3 Order, we found our adoption of the placeholder PSR was consistent with the state policy specified in R.C. 4928.02 and, in particular, with our obligation under R.C. 4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service. In the Order, we also rejected claims that the rider is contrary to R.C. 4928.02(H) or inconsistent with our decision in Case No. 10-1454-EL-RDR. ESP 3 Order at 47-48. In that case, we specifically determined that the plant closure costs in question were not authorized under R.C. 4928.143; here, we noted that a PSR is permissible under R.C. 4928.143(B)(2)(d), which permits rate stability mechanisms. Although we did not approve the PSR, as proposed, we did find that a PSR could provide significant customer benefits. Therefore, there is no conflict with R.C. 4928.02(A) or (H). We further find that the opposing intervenors' arguments, as they pertain to Duke's recovery of costs through the PSR, are premature. As previously emphasized, we have not approved any cost recovery in these proceedings. ESP 3 Order at 48. Accordingly, requests for rehearing on this issue should be denied.

5. COMPLIANCE WITH OTHER STATUTES

{¶ 41} OCC, OP&E, and I&E assert the PSR is an unlawful transition charge and must be disallowed under R.C. 4928.38 and 4928.39. OCC and I&E explain the PSR would require customers to pay for lost revenues when the cost to Duke of generation from OVEC

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is too high to compete in the PJM market. OCC and IEU note that, in accordance with R.C. 4928.38, the recovery of generation transition charges was permitted only until the end of the market development period, which ended December 31, 2005. Moreover, IEU insists R.C. 4928.143(B) does not carve out an exception to the bar on authorization of transition revenue or its equivalent, noting that R.C. 4928.141 contains an explicit bar on the authorization of additional transition revenue. IEU contends that, based on the legislative intent and past precedent, the Commission cannot authorize a rate stability charge under R.C. 4928.143(B)(2)(d) if doing so permits the EDU to secure transition revenue or its equivalent in violation of R.C. 4928.38.

{¶ 42} OP&A points to R.C. 4928.143(B)(2)(b), stating that, under Ohio's competitive retail generation market, Duke's distribution customers cannot be required to subsidize energy and capacity produced by any particular power plants, unless Duke demonstrates a need for a new plant and the Commission authorizes Duke to build one.

{¶ 43} IEU notes that, under Duke's proposal, the balance collected through the PSR from retail customers is the difference between the wholesale costs Duke is charged by OVEC under the FERC-approved wholesale contract and the wholesale revenue Duke received under PJM tariffs. Therefore, IEU submits that the PSR is a charge or credit that increases or decreases Duke's compensation for wholesale capacity and energy services. IEU argues that the definition of EDUs in R.C. Chapters 4905 and 4928 does not give the Commission the statutory authority to adjust the compensation of an EDU for wholesale electric service; rather, the definitions limit the Commission's jurisdiction over EDUs to instances in which a retail service is being provided.

{¶ 44} IEU further states that authorization of the PSR is barred by the settlement approved in *In re Cincinnati Gas and Elec. Co.*, Case No. 99-1658-EL-ETP, et al., Opinion and Order (Aug. 31, 2000). According to IEU, the stipulation in that case provided the Company

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with no generation transition charge and placed the electricity market price risk on the Company.

{¶ 45} In Duke's reply, it contends the PSR does not remit transition revenue to Duke and is in compliance with R.C. 4928.38 and 4928.39. According to the Company, costs or credits from the PSR are not directly assignable or allocable to retail generation service and thus R.C. 4928.38 and 4928.39 are not applicable. Further, Duke asserts the Commission already addressed this in the ESP 3 Order. Duke also asserts that IEU's reliance on another proceedings' stipulation is misplaced, as that stipulation did not extend to contractual entitlements not included in Duke's rate base and does not preclude the Company from offering a rate stability rider.

{¶ 46} In the ESP 3 Order, we noted that the PSR would serve as a rate stability charge and specifically rejected the claim that it would permit Duke to collect untimely transition costs. We determined a properly conceived PSR could provide a significant financial hedge that stabilizes retail rates and protects customers from price volatility. Because a rate stability mechanism is permitted under R.C. 4928.143 there is no conflict with R.C. 4928.38 or 4928.39. Further, because we have not approved the recovery of any costs through the placeholder PSR, the contention that we have authorized the receipt of transition or equivalent revenues is without merit. We also do not find merit in IEU's claim that the PSR permits Duke to increase its compensation for wholesale generation-related services, as we expressly determined that the rider would constitute a financial limitation on customer shopping for retail electric generation service. ESP Order at 47-48. For the above reasons, requests for rehearing on these issues should be denied.

6. PREEMPTION

{¶ 47} OCC and IEU argue on rehearing that the Commission violated R.C. 4903.09 by not ruling on the federal preemption argument. OCC claims the question of whether the Commission's exercise of jurisdiction is preempted, among other things, by the Federal

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Power Act (FPA), through the Supremacy Clause of the U.S. Constitution (Supremacy Clause), is the threshold question with respect to the PSR; however, according to OCC, the Commission sidestepped this issue and proceeded to assert jurisdiction over the PSR. IEU states that, under the Supremacy Clause, federal law preempts state legislation and regulating authority if: Congress, in enacting a federal statute, has expressed a clear intent to preempt state law; it is clear, despite the absence of explicit preemptive language, that Congress has intended to occupy an entire field of regulation; or compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the federal policies in the federal law. According to OCC, OP&E, Sierra Club, RESA, and IGS the PSR is 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, capacity, and ancillary services.

{¶ 48} OCC, RESA, IEU, and IGS submit the PSR cannot be distinguished from the state programs the courts found to be preempted under the FPA, where those state programs were found to be supplementing the PJM wholesale auction clearing prices with the revenues secured through out-of-market state subsidies. See *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) (*Nazarian*); *PPL Energy Plus v. Solomon*, 766 F.3d 241 (3d Cir. 2014) (*Solomon*). Exelon agrees, that in *Nazarian* and *Solomon* the courts tossed out efforts to require retail customers to buy or subsidize the wholesale power on the ground that they are preempted by federal law. OCC explains that, like the situations posed in *Nazarian* and *Solomon*, the PSR 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. In the instant case, OCC believes the Commission is supplanting the rate generated by the PJM auction with an alternative rate preferred by the state, a make-whole rate subsidized by customers. OCC challenges Duke's attempts to distinguish the PSR from the state programs preempted in *Nazarian* and *Solomon*, stating any distinctions between new and existing plants is irrelevant, and noting that, while the PSR may not create

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a “fixed revenue stream” for Duke, there is a guaranteed revenue stream. Moreover, OCC insists Duke’s PSR is an attempt to set wholesale market prices. OCC further asserts the PSR would have anti-competitive effects on wholesale markets, stating it is not consistent with competition in the PJM wholesale power markets and it would: constitute a subsidy analogous to the subsidies preempted in *Nazarian* and *Solomon*; adversely affect bidding behavior in the wholesale competitive markets and make it difficult or impossible for generating units without subsidies to compete in the market; and suppress prices in the PJM energy markets and negatively affect incentives for nonsubsidized resources to build new generation in the region. Sierra Club opines that, as explained in *Nazarian*, market participants rely on price signals in determining whether to construct new capacity or expand; however, Sierra Club believes the signals intended to incentivize new construction may break down if new entrants are forced to compete against existing generation that is immune from price signals via the PSR.

{¶ 49} OPAE, Sierra Club, and IGS emphasize that the PSR would recover costs of a wholesale purchased power contract that is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC), thus, interfering with federal jurisdiction of wholesale power purchases and regional transmission organizations. IGS submits that PJM’s retail price model (RPM), which was approved by FERC, sets a uniform price for electric generation at various locations through a competitive process that rewards efficient sellers and drives inefficient sellers out of business, and supports infrastructure investment by providing a transparent uniform clearing price three years in advance in order for market participants to respond. According to IGS, in *Nazarian* and *Solomon*, the courts found that arrangements, such as the PSR, would undermine the RPM construct and are preempted by federal law; thus, state commissions cannot approve purchased power contracts between distribution utilities and wholesale generators that ensure that the generator receives a set amount of compensation that differs from that which the generator can obtain from market-based wholesale revenues.

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{¶ 50} Duke replies that the PSR is not preempted by the FPA and that the Commission has jurisdiction to decide on retail ratemaking issues. According to the Company, the proposed PSR has no factual similarities to the issues in either *Nazarian* or *Solomon*. Duke asserts those cases center around state and federal laws and that Ohio laws do not conflict with the FPA or FERC's jurisdiction. Duke further contends that there are other, major dissimilarities between the PSR and the *Nazarian* and *Solomon* cases. One is that the PSR is a strictly retail matter, as the mechanism has no effect on clearing prices for wholesale capacity. Further, the generation plants involved with the PSR are neither owned nor operated by Duke.

{¶ 51} In the ESP 3 Order, in declining to address constitutional issues, we noted that under the specific facts and circumstances of these proceedings such issues were best reserved for judicial determination. In doing so, consistent with R.C. 4903.09, we explained the basis for our decision. ESP 3 Order at 48. We do not find any error in our decision determining that the PSR is authorized under Ohio law. Whether Ohio law is preempted by the FPA is a constitutional question. Accordingly, we affirm that such arguments should be reserved for judicial determination. Therefore, the requests for rehearing should be denied.

7. FUTURE PSR FILING AND COMMISSION'S LIST OF FACTORS

{¶ 52} In the ESP 3 Order, the Commission did not authorize, at that time, Duke's recovery of costs through the PSR, stating that, in a future filing, Duke will have to justify any requested cost recovery and requiring that, at a minimum, in that filing Duke must address the following factors: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. The Commission reserved the right to

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require a study by an independent third party of reliability and pricing issues and required Duke, in its PSR proposal, to provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both Duke and its ratepayers. Finally, the ESP 3 Order required Duke to include a severability provision recognizing that all other provisions of its ESP will continue, in the event the PSR is invalidated, in whole or in part, at any point, by a court of competent jurisdiction.

{¶ 53} In its application for rehearing, IEU maintains that the factors the Commission intends to consider in future filings is tantamount to rulemaking. Thus, IEU contends the factors are invalid and improper, as the Commission is required to comply with the procedural requirements of R.C. 119.03 in order to adopt rules.

{¶ 54} Sierra Club asserts the new criteria for evaluating future cost recovery requests has no basis in law, offering that R.C. 4928.143(B)(2)(d) establishes the standard for approving such requests, and these new factors are inconsistent with that standard. Sierra Club also believe these factors threaten to bias the Commission's analysis in favor of approving a PSR-related cost recovery request. For example, balancing the "financial need of the generating plant" could tilt the decision in favor of approving a request in cases where the generating plant is unprofitable, while disregarding the negative of effects resulting from continued operation of a plant that is losing money. Thus, Sierra Club insists the Commission clarify that these factors, which are not based on the statute, will not guide its evaluation.

{¶ 55} The Environmental Advocates, OCC, and OMA submit the factors listed in the ESP 3 Order are inadequate. The Environmental Advocates state the factors do not adequately reflect the relevant statutory and legal considerations and propose the Commission add the following two requirements to the list of factors: first, require Duke to

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address not only the necessity of the generating facility in light of future reliability concerns, but also the necessity of the PSR to address any other issues relating to retail electric service stability or certainty, such as the price volatility concerns cited by Duke; and, further, consider whether Duke's proposal for stabilizing or providing certainty regarding retail electric service is a result of a competitive procurement process that ensures a just and reasonable outcome for customers. A competitive procurement process involving requests for proposals that are based on a consideration of all relevant resources is necessary, according to the Environmental Advocates, in order to comply with the state policy in R.C. 4928.02 of ensuring reasonably priced retail electric service; comply with the just and reasonable rates requirement in R.C. 4905.22; prevent anticompetitive subsidies in violation of state law; and comply with the corporate separation requirements in R.C. 4928.17.

{¶ 56} Exelon agrees the list should have been more explicit as to what information must be provided to ensure that the PSR complies with state and federal law, and is in the best interest of ratepayers. In addition to a competitive bid process that ensures the lowest cost, Exelon submits the financial need element should take into account the PJM capacity market reforms. Further, Exelon states the environmental factors should be more robust and require a showing of actual environmental value to ratepayers and not just bare environmental compliance. According to Exelon, a PSR application that is premised on reliability needs should be temporary and should address the need to retain certain generating plants until more permanent solutions are in place.

{¶ 57} OCC asserts the factors were incomplete and unreasonable because they skewed in favor of approving the PSR without fully considering the impact of the PSR on customers. According to OCC, the Commission failed to include factors that would enable it to assess the benefits, or detriments, to customers. OMA avers the Commission should also address factors surrounding the generation plant, such as ownership, location, and the cost of compliance with environmental regulations.

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{¶ 58} Duke asserts that nothing precludes the Commission from establishing guidelines for future consideration the PSR. The Company points out the Order only established minimum guidelines and was not binding on the Commission. Further, Duke contends the Commission, in other proceedings, has enumerated factors it will consider in future filings. According to Duke, the Commission is afforded broad discretion in setting rates. In outlining specific considerations, Duke avers the Commission acted appropriately and lawfully.

{¶ 59} As discussed in the ESP 3 Order, the enumerated factors were not meant to be an exhaustive list of the issues to be considered by the Commission in any future PSR proceeding. The list of factors was intended to identify matters of broad concern to the Commission; it was not intended to limit the scope of any future proceeding or limit the issues raised by intervenors. Thus, neither the list of factors nor the future filing process constitutes administrative rulemaking. We have broad discretion to manage our dockets and we routinely set forth directives in our orders that are intended to instruct the future filings of utilities. In a future PSR filing, the Commission would consider the factors, but not be bound by them.¹ Nothing in the ESP 3 Order precludes the intervenors from fully participating in a future PSR proceeding and calling the Commission's attention to issues they deem relevant. In such a proceeding, as we did here, we would weigh all of the evidence of record. Therefore, we do not consider the list of factors to be vague, arbitrary, or outside the bounds of our jurisdiction. Accordingly, rehearing on this issue should be denied.

8. BYPASSABILITY OF THE PRICE STABILITY RIDER

{¶ 60} The Environmental Advocates argue it is unreasonable for the PSR to be a nonbypassable charge on both shopping and nonshopping customers. The Environmental

¹ On March 31, 2017, Duke filed an application for approval to modify Rider PSR in Case No. 17-872-EL-RDR.

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Advocates assert the Commission's rationale that the PSR should be nonbypassable because both shopping and nonshopping customers may benefit from the stabilizing effect of the PSR on the price of retail electric service, does not justify forcing ratepayers to accept a purported hedge against price volatility sourced only from Duke's OVEC entitlement in contravention of Ohio law favoring an open retail market. According to the Environmental Advocates, this is especially true given other means that provide significant hedge against price volatility, such as laddering and staggering and fixed-price contracts, pointed out by the Commission. The Environmental Advocates note that, while Duke failed to show a demand for additional hedges, the existence of these arrangements shows there is a demand and such demand can be met through competitive products chosen by customers on the open market. The Environmental Advocates state there is no reason for the PSR to be nonbypassable and believe it could be offered as part of Duke's default service, leaving customers the option to shop and decide if they want an alternative hedging mechanism.

{¶ 61} We affirm our finding in the ESP 3 Order that the PSR should be nonbypassable. In reaching our decision in the Order, we thoroughly considered the position of the Environmental Advocates and explained that the intention of the rider, in theory, is to stabilize the price of retail electric service. This would be accomplished by smoothing out fluctuations in the market-based rates paid by both shopping and non-shopping customers, resulting in all customers benefiting from the hedging mechanism. ESP 3 Order at 44-45. Thus, the Environmental Advocates request for rehearing should be denied.

9. SEVERABILITY PROVISION

{¶ 62} According to OCC, the Commission erred in ordering an asymmetric severability provision without requiring that the PSR be collected subject to refund to avoid prejudice to customers, due to the Ohio Supreme Court's prohibition against retroactive ratemaking, citing *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). OPAE agrees that the temporary imposition of the PSR charge would

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deny Ohio retail customers any remedy because there is no mechanism to refund the charges. Duke replies that the Commission's decision was economic and appropriate.

{¶ 63} In the ESP 3 Order, we directed Duke to include, in any future PSR proposal, a severability provision that recognizes that, in the event that the PSR is invalidated, in whole or in part, by a court of competent jurisdiction, all other provisions of the ESP will continue. We also emphasized that Duke was not authorized to recover any costs through the PSR and the Company would be required, in a future filing, to justify any requested cost recovery. ESP 3 Order at 47. Given that no charges have been approved in these cases, we therefore find that OCC's argument to collect rider charges subject to a refund is premature. Accordingly, OCC's request for rehearing on this issue is denied.

B. *Divestiture of Ohio Valley Electric Corporation Entitlement*

{¶ 64} In these proceedings, the issue of whether Duke was required under the stipulation in the ESP 2 Case to transfer its OVEC entitlement out of Duke was raised. In the ESP 3 Order, the Commission noted that, while the record reflects arguments supporting both sides of this issue, in light of the fact that the stipulation in the ESP 2 Case was coming to an end, it was not necessary to evaluate the intent of the stipulating parties in the ESP 2 Case. However, the Commission clarified that, in adopting the stipulation in the ESP 2 Case, it was not the Commission's intent to exempt Duke from pursuing the divestiture or transfer of the OVEC contractual entitlement. Thus, the Commission directed Duke to pursue transfer or divestiture of the OVEC entitlement, and file annual status reports on this issue. ESP 3 Order at 48.

{¶ 65} In its application for rehearing, Duke argues the Commission's directive that Duke pursue divestiture of its stock in OVEC is unreasonable, arbitrary, unconstitutional, beyond the scope of this proceeding, and outside the Commission's jurisdiction. Duke submits the Commission did not explain its rationale for directing divestiture of OVEC as required by R.C. 4903.09. According to Duke, the Commission's new interpretation of the

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stipulation approved in the ESP 2 Case is a violation of Duke's due process rights, as the rehearing and appeal time frames for the ESP 2 Case have passed. Duke asserts that neither the statute nor the stipulation in the ESP 2 Case require Duke to divest generation assets or contractual entitlements in entities that own and operate generation assets. Duke maintains the Commission's new reading of the stipulation in the ESP 2 Case is illogical, pointing out that, if the stipulation was meant to require the transfer of the stock Duke owns in OVEC, then what about other comparable ownership interests, in the form of a subsidiary (e.g., Duke Energy Kentucky, Inc.) or an affiliate (e.g., Duke Energy Indiana, Inc.). Duke submits the stipulation in the ESP 2 Case did not require Duke to sell its stock in Duke Kentucky or break its affiliation with Duke Indiana. Duke claims the Commission's mandate to dispose of the OVEC interest without any justification or due process is a governmental taking and violates both the Ohio Constitution and U.S. Constitution. Finally, Duke contends the notion that Duke is prohibited from owning generation assets, directly or indirectly, or investing in entities that own such assets is at odds with Ohio law and serves to illegally preempt federal law.

{¶ 66} OMA, Exelon, RESA, and IGS respond that the Commission's directive for Duke to transfer its OVEC entitlement or divest the assets is reasonable and should be upheld. Contrary to Duke's assertions, OMA confirms that this is not a new interpretation of the stipulation in the ESP 2 Case; rather, the evidence in these proceedings reflects that the majority of the parties agree with this interpretation. Exelon submits, and RESA agrees, that Duke should be estopped from claiming that the evidence and arguments on divestiture of OVEC are outside the scope of these proceedings, because Duke was the party that presented evidence and raised the question in these proceedings of whether it was obligated to divest as part of the stipulated terms in the ESP 2 Case. In addition, Exelon and RESA point out that Duke addressed the question in its brief. IGS agrees that the stipulation in the ESP 2 Case required full legal separation, noting that R.C. 4929.17(A)(1) mandates that EDUs provide competitive and other unregulated services through a separate affiliate with

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separate books. According to Exelon, the ESP 3 Order must flow from the Order approving the stipulation in the ESP 2 Case, which called for divestiture of OVEC. Moreover, Exelon argues Duke's due process rights were not violated and Duke's reference to other generating assets owned by affiliates or subsidiaries is irrelevant. Further, RESA offers that the question of divestiture stems from the stipulated terms in the ESP 2 Case, not a comparison of other generating assets; thus, there is no governmental taking of private property. Finally, Exelon and RESA note that the Commission, in the ESP 3 Order, analyzed and weighed the issues raised by Duke and Duke is merely asking the Commission to reweigh the evidence and arguments.

{¶ 67} With regard to Duke's assignment of error, the Commission finds that Duke raises no new issue not already thoroughly considered in our ESP 3 Order. Contrary to Duke's allegations, in the ESP 3 Order, the Commission thoroughly considered the evidence concerning Duke's divestiture of OVEC as it relates to the stipulation in the ESP 2 Case. ESP 3 Order at 36-38. In the ESP 3 Order, the Commission made it clear that, by approving the stipulation in the ESP 2 Case, it was never our intention to excuse Duke from pursuing the divestiture or transfer of the OVEC contractual entitlement. Duke's assertions to the contrary are unfounded and without merit. Therefore, the Commission finds that Duke's request for rehearing of this issue should be denied.

C. *Generation Service Supply - Master SSO Supply Agreement - Section 3.9 - Declaration of Authority*

{¶ 68} The Master SSO Supply Agreement (MSA) sets forth the contractual obligations of successful suppliers and Duke with respect to each auction. The second and third sentences of paragraph 3.9 of the MSA provide that:

Duke * * * shall have the right to modify at any time the Attachment A - Addendum to the Declaration of Authority. In the event Duke * * * exercises such right to modify * * * each SSO Supplier shall execute

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an amendment to the Declaration of Authority or a new Declaration of Authority***as required by Duke * * * *

{¶ 69} On the record, ExGen argued that these sentences in paragraph 3.9 should be deleted because Duke should not be permitted to unilaterally revise the declaration of authority, unless such change is necessary to maintain consistency between the declaration of authority and the parties' obligation under the MSA. In the ESP 3 Order, the Commission declined to adopt ExGen's proposal stating that, to the extent Duke exercises this provision to protect SSO customers by ensuring proper credentials by auction participants, the language is appropriate. ESP 3 Order at 52-54.

{¶ 70} On rehearing, Exelon argues it was unjust and unreasonable for the Commission to include the entirety of paragraph 3.9 in the MSA because this provision allows Duke too much discretion to unilaterally modify the declaration of authority for any reason. Exelon insists that deletion of the second and third sentences in paragraph 3.9 would not remove flexibility for Duke or preclude Duke from protecting SSO customers; removal would ensure no unfair actions are taken by Duke and Duke can still run its auctions with good business practices.

{¶ 71} In response, Duke argues that, if these sentences are deleted, Duke would be forced to unnecessarily expend resources to ensure uniformity and equity among suppliers and, ultimately, customers from whom the costs are recovered. Duke explains that the declaration of authority reflects a process through which certain identified PJM billing items are transferred between the load serving entities that are customarily allocated such charges and Duke. According to Duke, the designated billing line items must uniformly apply to all suppliers so there are no discrepancies in the costs ultimately borne by customers and inconsistencies in the competitive market. Duke submits that paragraph 3.9 ensures that changes to the declaration of authority are accepted by all suppliers in a timely manner and that a recalcitrant supplier cannot force inconsistencies by refusing to agree to modifications.

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In addition, Duke insists that it has no intention of arbitrarily revising the billing line items included in the declaration of authority process. Duke asserts any amendments or revisions will be made consistent with good business practices and in an effort to protect customers.

{¶ 72} As stated in the ESP 3 Order, the Commission finds that this language is appropriate, so long as Duke exercises this provision to protect SSO customers by ensuring proper credentials by auction participants. ESP 3 Order at 54. There is no evidence, other than Exelon's speculations, that leads the Commission to believe Duke will enact this provision outside of these parameters. If there appears to be difficulty in the future, we would expect the stakeholders to make us aware of their concerns at that time. Accordingly, we find that Exelon's request for rehearing on this issue is unfounded and should be denied.

D. Generation Service Pricing – Retail Capacity Rider

{¶ 73} Duke's Retail Capacity Rider (Rider RC) recovers the cost for capacity, which is the amount of generation Duke has available to serve customers under the SSO. In the ESP 3 Order, the Commission approved Duke's proposal to change the manner in which capacity costs are allocated in the calculation of Rider RC. Specifically, the Commission authorized Duke to allocate the capacity costs that resulted from PJM's Reliability Pricing Model (RPM) prices based on each class's 5 coincident peaks (5CP) demand, as opposed to the allocation methodology that was stipulated to in the ESP 2 Case. ESP 3 Order at 55-56. The Commission found that the 5CP methodology was appropriate as it is structured to avoid a disparity between SSO rates and CRES offers and provides customers with an effective mechanism to compare SSO and CRES offers. ESP 3 Order at 60.

{¶ 74} In its application for rehearing, OP&E asserts the Commission acted unreasonably and unlawfully by approving Rider RC and the cost allocation for the rider. OP&E argues there is no need for Rider RC, as Duke does not incur direct capacity costs associated with SSO service apart from the capacity costs that are built into the competitive bid auction prices; therefore, there are no capacity costs to allocate. OP&E submits winning

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suppliers in the SSO auction bid and are paid on a flat dollar per megawatt hour basis to supply a bundled capacity, energy, ancillary services, and load-following generation product. According to OP&A, the pricing of each individual component of the generation is not revealed and the capacity costs are an implicit and unquantified component of the total payments to SSO suppliers. In addition, OP&A believes that Rider RC improperly charges residential SSO customers a price premium, noting that, since the capacity cost is not separately identified, neither is the cost to serve a particular class identified. OP&A contends marketers do not purchase capacity based on the 5CP method, they purchase it based on forward market prices that do not reflect peak usage. OP&A argues Duke's allocation methodology penalizes the residential class, as it increases the allocation for the residential class from 39.12 percent to 45.37 percent.

{¶ 75} In response, Duke notes that Rider RC is the same rider that was included in the stipulation approved in the ESP 2 Case, to which OP&A was a signatory party. Duke explains that the purpose of Rider RC continues to be the recovery of capacity costs from SSO customers. According to Duke, there is a capacity cost inherent in SSO supply, which results in a charge that suppliers will be billed by PJM based on the 5CP method. Thus, Duke must reimburse suppliers for the capacity they provide. Duke states that it proposes to perpetuate Rider RC, with slight modifications to the rate design and cost allocation, which will align the rider with recognized cost causation principals to provide customers with greater transparency into the pricing components for SSO supply. Duke believes OP&A seeks to evade this principle, thus, shifting costs that should be properly allocated to residential customers to nonresidential customers.

{¶ 76} The Commission initially notes that our approval of Rider RC in these proceedings represents a continuation of the process Duke has employed for many years to recover capacity costs. OP&A's argument that such a mechanism is not appropriate is not substantiated by the evidence in the record. In addition, OP&A continues to point to the stipulated allocation methodology in the ESP 2 Case to support the argument that the Rider

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RC allocation should not be revised. However, the record in this case supports our finding that the 5CP methodology, which is based on PJM's market price for capacity, is reasonable and is structured to avoid a disparity between SSO rates and CRES, while providing customers a mechanism to compare SSO and CRES offers. ESP 3 Order at 60. Accordingly, we conclude that OPAA's arguments for rehearing are without merit and should be denied.

E. Distribution Service – Distribution Capital Investment Rider

{¶ 77} In the ESP 3 Order, the Commission approved Duke's proposed Distribution Capital Investment Rider (Rider DCI), which is a nonbypassable rider designed by Duke to recover a return on capital investment in order to support 19 programs Duke considers vital to maintaining customer reliability. The Commission approved Duke's proposed 9.84 return on equity (ROE) for Rider DCI, and established the following annual caps on how much Duke can recover: \$17 million in 2015; \$50 million in 2016; \$67 million in 2017; and \$35 million for the first five months of 2018. In addition, we adopted the design advocated by two of the intervenors, which provides an equal percentage increase on distribution rates to all rate classes. The Commission further found that general plant should not be included in Rider DCI, and the calculation of the revenue requirement should be based off of actual plant balances. ESP 3 Order at 71-72.

10. APPROVAL OF RIDER DCI

{¶ 78} OPAA submits the Commission erred in approving Rider DCI. According to OPAA, the Commission acted unlawfully and unreasonably, as Duke did not present evidence showing that the rider was necessary in order to maintain reliability. OPAA notes that the Company has met reliability standards since 2011. Further, according to OPAA, Duke did not present evidence that the rider would improve reliability for customers, as the recovered funds will only go towards infrastructure maintenance, not modernization.

{¶ 79} Duke responds that improved reliability is a stated goal of the rider. The Company asserts it provided testimony illustrating such and that the rider will allow it to

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modernize equipment on a proactive, instead of a reactive, basis. Duke further notes that, because it is being proactive, the rider's effects on reliability may not be quantifiable.

{¶ 80} The Commission finds Duke's Rider DCI was properly approved. R.C. 4928.143(B)(2)(h) authorizes utilities to recover capital costs for distribution infrastructure through an ESP. In approving such recovery, the Commission must examine the reliability of the utility's distribution system and make sure customers and the utility's expectations are aligned and that the utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system. In approving the rider, the Commission found that the expectations of Duke and its customers are aligned. Further, relying on precedent from *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Aug. 8, 2012) at 47 and testimony submitted by Duke (Duke Ex. 21 at 11-15), we found that Duke's proactive maintenance program is an appropriate use of resources that should have a positive effect on reliability. ESP 3 Order at 71-72. Therefore, the rider was appropriately approved by the Commission, and OP&E's request for rehearing should be denied.

11. RETURN ON EQUITY FOR RIDER DCI

{¶ 81} On rehearing, OP&E also avers that Duke's approved ROE is unreasonably high. The approval of this rider decreases Duke's business risks, thus, according to OP&E, the ROE should be lower than what was approved in Duke's base rate case, not the same.

{¶ 82} The Commission finds that the 9.84 percent ROE was properly approved. In approving the ROE, the Commission specifically considered the effect Rider DCI would have on Duke's business risk and, based on testimony submitted by Duke witness Morin, found it was insignificant and that the ROE is lower than what is approved in similar riders for other EDUs. ESP 3 Order at 72. Accordingly, the Commission finds that OP&E's request for rehearing on this issue is without merit and should be denied.

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12. PROPERTY TAXES AND RIDER DCI

{¶ 83} OCC argues the Commission failed to consider how property taxes will be addressed in Rider DCI and the Commission should adopt OCC's proposal that only allows Duke to expense property taxes when the taxes are actually incurred. OCC states property taxes should not be included until the taxes appear on Duke's books and the property is properly considered taxable.

{¶ 84} Duke avers it uses standard accounting methods to expense property taxes. According to the Company, it uses the accrual method of accounting, which expenses taxes in the year they are assessed, as they are a known legal liability at that point in time. Duke notes this is an accepted accounting practice that it consistently uses.

{¶ 85} In approving the Company's rider, the Commission relied on, among other things, Duke testimony stating that the property taxes go on its books, as a valid expense, in the year the property is assessed (Tr. Vol. III at 790). No evidence was presented to show this is not an accepted accounting practice. Therefore, OCC's application for rehearing on this issue is denied.

13. CAP FOR RECOVERY UNDER RIDER DCI

{¶ 86} OMA, in its assignment of error, argues that in the Commission's approval of Rider DCI the approved cap on recovery is not supported by evidence in the record. OMA requests that the cap be lowered. Duke counters that OMA's argument lacks factual or legal support.

{¶ 87} The Commission finds OMA's assignment of error to be without merit. When the Commission modified the rider to include a cap on recovery, it relied specifically on testimony and recommendations submitted by Staff. ESP 3 Order at 72 (Staff Ex. 6 at 5-6). Further, OMA requested the Commission adopt these same cap numbers from Staff in

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its reply brief (OMA Reply Br. at 28). Therefore, the Commission concludes that this assignment of error should be denied.

14. GENERAL PLANT EXCLUSION FROM RIDER DCI

{¶ 88} Duke submits that the Commission inappropriately disallowed the inclusion of general plant expenditures. The Company avers that the Commission is going against precedent, as it previously allowed another utility to include general plant expenditures with a similar rider in *In re Ohio Edison Co., et al.*, Case No. 12-1230-EL-SSO (FirstEnergy ESP Case), Opinion and Order (July 18, 2012).

{¶ 89} In response, OCC points out the FirstEnergy ESP Case resulted in a stipulation and recommendation adopted by the Commission and was not to be binding on other proceedings. Precedent was set, according to OCC, in AEP ESP 3 Case, Opinion and Order (Feb. 25, 2015) at 46, when the Commission excluded general plant from a comparable rider.

{¶ 90} The Commission finds Duke's argument to be without merit. First, the decision to exclude general plant from the rider was based on the evidence in the record showing that general plant does not go towards proactively modernizing infrastructure. ESP 3 Order at 72 (OCC Ex. 45 at 20; Staff Ex. 6 at 3). Second, the Commission's ruling is in line with prior decisions. The FirstEnergy ESP Case cited by Duke, as OCC notes, was the result of a negotiated stipulation and is not binding on the Commission. Further, the Commission's decision to exclude general plant from a distribution rider is in line with prior Commission opinions, including the AEP ESP 3 Case, Opinion and Order (Feb. 25, 2015) at 46.

F. *Distribution Service - Distribution Storm Rider*

{¶ 91} In the ESP 3 Order, the Commission approved the Distribution Storm Rider (Rider DSR), which is a nonbypassable rider intended to assist Duke in recovering the

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financial impact caused by major storms. As modified by the ESP 3 Order, Duke should file an application with Commission seeking recovery under the rider when the balance of the asset or liability is over \$5 million, and the application should include a monthly rider charge when the amount is positive or a monthly rider credit when the amount is negative. We determined that the carrying costs would be at the long-term debt rate approved in Duke's last rate case and they should not begin until the conclusion of the calendar year that a deferral is determined and they should cease once the recovery begins. In addition, we concluded that Staff would perform an annual audit of the costs, and that eligible costs must be incremental and consistent with the exclusions set forth in the ESP 3 Order. ESP 3 Order at 74-75.

15. APPROVAL OF RIDER DSR

{¶ 92} OP&E submits the Commission erred in approving Rider DSR, as Duke failed to prove the rider was necessary. OP&E believes that, in order to properly review costs, a base rate case is the appropriate proceeding for Duke to recover costs associated with such a rider. Duke responds that OP&E's argument is not supported by the facts or the law.

{¶ 93} The Commission finds that OP&E's request for rehearing on this issue should be denied. In approving the rider, the Commission relied on testimony from Duke showing a necessity to recover from the financial impact caused by major storms (Duke Ex. 9 at 6-7). Further, in its modifications, the Commission ensures costs are appropriately reviewed and audited. ESP 3 Order at 74.

16. ALLOCATION OF RIDER DSR

{¶ 94} In its assignment of error, OCC asserts the Commission failed to address how Rider DSR would be allocated and should have adopted OCC's proposal to allocate costs using Duke's cost-of-service study from the last base rate case. OCC states the current method of allocation does not follow cost-causation principles and could over-collect from

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residential customers. OCC believes its proposed method more accurately reflects cost-causation and is fairer to residential customers.

{¶ 95} The Commission notes that OCC proposed the same form of allocation for Rider DCI, which the Commission also declined to adopt. In the ESP 3 Order, the Commission noted that the Greater Cincinnati Health Council (GCHC), in opposing OCC's proposal, pointed out that the cost-of-service study used by OCC was previously challenged and ultimately not adopted. ESP 3 Order at 69 (GCHC Br. at 15). In declining to modify how Rider DSR is allocated, the Commission found OCC's argument unpersuasive. Therefore, OCC's application for rehearing on this issue should be similarly denied.

17. ELIGIBLE RECOVERY COSTS FOR RIDER DSR MUST BE INCREMENTAL

{¶ 96} According to Duke, the Commission erred in finding that eligible recovery costs must be incremental. Duke asserts the direction is too vague and more details are needed. Duke states, for planning purposes, it needs to know in advance which expenses are incremental and which are in the baseline.

{¶ 97} OCC responds that the ESP 3 Order defines incremental costs as those relating to straight-time labor from working on storms, overtime compensation paid to employees, and mutual assistance. Further, OCC notes that Duke is to bear the burden of showing, in its application, that costs are incremental.

{¶ 98} Contrary to Duke's assertions, in modifying Rider DSR so that only incremental charges are eligible for recovery, the Commission outlined its expectations. As noted by OCC, the ESP 3 Order discussed how straight-time labor from working on storms, overtime compensation paid to employees, and mutual assistance are to be handled. Duke previously stated it always intended to only include incremental labor in its recovery (Duke Reply Br. at 41). In its application for recovery, the Company is expected to show that the expenses were reasonable and prudent. Further, its accounting for the rider is to be audited

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by Staff on an annual basis. ESP 3 Order at 74-75. The Commission finds that the ESP 3 Order provides sufficient guidance, and Staff's audits will provide sufficient review, such that the Company can reasonably conclude what is expected. Therefore, we find that Duke's request for rehearing on this issue is without merit and should be denied.

18. CARRYING COSTS FOR RIDER DSR

{¶ 99} Duke further claims the Commission erred in ordering carrying costs to cease accruing after recovery begins. The Company believes the Commission ignores the time-value of money, which will unfairly hurt either Duke or its customers. OCC counters that the decision was reasonable and follows precedent.

{¶ 100} The Commission denies Duke's request for rehearing on this issue. In reaching its decision, the Commission relied on testimony from Staff and remained consistent with precedent finding that, because risk is minimized once recovery begins, the accrual of carrying costs should cease. ESP 3 Order at 74-75. (Staff Ex. 4 at 5; AEP ESP 3 Case, Opinion and Order at 55 (Feb. 25, 2015)).

G. *Distribution Service - Load Factor Adjustment Rider*

{¶ 101} According to Duke the Load Factor Adjustment Rider (Rider LFA) was originally the result of a negotiated settlement in the ESP 2 Case and was created in order to incentivize larger customers to reduce their load factor. In the ESP 3 Order, while the Commission agreed that Rider LFA should eventually terminate, we concurred with Staff and others that the rider should be gradually phased out, stating this would avoid any major rate shock for customers who were previously given incentive to adjust their load. Therefore, we found that the rider should continue as it did under the ESP 2 Case but shall be reduced by 33 percent in the first year, 33 percent in the second year, and finally 34 percent in the third year. After that, the rider shall conclude with a final true-up. ESP 3 Order at 74.

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{¶ 102} In OEG's application for rehearing, it submits that the Commission's decision to phase out Rider LFA requires clarification. According to OEG, by reducing the rider 33 percent in year one, 33 percent in year two, and 34 percent in year three, there are two possible interpretations. OEG states it is ambiguous whether, in years two and three, the reduction should be taken off of the original \$8 per kilovolt-amp (kVa) credit, or the already reduced number. Under the first interpretation, the rider is completely phased out after two years. Under the second interpretation, the rider would last three years. OEG states the second interpretation is preferable as it is more gradual and offers less rate shock. Miami/UC support OEG's request, stating that they also prefer the second interpretation.

{¶ 103} Duke avers the ESP 3 Order is clear. According to Duke, the yearly reduction should be off of the original credit, which would result in the rider being fully concluded at the end of the ESP.

{¶ 104} Upon review of the issue raised by OEG, the Commission clarifies that the original credit is to be reduced by 33 percent in year one, by another 33 percent in year two (thus, 66 percent less than the original credit), and a final 34 percent in year three (resulting in a complete 100 percent reduction).

{¶ 105} The chart below illustrates how the Commission intends to gradually phase out Rider LFA:

ESP year	Calculation	Resulting Rider LFA Credit
1	33% of \$8.00/kVa = \$2.64	\$5.36/kVa
2	33% of \$8.00/kVa = \$2.64	\$2.72/kVa
3	34% of \$8.00/kVa = \$2.72	\$0/kVa

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{¶ 106} With this clarification, the Commission finds that, to the extent OEG and Miami/UC are requesting rehearing on this issue, their requests should be denied.

H. *Distribution Service – Large Customer Interruptible Load Program*

{¶ 107} In its application in these proceedings, Duke proposed to eliminate its large customer interruptible load program that was established in the ESP 2 Case, which gave customers a chance to receive an above-market credit for allowing Duke to use interruptible load in Duke's fixed resource requirements (FRR) plan. The end of this program would result in the termination of the Company's Economic Competitiveness Fund Rider (Rider DR-ECF). Currently, there are four customers in the program. Duke noted that it will cease being an FRR entity on June 1, 2015, and, thus, will no longer need the demand resources.

{¶ 108} In the ESP 3 Order, the Commission found that the large customer interruptible load program should continue, stating that, although Duke will no longer be an FRR entity, the advantages of the program are still available. We modified the program to make participating customers subject to unlimited emergency-only interruptions year round and found that the level of credit should remain at 50 percent of the net cost of new entry. We also continued Rider DR-ECF and provided that Duke may apply for cost recovery. Finally, we determined the Company should bid the additional capacity resources associated with the program into PJM's BRAs held during the ESP term, with any resulting revenues credited back to customers through Rider DR-ECF. ESP 3 Order at 76-78.

19. PJM'S BRA AND THE LARGE CUSTOMER INTERRUPTIBLE LOAD PROGRAM

{¶ 109} In regards to the Commission's decision to continue the large customer interruptible load program, Duke conveys that the requirement for Duke to bid additional capacity resources associated with the program into PJM's BRA requires clarification. The Company notes the auctions occur once a year and relate to a delivery date over three years in the future. Duke says the BRA regarding the delivery years covered by the ESP already

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occurred. If Duke participates in the next BRA, then the delivery period would go beyond the term of the ESP. Bidding into incremental auctions is possible, according to the Company, but the auctions for 2015/2016 are already completed.

{¶ 110} OCC agrees with Duke that bidding the resources into the BRA is not feasible. OCC submits Duke should be required to reduce the amount of the interruptible credits provided to each interruptible customer by the actual PJM BRA clearing price for each individual delivery year. The net amount of credits minus the actual BRA clearing price would be collected from the customers by Duke. OCC asserts this would prevent customers from being charged twice for the same capacity resource and would reduce the overall interruptible subsidy from Duke's customers.

{¶ 111} OMA submits that Duke should bid the capacity resources from the interruptible load program into the incremental auctions held during the last two years of the ESP term. This practice, according to OMA, is still within the ESP term and at least partially offsets the amounts that would otherwise be recovered from customers.

{¶ 112} ELPC/OEC argue that Duke should still bid into the BRA, even though new bids into the BRA will involve delivery dates outside of the ESP term. ELPC/OEC aver that extending past the ESP term date is a product of how the PJM capacity markets are designed. According to ELPC/OEC, demand response programs are worthwhile ventures that are valuable in extreme weather circumstances and also provide daily benefits to customers, such as lower capacity prices and additional revenue. Further, ELPC/OEC submit that, compared to the incremental auction, bidding into the BRA maximizes the value of the resource.

{¶ 113} To ensure that customers receive the intended benefit during the ESP period, the Commission clarifies that Duke should bid the program's related capacity resources into PJM's incremental capacity auctions held during the ESP term, to the extent that such capacity resources have not already been bid by the customer into any of PJM's auctions for

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the three delivery years of the ESP term. The resulting revenues should be credited back to customers through Rider DR-ECF. With this clarification, the Commission finds that, to the extent Duke is requesting rehearing on this issue, its request should be denied.

20. RIDER DR-ECF AND THE LARGE CUSTOMER INTERRUPTIBLE LOAD PROGRAM

{¶ 114} Duke also seeks clarification regarding the operation of the large customer interruptible load program's recovery mechanism, Rider DR-ECF. Duke seeks clarification on if there is to be a review of its application for recovery. The Company submits it was not clear whether it was allowed to recover actual costs of providing the program.

{¶ 115} The Commission clarifies it is appropriate for Duke to recover its actual costs associated with providing the large customer interruptible load program and it was not the Commission's intent to suggest otherwise. However, the Commission will fully review any application for recovery to ensure that the costs were actually incurred and that recovery was properly calculated. With this clarification, the Commission finds that, to the extent Duke is requesting rehearing on this issue, it should be denied.

I. Purchase of Receivables and Billing

{¶ 116} Duke currently operates a purchase of receivables (POR) program, where it purchases the accounts receivable of CRES providers and processes the collection efforts on its own. In the ESP 3 Order, the Commission denied Duke's proposal to amend its certified supplier tariff (CST) to make POR mandatory for CRES providers using the consolidated billing service. However, the Commission found that the Company's assertion that bill-ready billing should be limited to only electric commodity charges was reasonable and approved Duke's proposal to amend its tariff on this point. The Commission stated that, because Duke's affiliate, Duke Energy One, which currently places charges for noncommodity services on Duke's bill, does not provide retail electric service, the entity is not comparable to a CRES provider. ESP 3 Order at 87-89.

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21. LIMITING BILL-READY BILLING TO ONLY COMMODITY CHARGES

{¶ 117} IGS and RESA assert several assignments of error regarding the Commission's decision to approve Duke's changes to the CST to limit bill-ready billing for CRES providers to only commodity charges. Direct Energy notes it supports RESA's arguments. First, IGS and RESA assert it is unreasonable for the Commission to allow the change because it gives undue preference to a Duke affiliate, Duke Energy One, which is permitted to use Duke's bill to charge for noncommodities, and discriminates against CRES providers, which cannot. They assert this violates Duke's corporate separation requirements and violates R.C. 4905.35 and 4928.03. According to IGS and RESA, Duke Energy One is advantaged by being on the utility bill, as it is more economical for the Company and more convenient, and, thus, preferable for customers. They request for CRES providers to be able to bill noncommodities on the utility bill, or, alternatively, that Duke Energy One also be prevented from appearing on the utility bill. IGS and RESA further state there is no evidence to support that Duke cannot separate noncommodity charges from its POR program. They claim Duke's affiliate's ability to put noncommodity charges on the bill is proof that the charges can be separated, whereas Duke's assertion otherwise is unsupported. Therefore, IGS and RESA request that the tariff change not be approved. If the change remains approved, they seek orders mandating Duke to develop the ability to separate the two charges.

{¶ 118} Duke responds that it met its burden regarding its corporate separation plan (CSP) as it pertains to its ESP application. Duke avers it only needed to demonstrate the current status of its CSP, with a timeline of anticipated revisions. Because its current plan was previously approved by the Commission, Duke asserts it is in compliance and met its burden. In regards to any undue preference, Duke asserts IGS and RESA failed to demonstrate its existence. Because the Company has not denied any CRES provider access to its utility bill, they cannot prove any preferential treatment exists. Duke further conveys that the record is insufficient to show Duke is giving unfair advantages to an affiliate and

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the proper forum for this to be litigated is in a complaint case. Moreover, Duke states that its reasoning for excluding noncommodities was sufficiently supported by testimony. According to the Company, Daniel L. Jones testified on behalf of Duke that including noncommodity charges is currently not feasible. The testimony noted that Duke's billing system currently cannot separate commodity and noncommodity services.

{¶ 119} The Commission finds that the applications for rehearing on this issue filed by IGS and RESA should be denied. Initially, we find that, because Duke had a Commission-approved CSP and provided a timeline of proposed revisions, the Commission also found the Company met its burden of proof regarding the CSP as it pertains to its ESP application. IGS and RESA have not presented a new, persuasive argument to demonstrate that Duke has not met its burden. For specific issues regarding the CSP, the Commission again informs the parties this is not the proper forum. In addition, the Commission relied on the evidence in the record in determining that Duke's billing system is currently not able to separate commodity charges and noncommodity charges. ESP 3 Order at 89 (Tr. Vol. IV at 1065-1066). The arguments by IGS and RESA regarding these issues are neither new nor persuasive.

22. CRES PROVIDERS OPT-OUT OF THE POR PROGRAM

{¶ 120} According to IGS and RESA, the Commission erred in not allowing CRES providers that opt out of the POR program from utilizing the utility bill to charge for noncommodities. IGS and RESA assert that part of Duke's rationale for excluding noncommodities from the bill was because the noncommodities would be unfairly included into the POR program. Because the Commission allowed CRES providers to opt out of the POR program, those choosing to do so are, according to IGS and RESA, unjustifiably prevented from including noncommodities. Therefore, they request that those opting out of the POR program should be able to include noncommodities on their utility bill. Similarly, IGS and RESA also submit that CRES provider affiliates that do not provide retail

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electric service and are not part of the POR program should be able to access the utility bill. Direct Energy notes it supports RESA's arguments.

{¶ 121} Duke counters that such a scenario would be unfair to CRES providers, confusing for customers, and result in higher costs. Duke asserts CRES providers would be unfairly forced to choose between the POR program and using the utility bill to charge for noncommodities. Further, according to Duke, if all suppliers of noncommodity services gain access to the bill, the ensuing costs to make that feasible would likely need be absorbed by customers.

{¶ 122} Regarding the potential for CRES providers to opt out of the POR program and, thus, place noncommodities on the utility bill, the Commission finds that the applications for rehearing filed by IGS and RESA on this issue should be denied. We note the Commission has already opened dockets for the review of Chapters 4901:1-10 and 4901:1-21, which govern noncommodity billing by utilities and CRES providers. *In the Matter of the Commission's Review of Chapter 4901:1-10 of the Ohio Administrative Code*, Case No. 17-1842-EL-ORD; *In the Matter of the Commission's Review of Chapter 4901:1-21 of the Ohio Administrative Code*, Case No. 17-1843-EL-ORD. In those dockets the rules will be open to comments from all interested parties and subject to review by the Commission. Thus, the Commission finds that, at this time, those dockets are the appropriate venue to address these issues.

J. Resettlement

{¶ 123} In the ESP 3 Order, the Commission denied Duke's request to revise its CST to require that, if Duke seeks to pursue settlement with PJM, all suppliers will agree to participate. ESP 3 Order at 90-91.

{¶ 124} Direct Energy disagrees with the Commission's decision to deny Duke's request to require certified suppliers to consent to billing adjustments or resettlements with

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PJM. Direct Energy avers that the reason Duke would seek resettlement or a billing adjustment is to correct an error. For this reason, CRES providers should not object when Duke pursues such an action. However, PJM requires affirmative consent from all other providers in order for Duke to proceed. Direct Energy conveys that, in a current case, it found it difficult to elicit any responses from other CRES providers. Direct Energy believes requiring others to consent, at least for metering errors, would allow the market to operate fairly.

{¶ 125} Upon reconsideration, the Commission grants Direct Energy's application for rehearing. In Duke's ESP application, it proposed a provision be added to its supplier tariff where, if the Company seeks a billing adjustment or resettlement with PJM, each CRES provider shall consent to the billing adjustment or resettlement. Duke Ex. 13 at Att. DLJ-1 at 22. In the ESP 3 Order, we noted the onerous task of acquiring the required affirmative consent of all other CRES providers in order for Duke to go forward with resettlement. ESP 3 Order at 91. As discussed by Direct Energy, Duke would have no motivation to seek resettlement except to correct an error. Similarly, CRES providers should have no objection to Duke ensuring proper billing. Direct Energy demonstrated that acquiring affirmative consent from numerous parties that are in no way affected by the transaction can be overly burdensome. Accordingly, Direct Energy's application for rehearing should be granted and the provision language originally submitted by Duke should be approved.

K. Economic Development

{¶ 126} Noting that R.C. 4928.143(B)(2)(i) authorizes the inclusion of economic development programs in ESPs, in the ESP 3 Order, the Commission modified the ESP to include an economic development fund to be funded by shareholders at \$2 million per year during the term of the ESP. The Commission stated that this program will create private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio. ESP 3 Order at 91.

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{¶ 127} In its application for rehearing, Duke asserts the Commission's decision to add an economic development program to be funded annually by \$2 million in shareholder funds is not based on evidence or law, and is unconstitutional, arbitrary, and inconsistent with the treatment of other EDUs. Duke submits that the situation in this case is not comparable to the ESP 2 Case where the parties stipulated to an economic development program; in this case, Duke did not propose such a program in its ESP. Duke argues that, while R.C. 4928.143(B)(2)(i) allows a utility to propose an economic development program in an ESP, it says nothing about the Commission being allowed to require it be included in the ESP. According to Duke, precedent dictates that the Commission must base its decisions on record evidence and, in these cases, there is no record support for the implementation of an economic development program. *See Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) (*Tongren*). Duke further notes that, in the AEP ESP 3 Case, which the Commission points to in support of its economic development contribution mandate, the Commission also required a \$2 million contribution by AEP to an economic development fund; however, Duke points out that AEP is not comparable to Duke, because AEP has more than twice Duke's customer base and earnings. Finally, Duke states that, in the other cases cited by the Commission to support the economic development fund, the utility was granted the authority to receive some form of a nonbypassable generation charge in return; however, such is not the case in the ESP 3 Order. Therefore, Duke contends the requirement to add an economic development program to the ESP should be deleted or, in the alternative, modified such that no annual contributions from shareholders would be required unless Duke's annual return on equity, as determined under the significantly excessive earnings test in R.C. 4928.143(F) exceeds 10 percent. If the program is not deleted, the Commission should clarify that contributions toward economic development initiatives in Duke's territory shall continue, during the term of the ESP consistent with historical giving.

{¶ 128} First, the Commission points out that R.C. 4928.143(B)(2)(i) provides that ESPs may include provisions related to economic development. Contrary to Duke's

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assertions, as we have found for other EDUs, Duke's contributions to the economic development fund are voluntary, as Duke is not required to accept the ESP authorized by the Commission; however, if Duke accepts the authorized ESP, Duke shall contribute to the economic development fund. See *In re Dayton Power & Light Co.*, Case No. 12-426-EL-SSO, et al., (DP&L ESP Case) Second Entry on Rehearing (Mar. 19, 2014) at 32. In addition, we find that the \$2 million annual contribution to the fund is comparable to other EDUs. See DP&L ESP Case, Opinion and Order (Sept. 4, 2013) at 42-43. Furthermore, the economic development fund furthers the state policy outlined in R.C. 4928.02. Specifically, it helps facilitate the state's effectiveness in the global economy, in concert with R.C. 4928.02(N). The Commission disagrees with Duke's comparison of our modification of the ESP in these cases to *Tongren*. The cases at issue in *Tongren* involved a merger application and gas cost recovery proceedings, not an ESP application filed under R.C. Chapter 4928. Unlike in the cases considered by the Court in *Tongren*, our consideration of an ESP application must include a review and adherence to the state policy under R.C. 4928.02 and the provisions set forth in R.C. 4928.143, including our weighing of all the ESP provisions against the expected results of an MRO. Should Duke disagree with the Commission's finding that the economic development program inclusion as an integral part of the ESP is not warranted, unlike the situation in *Tongren*, the statute provides Duke with a remedy. Under R.C. 4928.143(C)(1), the Commission has the authority to approve, or modify and approve, an ESP application if it finds that the ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results of an MRO. As we determined in our ESP versus an MRO analysis, many of the provisions of the modified ESP, which includes Duke's contribution to an economic development program, advance the state policy under R.C. 4928.02 and support our finding that the modified ESP is more favorable. All of the provisions and the modifications adopted by the Commission as set forth in the ESP 3 Order taken together led the Commission to determine that the ESP should be approved, as modified. Accordingly, the Commission finds that Duke's request for rehearing regarding the economic development fund provision should be denied.

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L. State Policy R.C. 4928.02(L) - Protect At-Risk Populations

{¶ 129} In the ESP 3 Order, the Commission found that, with the modifications required in the Order, the proposed ESP creates a reasonably priced rate structure for customers, noting that the Commission specifically considered the impact the ESP would have on at-risk populations, in line with R.C. 4928.02. ESP 3 Order at 79.

{¶ 130} On rehearing, OP&E argues the Commission disregarded the requirement in R.C. 4928.02(L) to protect at-risk populations when it approved the ESP. OP&E asserts that nothing in the ESP addresses the affordability of electric service or the protection of at-risk populations; rather, the ESP will increase the cost of electricity for residential and small commercial consumers without addressing the impact on consumers, especially low-income, at-risk residential consumers. OP&E submits there is ample proof on the record that Duke's electric service is unaffordable for many of its customers and that Duke's residential customers are struggling to pay their bills. OP&E states that the record reflects that the expected rate increases from the ESP riders could result in even more customers being disconnected for nonpayment, more customers ending up on the percentage of income payment plan (PIPP) and other payment plans, and more at-risk customers facing potential health and safety issues. According to OP&E, based on this assessment, Riders DCI and DSR should have been rejected and OP&E's recommendation to exempt at-risk customers from payment of these riders should have been adopted.

{¶ 131} Duke disagrees with OP&E's assertions, noting that, to accept OP&E's premise that, under the ESP, Duke's electric rates will become even higher and more unaffordable to customers, requires a concession that today's rates, which were previously approved by the Commission and stipulated to by OP&E, are unaffordable. To the contrary, Duke points out that when compared to the other EDUs in the state Duke's rates are the lowest. Duke also states that while OP&E continues to oppose Riders DCI and DSR, OP&E does not dispute that the costs are recoverable. Rather, for Rider DCI, OP&E disputes the manner of recovery, but ignores that the rider will be adjusted quarterly, thereby avoiding

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rate shock, thus, avoiding detrimental effects to the state's economy. In addition, the Commission imposed a revenue cap on Rider DCI, to ensure that spending is prudent and not too onerous for customers. As for Rider DSR, Duke submits that OP&E does not understand that the rider is structured as a tracking mechanism where the storm costs will be deferred with an adjustment in the next base rate case; however, only when the annual balance of the deferral exceeds \$ 5 million will Duke initiate efforts to recovery or return the excess. Therefore, Duke offers that it is incorrect to say that Rider DSR will be adjusted at the frequency suggested by OP&E or that the rider will result in net costs to customers. Because the Commission did not fail to protect at-risk populations, Duke argues there is no justification for exempting a subset of customers from Riders DCI and DSR.

{¶ 132} In consideration of all of the requirements and policy objectives set forth in R.C. Chapter 4928 for an ESP proposal, including the impact on at-risk populations, the Commission thoroughly reviewed the record in these matters and determined that, as modified, the ESP proposed by Duke was reasonable and should be approved. ESP 3 Order at 79. In addition, the Commission will continue to explore and focus on various means to ensure electric utility service is affordable for Ohio's residential customers, including at-risk populations. Accordingly, the Commission finds that OP&E's request for rehearing on this issue is unfounded and should be denied.

M. Statutory Test - ESP Versus MRO

{¶ 133} R.C. 4928.143(C)(1) provides that the Commission must determine whether the proposed ESP, as modified, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO in R.C. 4928.142. In the ESP 3 Order, the Commission concluded that the ESP, as modified, is more favorable than an MRO. ESP 3 Order at 96.

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{¶ 134} On rehearing, OMA, OCC, and OP&E assert Duke failed to sustain its burden, under R.C. 4928.143(C)(1), to demonstrate that the ESP is more favorable in the aggregate than an MRO. OMA asserts the Commission's conclusion that the ESP was quantitatively and qualitatively more favorable was based, in large part, on the approval of the distribution-related riders, because such approval would hold base distribution rates constant over the ESP period. However, OMA notes that the Commission failed to take into account that Duke did not commit to refrain from filing a distribution rate case during the term of the ESP. In addition, according to OMA, the qualitative benefits related to Rider DCI and other distribution-related riders are illusory and it is unclear whether the qualitative benefits will come to fruition without the imposition of additional costs being placed on ratepayers. OMA also questions the Commission's reliance as a qualitative benefit of the ESP that Duke will implement fully market-based prices beginning on June 1, 2015. OMA contends that, if moving more quickly to market-based pricing than would be expected under an MRO represents a qualitative benefit of the ESP, as the Commission claims, then establishing the PSR as a financial limitation on shopping that would purportedly alleviate the risk associated with market-based pricing represents a step in the opposite direction and is not a benefit of the ESP. Finally, OMA maintains that, although the PSR has been set at zero as a placeholder rider, the Commission must still consider the effect that the establishment of the PSR in an ESP will have on customers as compared to the expected results that would otherwise apply under an MRO, noting a PSR would not be able to be established under an MRO.

{¶ 135} OCC asserts that, while the Commission quantified the costs of the PSR and Rider DCI at zero for purposes of finding the ESP more favorable than an MRO, the riders should have been quantified at a cost of \$22 million and \$272 million, respectively, for the ESP term. In addition, OCC contends 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. According to OCC, absent costs being assigned and quantified, Duke cannot sustain

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its burden to show that the ESP is more favorable. In addition, OPAE submits Duke's proposed PSR requires distribution customers to pay the above-market costs of the OVEC generating units through the PSR. Thus, OPAE asserts that it is not possible that an ESP that includes a PSR charge priced higher than market could ever, under any circumstances, be equivalent or more favorable in the aggregate than an MRO.

{¶ 136} OCC believes the Commission erred by relying on qualitative benefits in determining that the ESP was quantitatively more favorable than an MRO. According to OCC, qualitative benefits should not be included and considered as part of the ESP versus MRO test. Specifically, with regard to Rider DCI, OCC notes that Duke made no commitment to freeze base rates; thus, the Commission's benefit attributed to this rider keeping base rates constant is misleading. OCC notes that, if the result of Rider DCI is accelerated infrastructure reliability benefits, then the fact that customers must also pay for the improvements sooner should be recognized; therefore, the accelerated payment under Rider DCI should be considered as a wash with the payments under a base rate proceeding, which is over an indefinite period of time. Further, OCC claims that, while the Commission must review an ESP to ensure that its provisions do not violate state policy, 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). *Columbus S. Power Co. v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 (*Columbus Southern 2*). OCC insists the Commission erred by finding that several qualitative factors provide a benefit under the ESP, stating that they may not lawfully be considered under R.C. 4928.143(B)(2) and that those factors provide no benefit at all. According to OCC, even if the alleged qualitative benefits did fall within R.C. 4928.143(B)(2), they would be excluded from consideration in the test because they can also be offered under an MRO. Moreover, OCC avers that none of the qualitative factors identified benefit Ohio consumers. OCC argues the Commission violated R.C. 4903.09 by failing to explain why *Columbus Southern 2* is not controlling and by failing to identify which ESP provisions advance what state policies. Finally, OCC argues that, while the

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Commission identified Duke's transition to market-based rates as a qualitative benefit to customers under the ESP, it can not be considered a benefit because it was a benefit offered and approved previously in the ESP 2 Case and has already occurred.

{¶ 137} In its memorandum contra, Duke submits the Commission properly considered both quantitative and qualitative factors in its ESP versus MRO analysis, in keeping with the statute and the guidance provided by the Ohio Supreme Court. Moreover, Duke points out that the Commission delineated its reasoning in the ESP 3 Order supporting its findings regarding the qualitative and quantitative benefits of the ESP. Duke submits that, in its argument that qualitative factors are not to be considered, OCC erroneously merges two entirely different concepts, i.e., what costs may be recovered through an ESP, and how to evaluate the favorability of the ESP versus an MRO. Contrary to OCC assertions, Duke argues *Columbus Southern 2* related only to what cost recovery categories could be addressed through an ESP, and the case did not address the MRO test. According to Duke, *Columbus Southern 2* did not prohibit the inclusion of other provisions, it prohibited the inclusion of other categories of cost recovery. Rather, Duke states that an earlier Ohio Supreme Court case addressed the MRO test, providing that both pricing and other terms and conditions are to be factored into the Commission's consideration of the MRO test, citing *Columbus S. Power Co. v. Pub. Util. Comm.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501.

{¶ 138} In response to the quantitative measurements raised by OMA and OCC regarding the PSR, Duke notes that recovery of costs under the PSR is illusory, in that, while the rider exists in theory, there is no way to predict whether any rate will be assigned to the PSR and what dollar amount might be recovered. With regard to the concern over Rider DCI and that Duke might file a base rate case during the term of the ESP, Duke points out there is nothing in the ESP versus MRO test that requires a commitment in order for the Commission to find an advantage. Duke believes the Commission properly recognized that, with the approval of Rider DCI, Duke's rate of return is less likely to fall, thus, Duke is less

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likely to spend resources on a base rate case. While Duke agrees that faster recovery of costs will ensue with Rider DCI, Duke notes that OCC has failed to consider that the result will be lower carrying charges.

{¶ 139} The Commission finds that the requests for rehearing filed by OCC and OMA are without merit. Initially, we affirm our finding that the ESP, as modified, is more favorable in the aggregate than the expected results under R.C. 4928.142. Further, we affirm our finding that it is not necessary to attempt to quantify the impact of the PSR in the ESP versus an MRO analysis, given that the placeholder PSR has been set at zero, and any future costs associated with this rider are unknown and subject to future proceedings. Consistent with our determinations in other proceedings, we also affirm that it was unnecessary to consider the revenue requirements associated with the Rider DCI, and other approved distribution-related riders, because the results should be considered the same whether incremental distribution investments and expenses are recovered through the ESP or through a distribution rate case in conjunction with an MRO. AEP ESP 3 Case, Second Entry on Rehearing (May 28, 2015) at 56. As we noted in the ESP 3 Order, the Ohio Supreme Court, in *Columbus Southern 2*, determined that R.C. 4928.143(C)(1) does not bind the Commission to a strict price comparison but rather instructs the Commission to consider pricing, as well as all other terms and conditions. Therefore, it is the Commission's responsibility to ensure that the modified ESP, as a total package, is considered, including both a quantitative and qualitative analysis. Upon consideration of the modified ESP, in its entirety, we found that the ESP, as modified, is more favorable in the aggregate than the expected results under R.C. 4928.142. ESP 3 Order at 96.

{¶ 140} With regard to the arguments espoused by OCC and OMA related to the qualitative benefits of the ESP, the Commission again finds that there are indeed qualitative benefits that make the ESP, as modified by the Commission, more favorable in the aggregate than the expected results under R.C. 4928.142. We previously determined that the ESP furthers the state policy found in R.C. 4928.02; enables Duke to implement fully

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market-based prices as of June 1, 2015; and should enable the Company to hold base distribution rates constant over the ESP period, while making significant investments in distribution infrastructure and improving service reliability. As noted in the ESP 3 Order, the evidence of record reflects that these are additional benefits that will occur as a result of the ESP. ESP Order at 97. For example, many of the riders incorporate benefits that would not otherwise be available. This includes the Distribution Decoupling Rider, which promotes energy efficiency and conservation efforts, and the Large Customer Interruptible Load Program, which can lower market prices during peak times and offer rate stability to participating customers. ESP Order at 76-77. Further, the DCI promotes gradualism in rates and includes a hard cap in recovery to ensure prudent spending. ESP Order at 71-72. We, therefore, do not agree with OMA's assertion that these benefits are not likely to come to fruition. We also disagree with OCC's contention that the nonquantifiable provisions of an ESP may not be considered in conducting the ESP versus MRO analysis. R.C. 4928.143(C)(1) specifically requires the Commission to determine whether the ESP, including not only pricing but also all other terms and conditions, is more favorable in the aggregate than an MRO. Further, we agree with Duke that OCC confuses the condition that an ESP may only include items listed in R.C. 4928.143(B) with the need to weigh the quantitative and qualitative benefits that those items provide, in performing the ESP versus MRO test.

{¶ 141} We also found that the ESP promotes the state policies enumerated in R.C. 4928.02, in a manner that may not be possible under an MRO, and we explained throughout the ESP 3 Order how specific provisions of the ESP promote state policy, contrary to OCC's claims. ESP 3 Order at 96-97. Specifically, we note the ESP included \$2 million of Duke shareholder funds be directed to economic development. ESP Order at 91. Additionally, we find that the DCI and other distribution-related riders may enable the Company to hold base distribution rates constant over the term of the ESP, while continuing to invest in distribution infrastructure and improve service reliability. Accordingly, the Commission finds that the applications filed by OMA and OCC on this issue should be denied.

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N. Procedural Issue - Confidentiality Agreements

{¶ 142} A prehearing conference was held in these cases for the purpose of considering various procedural motions regarding certain documents and information requested in discovery, including Duke's July 8, 2014 motion for protective order, OCC's July 18, 2014 motion to hold in abeyance Duke's motion for protective order, and OCC's July 18, 2014 motion to compel.

{¶ 143} At the August 12, 2014 prehearing conference, the attorney examiner determined that the parties should move forward and enter into protective agreements consistent with the confidentiality agreement attached to Duke's July 8, 2014 motion (referred to as Exhibit 3) with certain revisions, including that the agreement should be revised such that one copy of the alleged confidential information may be retained by the recipient and that rulings on the use of such information beyond these cases shall be dealt with in any subsequent cases. Accordingly, the attorney examiner: granted, in part, and denied, in part, Duke's July 8, 2014 motion for protective order; denied OCC's July 18, 2014 motion to hold in abeyance Duke's motion for protective order; and found that OCC's July 18, 2014 motion to compel was moot, given the ruling on the protective order.

{¶ 144} In consideration of an interlocutory appeal filed by Duke, by Entry issued August 27, 2014, the Commission found that the attorney examiner's rulings at the August 12, 2014 prehearing should be modified, in part. The Commission concluded that, in order to enable the parties to move forward with discovery in these proceedings, the document that was attached to OCC's memorandum contra Duke's July 8, 2014 motion for protective order (referred to as Exhibit 1) should be adopted and Duke should enter into protective agreements, like Exhibit 1 and the agreements entered into in the previous ESP proceedings, with the intervenors that are seeking the alleged confidential information. Accordingly, the Commission modified the attorney examiner's ruling such that Duke's July 8, 2014 motion for protective order was granted to the extent the information marked confidential by Duke should be treated confidentially by the recipients until such time as the Commission rules

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otherwise, and denied to the extent Duke requested the Commission adopt Exhibit 3; and OCC's July 18, 2014 motion to compel responses to discovery was granted.

{¶ 145} By Entry on Rehearing issued October 22, 2014, Duke's application for rehearing of the Commission determination regarding the confidentiality agreements was denied, thus, affirming the Commission's decision in the August 27, 2014 Entry.

{¶ 146} In its brief filed in this matter on December 15, 2014, and again in its application for rehearing of the April 2, 2015 ESP 3 Order, Duke incorporates by reference its arguments disputing the Commission's August 27, 2014 Entry, as affirmed in the October 22, 2014 Entry on Rehearing.

{¶ 147} In their memoranda contra Duke's application for rehearing, OCC and IGS state that Duke has raised no new argument and, therefore, rehearing on this issue should be denied. IGS notes that Duke merely incorporates its prior arguments by reference. Therefore, IGS states the Commission should not second guess its prior rulings as they are supported by sound regulatory policy and precedent.

{¶ 148} The Commission finds that Duke raises no new issue concerning the Commission's ruling regarding the confidentiality agreements that has not already been thoroughly considered in these cases. Therefore, Duke's request for rehearing on this issue has no merit and should be denied.

O. IGS Motion for Protective Order

{¶ 149} At the hearing held in these matters, the attorney examiner granted the motions for protective treatment of certain information presented on the record in these dockets, as well as portions of the transcripts that contained testimony referencing confidential information. In addition, in the ESP 3 Order, the Commission granted protective treatment to portions of the briefs filed underseal by IGS, OCC, and Sierra Club. ESP 3 Order at 11.

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{¶ 150} On May 4, 2014, IGS filed a motion for protective treatment of certain limited information contained in its application for rehearing filed on that same day. No one filed memorandum contra the motion for protective treatment filed by IGS.

{¶ 151} Upon review of the May 4, 2015 motion filed by IGS and the information filed under seal, the Commission finds that the redactions are consistent with the rulings in these cases and, therefore, the motion is reasonable and should be granted. Accordingly, consistent with our decision in the ESP 3 Order, pursuant to Ohio Adm.Code 4901-1-24(D), confidential treatment shall be afforded for a period ending 24 months. Until that date, the docketing division should maintain, under seal, the information filed confidentially. Any party wishing to extend the protective order must file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to the parties.

IV. ORDER

{¶ 152} It is, therefore,

{¶ 153} ORDERED, That, in accordance with paragraph 121, the applications for rehearing of the ESP 3 Order on that issue filed by IGS and RESA, be granted, that, in accordance with paragraph 124, the application for rehearing filed by Direct Energy be granted, and, as set forth in this Second Entry on Rehearing, all other applications for rehearing on all the remaining issues be denied in their entirety. It is, further,

{¶ 154} ORDERED, That, in accordance with paragraph 149, the motion for protective treatment filed by IGS be granted. It is, further,

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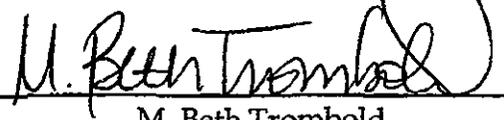
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{¶ 155} ORDERED, That a copy of this Second Entry on Rehearing be served on all parties of record.

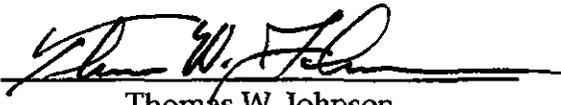
THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman

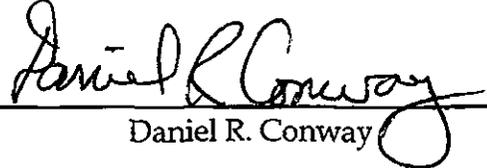


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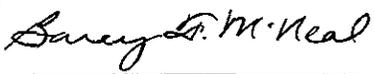


Daniel R. Conway

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Entered in the Journal

MAR 21 2018



Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF 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 NO. 14-841-EL-SSO

**IN THE MATTER OF APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
AUTHORITY TO AMEND ITS CERTIFIED
SUPPLIER TARIFF, P.U.C.O. NO. 20.**

CASE NO. 14-842-EL-ATA

THIRD ENTRY ON REHEARING

Entered in the Journal on May 16, 2018

I. SUMMARY

{¶ 1} The Commission grants, in part, and denies, in part, the application for rehearing filed by Duke Energy Ohio, Inc.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On May 29, 2014, Duke filed an application for an SSO, in the form of an ESP, pursuant to R.C. 4928.143.

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{¶ 5} On April 2, 2015, the Commission issued its Opinion and Order approving Duke's proposed ESP, with certain modifications (ESP 3 Order).

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 7} On May 1, 2015, and May 4, 2015, applications for rehearing of the ESP 3 Order were filed by: Duke; Industrial Energy Users-Ohio (IEU); Ohio Energy Group (OEG); Ohio Partners for Affordable Energy (OPAE); Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (ExGen) (jointly, Exelon); Ohio Consumers' Counsel (OCC); Ohio Manufacturers' Association (OMA); Retail Energy Supply Association (RESA); city of Cincinnati (Cincinnati); Environmental Law & Policy Center (ELPC) and Ohio Environmental Council (OEC) (the Environmental Advocates); Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy); Interstate Gas Supply, Inc. (IGS); and Sierra Club (Sierra Club). Memoranda contra the various applications for rehearing were filed by: Duke; IEU; OEG; OPAE; the Environmental Advocates; Exelon; OCC; OMA; RESA; Miami University and The University of Cincinnati (Miami/UC); and IGS.

{¶ 8} By Entry on Rehearing dated May 28, 2015, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing. On March 21, 2018, and corrected on March 28, 2018, in a Second Entry on Rehearing (EOR 2), the Commission granted in part, and denied in part, the applications for rehearing. Specifically, the Commission granted Direct Energy's application for rehearing regarding language in the certified supplier tariff (CST) that applies to billing adjustments or resettlements with PJM Interconnection, LLC (PJM). All other applications for rehearing were denied.

{¶ 9} On April 20, 2018, Duke filed an application for rehearing. OCC responded with a memorandum contra on April 30, 2018.

III. DISCUSSION

{¶ 10} In its application for rehearing, Duke argues two points of error in the Commission's Second Entry on Rehearing. Duke first argues that the Commission wrongfully included an economic development program in its modifications to the ESP. In the ESP 3 Order, the Commission modified the ESP to include an economic development fund to be funded by Duke shareholders at \$2 million per year during the term of the ESP. The Commission authorized the program pursuant to R.C. 4928.143(B)(2)(i), stating that the fund would create private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio. Duke notes that it originally filed an application for rehearing on this issue on May 1, 2015. There, Duke averred that the Commission's actions were improper. In the Second Entry on Rehearing, the Commission denied Duke's application for rehearing. In the entry, the Commission maintained that Duke's required contribution was lawful, as the Commission has authority to modify and approve an ESP pursuant to R.C. 4928.143(C)(1). EOR 2 at 46-47.

{¶ 11} In renewing its argument, Duke submits that the Commission lacks the authority to direct the Company to create an economic development fund. According to Duke, citing R.C. 4928.143(B)(2)(i), it was improper for the Commission to modify the ESP to create the economic development fund as only an ESP applicant can include provisions for economic development and, further, the costs of such provisions are to be provided by customers, not shareholders. The Company further states that the Commission wrongly compares the directive to support an economic development fund to similar funds associated with other EDUs. Duke avers that other economic development funds were the result of agreed-upon stipulations and that, at the least, the amount Duke contributes to a fund should take into consideration Duke's load size in Ohio as compared to other EDUs. Finally, Duke contends that the Commission's decision failed to properly consider *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) (*Tongren*). Duke states the Commission differentiated *Tongren* from these proceedings because, in an ESP case, the

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Commission must consider state policy and weigh an MRO versus an ESP, and because an EDU has the ability to reject the Commission's modifications. Duke submits that this rationale is invalid because the Commission, in the ESP 3 Order, did not originally mention the economic development fund in consideration of state policy or the MRO versus ESP test. Further, according to Duke, the Company's ability to reject an ESP does not permit the Commission to include provisions that are not supported by record evidence.

{¶ 12} In its memorandum contra, OCC requests that Duke's application for rehearing be denied. OCC avers that it is lawful for the Commission to include a provision for economic development as the Commission is expressly authorized to modify an ESP application. Additionally, OCC explains that the inclusion of the economic development fund factored into the Commission's review of whether the ESP application was more favorable than an MRO. Thus, submits OCC, if that provision is removed, the Commission would need to reconsider the ESP versus MRO test. OCC also maintains that the program furthers the state policy outlined in R.C. 4928.02 to facilitate the state's effectiveness in the global economy. OCC also states that R.C. 4928.143(B)(2)(i) specifically allows provisions for economic development and Duke submitted its own programs for economic development that were approved by the Commission.

{¶ 13} Duke's application for rehearing on this issue is denied. The Commission has established that it is improper to seek rehearing of a denial of rehearing on the same issue. The Commission directly addressed this question on numerous occasions, holding that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon rehearing of the same issue. *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (September 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). See also *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (January 30, 2013) at 4-5. In EOR 2, the Commission addressed all of the issues that Duke is attempting to relitigate in its April 20, 2018 application for rehearing. Therein, the

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Commission confirmed its authority to modify and approve an ESP application under 4928.143(C). In the entry, we discussed that 4928.143(B)(2)(i) explicitly permits an ESP to include provisions implementing economic development programs. We additionally explained how the unique aspects of an ESP application proceeding differentiates this case from *Tongren*. Specifically, the entry observed that, in an ESP proceeding, an EDU has the ability to withdraw an ESP application that has been modified by the Commission. Further, the Commission noted that in reviewing an ESP application the Commission must consider the state policies set forth under R.C. 4928.02 and weigh the ESP application against the expected results of an MRO. Regarding that review, we explained in EOR 2 that the modification to include an economic development fund furthered state policy and contributed towards the ESP being more favorable than an MRO. EOR 2 at 46-47. In its application for rehearing, Duke did not raise any novel arguments; instead, the Company put forth the same claims that were previously rejected by the Commission in EOR 2. Thus, Duke's application for rehearing on this issue is again rejected.

{¶ 14} Duke's second assignment of error concerns a provision originally proposed by Duke to require suppliers to consent to resettlements requested to PJM. The Commission denied Duke's request in the ESP 3 Order, but, upon review, granted Direct Energy's application for rehearing regarding the issue. In its application, Duke contends that after the Commission initially denied the Company's request, Duke filed an application with the Federal Energy Regulatory Commission (FERC) to amend its Open Access Transmission Tariff (OATT) at PJM. The Company states the situation was thus resolved at the federal level with FERC and that, at this juncture, the provision would now be in conflict with the amended OATT. Therefore, Duke asks that the CST language remain unchanged. No party opposed Duke's application.

{¶ 15} Upon review, the Commission grants Duke's application for rehearing on this issue. As described by Duke, its original predicament has been resolved at the federal level and its original request is now moot. As no party opposes the Company's request, the application should be granted and Duke's supplier tariff should not be amended.

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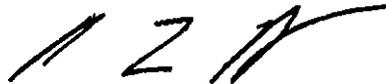
IV. ORDER

{¶ 16} It is, therefore,

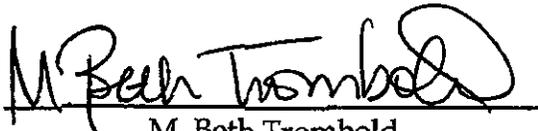
{¶ 17} ORDERED, That the application for rehearing filed by Duke be granted in part and denied in part. It is, further,

{¶ 18} ORDERED, That a copy of this Third Entry on Rehearing be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



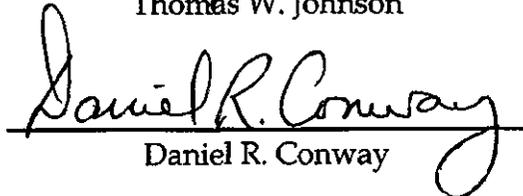
Asim Z. Haque, Chairman



M. Beth Trombold



Thomas W. Johnson



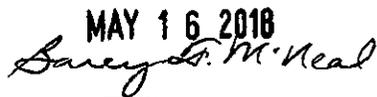
Daniel R. Conway

Lawrence K. Friedeman

NJW/mef

Entered in the Journal

MAY 16 2018



Barcy F. McNeal
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In the Matter of the Application of Duke)
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Generation Service.)

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Certified Supplier Tariff, P.U.C.O.)
No. 20.)

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

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May 4, 2015

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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No. 20.)

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

The Office of the Ohio Consumers' Counsel ("OCC") files this application¹ 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 subsidies³⁸ 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 million⁴³ 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 bypassability⁵³ 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 brief⁵⁹ that the PSR represents a financial limitation on shopping.⁶⁰ But briefs are not evidence in PUCO proceedings⁶¹

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 record⁶³ 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 Brief⁶⁵ 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 competitive⁹⁶ 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 supply¹⁰⁰ and other terms and conditions of the ESP¹⁰¹ 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 benefits¹³⁵ 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 quantitatively 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 infrastructure¹⁴⁰ 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 riders¹⁶⁵ (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 than 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 its 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 principles¹⁸³ 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 than 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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