

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Modify Rider PSR.)))	Case No. 17-0872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Amend Rider PSR.)))	Case No. 17-0873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)))	Case No. 17-0874-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.)))	Case No. 17-0032-EL-AIR
In the Matter of the application of Duke Energy Ohio, Inc., for Tariff Approval.))	Case No. 17-0033-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)))	Case No. 17-0034-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.))))))))	Case No. 17-1263-EL-SSO
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.)))	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.)))	Case No. 17-1265-EL-AAM

**CONSERVATION GROUPS' POST-HEARING BRIEF
REGARDING RIDER PSR**

Public Version

Sierra Club, Ohio Environmental Council, Environmental Law & Policy Center, Environmental Defense Fund, and Natural Resources Defense Council (collectively, “Conservation Groups”)¹ respectfully ask that the Public Utilities Commission of Ohio (the “Commission”) reject the “Price Stabilization Rider” (“Rider PSR”) proposed by Duke Energy Ohio (“Duke”). Through Rider PSR, Duke seeks to charge its share of Ohio Valley Electric Corporation (“OVEC”) losses to customers, which Duke itself estimates at a \$77 million customer loss through May 2025. But Duke has likely underestimated the costs and risks that Rider PSR imposes, including that the bankruptcy of FirstEnergy Solutions (“FES”) and the bankruptcy court’s rejection of the OVEC contract will increase costs for Duke as one of the remaining OVEC owners. In the face of nearly guaranteed higher customer bills over the next seven years, both of Duke’s purported justifications for a shareholder bailout—hedge value and credit rating support—lack evidentiary support. Duke simply cannot justify foisting the exorbitant costs and grave risks of OVEC onto Ohio customers. Nor has Duke made the case that

¹ To conserve the Commission’s resources, the Conservations Groups are filing a joint brief regarding Rider PSR. ELPC and OEC are contemporaneously filing a separate brief regarding battery storage and non-wires alternatives, and OEC and EDF are contemporaneously filing a separate brief regarding data access and net metering.

other benefits from the proposed Stipulation and Recommendation (“Stipulation”) outweigh the significant costs and risks of Rider PSR.

In addition to overcoming a record that overwhelmingly supports rejecting Rider PSR, to approve cost recovery here, the Commission must explain why approval of Duke’s OVEC cost recovery would be appropriate when the Commission previously rejected a nearly identical proposal on a record that was much more favorable to Duke and OVEC. The evidence in this proceeding is indisputably more negative for Duke’s customers than the record in the previous case in which OVEC costs were rejected. Therefore, the Commission should once again reject Duke’s Rider PSR proposal.

I. Background: OVEC and Duke's Rider PSR Proposal

In this proceeding, Duke seeks approval of a Stipulation that includes a proposal for a Price Stabilization Rider for the period January 1, 2018 to May 31, 2025. Duke is proposing that it bid 100% percent of the Ohio Valley Electric Corporation ("OVEC") energy, capacity, and ancillary services to which Duke is contractually entitled into the PJM wholesale markets. If the Commission approves Rider PSR, Duke would recover the costs allocated to it from OVEC through the Rider, less any market revenue generated from these sales.²

OVEC was organized during the 1950s to provide power to a federal government atomic program. In 2003, the federal government terminated its power purchase contract with OVEC, "all obligations [of the federal government] were settled at that time,"³ and the output of the plants became fully available to the owners.

Today, OVEC is an independent power producer that is owned as a joint venture between various utilities, including Duke. OVEC owns and, along with its wholly owned subsidiary Indiana Kentucky Electric Corporation, operates two coal-burning power plants—the six-unit, approximately 1,300 megawatt ("MW") Clifty Creek plant near Madison, Indiana, and the five-unit, approximately 1,100 MW Kyger Creek plant near Cheshire, Ohio.

² Joint Exhibit 1, Stipulation and Recommendation ("Stipulation"), at 18-20; *see also* Duke Exhibit 30, Second Supplemental Testimony of William Don Wathen Jr. In Support of Stipulation ("Wathen Second Supplemental Testimony"), at 19-21.

³ Sierra Club Exhibit 4, Direct Testimony of Jeremy I. Fisher, PhD ("Fisher Direct Testimony"), at 31.

Duke is one of about a dozen Sponsoring Companies under the current Inter-Company Power Agreement (“ICPA”), the contract that governs OVEC cost and output allocation. Duke is responsible for 9% of the “benefits and requirements” of OVEC—under the contract this percentage is referred to as a Power Participation Ratio. This means that Duke is entitled to 9% of the energy, capacity, and ancillary services from the OVEC units and, in turn, is responsible for 9% of total OVEC’s costs, including debt and decommissioning costs.

After the federal government’s termination of its purchase obligation, participating utilities, including Duke, extended the term of the OVEC contract. In 2004, the OVEC parties extended the ICPA by 20 years, from March 2006 to March 2026. In August 2011, they once again extended the ICPA, this time to 2040. Each of these contract extensions was precipitated by major capital spending decisions regarding investment of \$2 billion on air pollution controls. These capital projects were financed by issuing debt, and the contract extensions were required to provide sufficient time to pay off the debt. As of October 2017, OVEC had over \$1.4 billion in outstanding debt.⁴

In April 2018, FES, at the time a Sponsoring Company under the ICPA, filed for bankruptcy protection in federal bankruptcy court in Ohio and asked the bankruptcy court to “reject” the ICPA and thus terminate FES’s obligation to pay ongoing OVEC costs. In support of that request, FES stated that it is losing \$12 million per year on its 4.85% OVEC share, that OVEC output is priced at “more than double” the market price, and that FES would be expected to lose \$268 million over the remaining term of the

⁴ Fisher Direct Testimony, at 10.

contract.⁵ In response to FES’s effort to reject the ICPA, OVEC stated in a filing at the Federal Energy Regulatory Commission (“FERC”) that the costs for remaining OVEC Sponsoring Companies, like Duke, could increase by “hundreds of millions of dollars” if FES were permitted to exit the contract, as OVEC would potentially need to cover an FES shortfall by issuing more debt at higher interest rates.⁶ On August 9, 2018, the bankruptcy court granted FES’s rejection motion with an effective date of July 31, 2018. OVEC and other parties have appealed the bankruptcy judge’s order.

In Duke’s previous ESP proceeding, the Commission denied OVEC cost recovery for a similar proposal under which Duke would recover its net OVEC costs from customers through 2040. In that proceeding, Duke argued that the OVEC contract could serve as a hedge and forecast a \$1 million customer loss during the first ten years of the OVEC rider, *i.e.*, through 2024.⁷ Based on that minimal evidence of customer benefit and the uncertainty regarding the risks of the arrangement, the Commission concluded that there was not sufficient evidence before it to show “that Duke’s PSR proposal would provide customers with sufficient benefit from the rider’s financial hedging mechanism or

⁵ Fisher Direct Testimony, at 22-24; *see* Sierra Club Exhibit 1, Expert Declaration of Judah L. Rose, Case No. 18-50757, United States Bankruptcy Court, Northern District of Ohio, Eastern Division, at 4-6 (describing methodology for FES’s OVEC forecast).

⁶ Fisher Direct Testimony, at 13 and Fisher Direct Testimony, attachment JIF-02, OVEC v. FES, Complaint, March 26, 2018, FERC No. EL18-135 (“OVEC FERC Complaint”), at 14, 22-23.

⁷ *In re Duke Energy Ohio, Inc.* (“*Duke ESP 3 Case*”), Case Nos. 14-841-EL-SSO *et al.*, Opinion and Order, Apr. 2, 2015 (“*Duke ESP III Opinion and Order*”), at 45-46 (describing, under Duke’s projection, a nominal net cost of \$29 million through 2018 that is partially offset by a nominal net credit of \$28 million during 2019 through 2024).

any other benefit that is commensurate with the rider's potential cost.”⁸

II. Standard of Review

Ohio Revised Code (“R.C.”) 4903.09 requires the Commission to provide, in all contested cases, a record that includes “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.”

Accordingly, “the PUCO’s order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.” *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987).

In this case, since the Commission is reviewing a proposed stipulation “[t]he ultimate issue for the Commission’s consideration is whether the agreement . . . is reasonable and should be adopted.” *In re Columbus S. Power Co. (“AEP ESP 2 Case”)*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order (Dec. 14, 2011) at 27. In conducting this inquiry, the Commission has traditionally considered three criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

⁸ *Id.*, at 46.

Id.

In addition, in reviewing a proposed Electric Security Plan (“ESP”) under R.C. 4928.143, the Commission has authority to approve only those provisions specifically stated in the ESP statute. *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 520 (2011) (“if a given provision does not fit within one of the categories listed ‘following’ (B)(2), it is not authorized by statute”). The Commission also has recognized that it should use the state policy statements codified by the General Assembly in R.C. 4928.02 to “guide” its “implementation of [the ESP statute].” *In the Matter of the App. of the Ohio Edison Co.*, Pub. Util. Comm. No. 08-935-EL-SSO, 2008 Ohio PUC LEXIS 782, at 21 (Dec. 19, 2008). These codified policy statements include a duty to ensure “reasonably priced” electric service and to ensure effective market competition:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

* * *

(H) 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;

R.C. 4928.02 (A), (H).

Finally, “[t]he burden of proof in [an ESP] proceeding shall be on the electric distribution utility.” R.C. 4928.143(c)(1).

III. The Commission Should Reject the Proposed Stipulation Because the Significant Costs and Risks of Rider PSR Outweigh Any Benefits.

There is no doubt that Rider PSR would harm Duke's customers if approved. The undisputed evidence shows that the OVEC contract is likely to increase customers' costs, and there is good reason to expect higher costs even than those that Duke forecasted. Thus, any potential benefits to ratepayers or the public interest from the proposed Stipulation are outweighed by the significant costs and risks that Rider PSR imposes on Duke's customers.

A. Duke's Own Analysis Shows that Customers Would Suffer if Rider PSR Were Approved.

In order to project the net costs of its OVEC ownership share, Duke provided the forecast of witness Judah L. Rose, an economist with the firm ICF.⁹ In his base case forecast, Mr. Rose projects that Rider PSR would cost Duke's customers \$77 million, net present value.¹⁰ Mr. Rose performed a sensitivity analysis relying on an U.S. Energy Information Administration ("EIA") natural gas forecast that shows a \$62 million customer loss, net present value, during the term of Rider PSR.¹¹ That projection is the most positive one in the record for Rider PSR.

Moreover, Mr. Rose's forecast in this case is [REDACTED]

[REDACTED] of the forecast period, roughly 2018 to 2022.¹² In creating his forecasts of

⁹ Duke Exhibit 8, Supplemental Testimony of Judah L. Rose on Behalf of Duke Energy Ohio ("Rose Supplemental Testimony").

¹⁰ Tr. Vol. I, at 177 and Rose Supplemental Testimony, (Confidential) Exhibit 41

¹¹ Tr. Vol. I, at 178 and Rose Supplemental Testimony, (Confidential) Exhibit 41.

¹² Rose Supplemental Testimony, (Confidential) Exhibit 39 (net margins with total demand charge in each year).

OVEC net costs, Rose relied on two general sets of data: (i) projections of commodity prices, such as natural gas, electric energy, and capacity prepared by Rose and his firm ICF; and (ii) projections of OVEC costs that were prepared by OVEC.¹³ In the later years of the forecast period (generally 2022 to 2025), both ICF and the EIA natural gas forecast case that Rose used as a sensitivity predict [REDACTED]

[REDACTED].¹⁴ In addition, the OVEC plant operation and maintenance costs that Rose relied on [REDACTED]

[REDACTED]¹⁵ Due to these changing inputs, [REDACTED]

[REDACTED]

Mr. Rose's forecast is also more reliable in the near-term years than the long-term ones. Rose's natural gas forecast in the near term reflects forward prices that are actually being offered and paid by market participants, while the out-years forecast (beyond 2021) relies on the ICF and EIA projections that are subject to more uncertainty.¹⁶ In addition, PJM capacity prices are known with certainty through May 2022,¹⁷ and unknown beyond that date. Thus, the [REDACTED] years in Mr. Rose's forecast are effectively "locked in" through 2021 through reliable forward prices and settled capacity prices, while the

¹³ Tr. Vol. I, at 178.

¹⁴ Rose Supplemental Testimony, (Confidential) Exhibit 14 (comparing ICF and U.S. EIA natural gas price forecasts).

¹⁵ Fisher Direct Testimony (Confidential), at 15.

¹⁶ Rose Supplemental Testimony, at 27-28.

¹⁷ *Id.*, at 11.

greatest uncertainty in his forecast is for the final three and a half years. Accordingly, under Duke's own evidence, Duke's customers would be paying for the near-term guarantee of [REDACTED] for the less certain possibility of [REDACTED] in the future—and that is only if the market position of OVEC were to dramatically improve.

B. Duke's Projections Understate the Likely Losses that Duke's Customers Would Incur if Rider PSR were Approved.

While Duke's own estimates shows that customers would face significant losses if Rider PSR were approved, Duke's figures likely understate the losses that customers face for several reasons.

First, Mr. Rose's forecast does not account for the risk of increased borrowing costs for OVEC, especially in light of the FES bankruptcy. As OVEC's credit ratings fall, borrowing costs increase, increasing the cost of both existing and new debt held by OVEC. Mr. Rose's forward-looking projections of the cost of the ICPA do not reflect the potential for substantially higher borrowing costs.¹⁸ OVEC described this risk in its preemptive response to FES recent bankruptcy filing at FERC:

As an initial matter, because the Sponsoring Companies' obligations are several and not joint, if FirstEnergy is able to reject its obligations under the ICPA, the resulting cost shortfalls are not payable by the other Sponsoring Companies and will go unreimbursed every month over the life of the contract (i.e., until at least 2040), absent the types of ameliorative changes to the filed rate discussed in Section IV.B, *infra*. This will further impact OVEC's credit rating (which already has been impacted by the prospect of contract rejection), further raising OVEC's borrowing costs. Those higher borrowing costs will directly result in higher costs to the remaining Sponsoring Companies and their customers.¹⁹

¹⁸ See Fisher Direct Testimony, at 9-13.

¹⁹ OVEC FERC Complaint, at 13.

If FES ceases to pay OVEC for its share of losses, OVEC will be forced to issue more debt, likely at higher rates, and pass these costs on to Duke and the other remaining Sponsoring Companies. Mr. Rose's estimate of OVEC net costs does not account for this significant risk, nor does Duke's or Staff's testimony address it.

Second, the OVEC cost projection that Rose relied on assumes that Clifty Creek and Kyger Creek will not have to comply with existing environmental requirements related to the Effluent Limitation Guidelines ("ELGs") for steam power plant toxic water discharges.²⁰ OVEC's own planning documents assess these costs in two scenarios: a "best case," from OVEC's perspective, in which the ELGs are largely repealed by the current U.S. EPA, and OVEC need only incur \$[REDACTED] million in environmental capital spending during the next several years, and a "worst case," in which existing regulatory obligations remain unchanged from current law, and OVEC would have to spend \$[REDACTED] million to comply with environmental requirements.²¹ Rose relied solely on OVEC's "best case" projection of environmental costs, and his estimate of OVEC losses does not account for the risk that these environmental capital costs could be higher.²² Simply adding OVEC's existing environmental requirements into Rose's base case forecast, as Sierra Club witness Dr. Jeremy Fisher has done, produces an \$[REDACTED] million customer loss.²³

²⁰ Fisher Direct Testimony, at 13-15.

²¹ *Id.*, at 14.

²² Sierra Club Exhibit 3A (OCC-POD-02-009(31) (Confidential) (providing OVEC environmental capital projection relied on by Mr. Rose); *see also* Fisher Direct Testimony, at 14.

²³ Fisher Direct Testimony, at 14.

Third, Rose's forecast relies on an unsupported OVEC projection of [REDACTED] [REDACTED] while at the same time Rose himself projects that the plants will achieve their [REDACTED] [REDACTED] While it may be theoretically possible to [REDACTED] [REDACTED], there is clearly a risk that either [REDACTED] [REDACTED]²⁴

Last, Mr. Rose submitted a forecast of OVEC costs, on behalf of FES, to the bankruptcy court that is more negative toward OVEC than the one that he provided here.²⁵ When scaled to Duke's larger ownership share, the estimated losses provided by Rose in the FES bankruptcy are approximately \$22 million per year from 2018 through 2023.²⁶ If Rider PSR were approved, this equates to a \$110 million loss for Duke's customers in just the first five years of Rider PSR, significantly greater than Rose's estimated \$77 million loss over the entire period provided here. It's possible the Rose's OVEC forecast for FES is more accurate than Rose's OVEC forecast for Duke.

²⁴ Fisher Direct Testimony (Confidential), at 15-16. *Compare* Rose Supplemental Testimony Exhibit 30 (historical capacity factors of OVEC plants) *to* Rose Supplemental Testimony, Exhibit 31 (Confidential) (capacity factor projections).

²⁵ Tr. Vol 1, at 182-85.

²⁶ *Id.*, at 185.

IV. Rider PSR Will Not Work as a Hedge Against Volatility.

The Commission cannot rely on Duke's hedge theory to justify approving Rider PSR. Duke's own evidence shows that OVEC plants are above market [REDACTED]

[REDACTED]²⁷ [REDACTED]
Duke has not performed even a cursory analysis to show a hedge value for customers, despite multiple undisputed projections showing Rider PSR is most likely to impose significant costs on customers, along with risks of the FES bankruptcy. Duke has not quantified a hedge value for the OVEC contract,²⁸ assessed the current bill volatility experienced by customers, or compared the volatility of OVEC costs to that of Duke's customers' bills.

Duke goes so far as to insist that Rider PSR is still a hedge, even if it is always a charge to customers.²⁹ Duke witness Ms. Amy Spiller stated that she believes that Rider PSR will always be a hedge simply because it has the theoretical ability to function as one.³⁰ When pressed by counsel for OCC, asking if the Rider was still a hedge even if it always resulted in a charge to customers, she responded "yes."³¹ It is clear Duke is asserting the factually ungrounded concept that Rider PSR is a valid "hedge" no matter how financially negative, how risky it is, or even what its actual impact on customers' bills would likely be—with no record evidence as to its actual hedge value for customers.

²⁷ Rose Supplemental Testimony, (Confidential) Exhibit 39.

²⁸ Tr. Vol. 1, at 181.

²⁹ *Id.*, at 72.

³⁰ *Id.*

³¹ *Id.*

The undisputed record evidence in this case provides no basis to expect that Rider PSR will ever provide any beneficial hedge value. Dr. Fisher, relying on Duke's own numbers, shows that OVEC energy is more expensive than market prices in every year, averaging [REDACTED] above Rose's projected market cost of energy during the 2018-2025 period.³² Furthermore, the OVEC contract has resulted in losses each and every year from 2010 to 2017,³³ and is projected to be a substantial loss to customers in every year of the Rider. There simply is no factual predicate underlying Duke's hedge theory, and any Commission ruling to the contrary would lack evidentiary support.

V. To Determine that Rider PSR Benefits Ratepayers and the Public Interest, the Commission Must Explain Why Rider PSR Is a Better Deal for Customers Than the Same Rider It Rejected in 2015.

The Commission must address the fact that it has already rejected OVEC cost recovery under Rider PSR as not being "in the public interest." In its third ESP case, Nos. 14-841-EL-SSO *et al.*, Duke originally proposed Rider PSR as a vehicle for cost recovery for its OVEC share through the end of the current ICPA term in 2040.³⁴ Then, as now, Duke framed the proposal as a "hedge to mitigate some of the volatility in overall rates that customers pay for generation service."³⁵ In that case, however, Duke offered a relatively rosy financial projection suggesting net costs for customers of \$29 million from 2015 through 2018, then net benefits in 2019 through 2024 of approximately \$28

³² Fisher Direct Testimony, at 17- 18.

³³ *Id.*, at 17.

³⁴ Duke ESP III Opinion and Order, at 15.

³⁵ *Id.*, at 16.

million.³⁶ Accordingly, in the *Duke ESP 3 Case*, Duke's projection for the 10 years through 2024 showed a net cost of \$1 million to customers, without any financial projection for the years 2025 and beyond.

The Commission rejected that proposal as against the public interest, explaining "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."³⁷ Based on that evidence, the Commission concluded that there was not sufficient evidence before it to show "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."³⁸ The Commission confirmed its view on rehearing, reiterating "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."³⁹

As detailed above, Duke's current financial projection for OVEC cost recovery under Rider PSR is substantially worse than in the *Duke ESP III Case*: a net loss of \$77 million to customers through 2025.⁴⁰ That projected cost is further accompanied by additional risk to ratepayers in the form of the FES bankruptcy, which may lead to millions more in OVEC costs that would be subject to recovery under Rider PSR.⁴¹

³⁶ *Id.*, at 45-46.

³⁷ *Id.*, at 46.

³⁸ *Id.*

³⁹ *Duke ESP 3 Case*, Second Entry on Rehearing, Mar. 21, 2018, at 4.

⁴⁰ Tr. Vol. I, at 177 and Rose Supplemental Testimony, (Confidential) Exhibit 41.

⁴¹ *See*, section III.B above.

While the Commission's Order in the *Duke ESP 3 Case* suggested that a "properly conceived" proposal for Rider PSR could "provide[] for a significant financial hedge that truly stabilizes rates, particularly during periods of extreme weather," that is not the situation here.⁴² Neither Duke nor other signatories to the Stipulation have offered any evidence suggesting the current OVEC proposal offers any real improvement over the 2015 proposal that the Commission judged would not be in the public interest.

Instead, both Duke and Commission Staff rely in large part on the fact that the Commission has, since the *Duke ESP 3 Case* decision, approved OVEC cost recovery for AEP Ohio and Dayton Power & Light ("DP&L") as part of stipulations submitted in Case Nos. 14-1693-EL-RDR *et al.* and 16-395-EL-SSO *et al.*⁴³ Staff witness Donlon explained that in those cases, the Commission deemed that cost recovery for OVEC through riders similar to Rider PSR would "operate as a hedge for the costs and associated revenues of the EDU's ownership share of OVEC and are in the public interest." According to his testimony, "Staff does not believe that the facts in this case differ enough to merit a change in Commission precedent."⁴⁴

As numerous parties and the Commission have insisted over the years of applying the stipulation standard, however, the Commission reviews whether a stipulation as a

⁴² Duke ESP III Opinion and Order, at 46-47.

⁴³ See Duke Exhibit 5, Direct Testimony Amy B. Spiller in Support of Stipulation, at 10; Staff Exhibit 17, Pre-filed Testimony in Support of the Stipulation of Patrick Donlon ("Donlon Testimony"), at 13 (Question 17).

⁴⁴ Donlon Testimony, at 13 (Question 17).

package benefits ratepayers and the public interest.⁴⁵ Accordingly, when asked at hearing whether Staff had reviewed Rider PSR standing alone, Staff witness Donlon testified at hearing that, “[y]ou have to—you have to review the sum of the parts to analyze the whole, but the test is the stipulation as a whole.”⁴⁶

Thus, the “Commission precedent” cited by Mr. Donlon from the AEP Ohio and DP&L cases is the precedent of having approved particular stipulation packages as being beneficial to ratepayers and the public interest. The AEP Ohio and DP&L orders do not stand for an inherent determination that OVEC cost recovery is a beneficial hedge for all utilities regardless of the record evidence, particularly in light of the Commission’s previous precedent rejecting Duke’s proposal to use OVEC as a hedge in the *Duke ESP 3 Case*. And it does not allow either Staff or Duke to bootstrap approval for OVEC in this case based on the simple fact that the Commission approved prior stipulations that included OVEC cost recovery.

This context is particularly important since the record regarding those stipulations is very different than the record here. Among other salient differences:

⁴⁵ See, e.g., *In re Ohio Power Co.*, Case No. 94- 996-EL-AIR, *et al.* Opinion and Order. Mar. 23, 1995, at 20-21; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 99-1729-EL-ETP, *et al.*, Opinion and Order, Sept. 28, 2000, at 44; *In re Dayton Power & Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order, Sept 2, 2003, at 29; *In the Matter of the Application of the Dayton Power & Light Co. for Approval of Its ESP.*, Case Nos. 08-1094-EL-SSO *et al.*, Opinion and Order, June 24, 2009, at 10.

⁴⁶ Tr. Vol. XII, at 2001.

- AEP Ohio projected at the time that the OVEC units would provide a net benefit of \$110 million to customers through 2024;⁴⁷
- AEP Ohio committed to provide ratepayers credits of \$15 million in the final four years of its rider if actual PPA revenues turned out to be below projections;⁴⁸
- DP&L was already suffering financial losses that the Commission found to be sufficient to warrant allowing it to collect over \$300 million from its customers “to maintain its financial integrity” – a goal that would seemingly be undercut by requiring DP&L to absorb continuing losses under the ICPA.⁴⁹
- The DP&L stipulation provided for \$9 million to \$11.5 million of shareholder funding for economic development, energy education payments, and payments to assist low-income customers.⁵⁰

Duke does not offer the same optimistic financial forecasts or direct customer payments, nor has Duke offered any evidence of a dire financial crisis that would warrant allowing OVEC cost recovery as part of a larger corporate bailout.

⁴⁷ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter Into an Affiliate Power Purchase Agreement For Inclusion In the Power Purchase Agreement Rider*, Case Nos.14- 1693-EL-RDR *et al.*, Second Entry on Rehearing, Nov. 3, 2016, at 103.

⁴⁸ *Id.*, at 29.

⁴⁹ *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order, Oct. 20, 2017, at 6, 19.

⁵⁰ *Id.*, at 43.

This “Commission must base its decision upon the record before it.” *Ideal Transp. Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 195, 199, 326 N.E.2d 861 (1975). The record before the Commission, in this case, is one where Duke has proposed, as part of a stipulation, a provision that the Commission previously rejected as not in the public interest and that, as a factual matter, has only become a worse deal for customers since that rejection. The stipulation review standard, although it focuses on reviewing a settlement as a package, should not operate as a mechanism for the Commission to avoid its own precedent and the requirement under R.C. 4903.09 to provide facts and reasoning for any decision.

In the case before the Commission now, there are no facts and reasoning that would support a determination that Rider PSR itself benefits ratepayers and the public interest. Duke witness Spiller testified that in her view the stipulation standard could nevertheless allow the Commission to approve a settlement provision that would in fact harm ratepayers.⁵¹ Even under that view of the stipulation standard, the Commission must still reach a determination based on record evidence that the other benefits of the Stipulation outweigh the projected \$77 million cost of Rider PSR plus the unknown additional risks from factors such as the FES bankruptcy. No party, including Duke, has offered any evidence that the Stipulation is worth such a price.

⁵¹ Tr. Vol I, at 48.

VI. Duke's Belated Attempt to Justify a Corporate Bailout Via Credit Rating Concerns Should be Rejected.

Duke's separate Rider PSR proceeding, filed last year, included no credit rating argument.⁵² That fact is telling regarding the merits of Duke's claim that it truly needs millions of dollars from ratepayers to shore up its financial standing. In fact, Duke hasn't made any real case that costs of any speculative increase in borrowing costs might exceed the very likely costs of Rider PSR. As Dr. Fisher explained,⁵³ there are at least three steps in such a demonstration, none of which Duke has bothered to undertake. First, Duke hasn't shown that denial of Ride PSR alone would impact Duke's credit rating. Second, if denial of Rider PSR alone would impact Duke's credit rating, Duke hasn't shown that changing its credit rating one notch would significantly increase borrowing costs. Third, and most important, Duke hasn't shown that any increased borrowing costs would exceed the costs of Rider PSR. There is no factual predicate underlying any of these necessary steps in Duke's credit rating theory, and so a Commission ruling on this issue would lack evidentiary support.

Moreover, Duke has not provided the evidence to support a customer-funded bailout consistent with the Commission's own precedent. In approving "credit support" mechanisms for other Ohio utilities, the Commission has looked at factors such as whether the utility has taken other steps to attempt to address its financial difficulties and

⁵² Duke Exhibit 26, Direct Testimony of William Don Wathen, Jr., filed on March 16, 2017.

⁵³ Fisher Direct Testimony, at 38-39.

whether the specific amount requested is reasonable.⁵⁴ Duke has not offered evidence on the first of these considerations, even admitting that part of its financial situation is due to factors like a \$20 million penalty for mismanagement by its North Carolina subsidiary.⁵⁵ Duke also has not established a basis for the correct amount of any “credit support” that it purportedly would need to maintain its credit rating. Without these important predicates, approving Rider PSR to support Duke’s credit rating would be the same as handing out a blank check.

VII. Rider PSR Amounts to An Unlawful Transition Charge and Must Be Rejected.

As described above, Duke’s own projections show Rider PSR to be a cost to customers. With no demonstrated benefits to justify approving the Stipulation, and therefore Rider PSR, both the Ohio Code and Ohio Supreme Court precedent demand that Rider PSR be rejected as an unlawful transition charge. The Commission must therefore reject it.

Section 4928.38 of the Ohio Revised Code forbids the collection of transition revenues or any equivalent revenues outside of the transition period. The Ohio Supreme

⁵⁴ *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order, Oct. 20, 2017, at 25-28; *In re Ohio Edison Co., Cleveland Elec. Illum. Co., and Toledo Edison Co. for Auth. to Provide for a Std. Serv. Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing, Oct. 12, 2016, at 93-96.

⁵⁵ Tr. Vol. IV, at 758-759.

Court has held that charges to support uneconomic generation assets are illegal transition charges regardless of the nomenclature used to describe them.⁵⁶

There can be no serious dispute that Rider PSR would allow Duke to recover generation-related costs. Under Rider PSR, the Duke is allowed to sell the power and capacity it takes under its OVEC entitlement into the PJM wholesale market. In the event the price does not cover the costs associated with producing that power and capacity, the Duke will be allowed to flow through those costs to its customers. The costs that the Duke is seeking to recover from customers are therefore those of running an obsolete and uneconomic generating asset that cannot compete in today's market. This type of charge is expressly prohibited by R.C. 4928.38 as transition revenue or equivalent charges.

VIII. The Attorney Examiners' Ruling that Annual Rider PSR Projection is a Trade Secret Lacks Evidentiary Support and Must be Reversed.

At the hearing several parties objected to the Company's request to treat certain year by year information regarding OVEC confidential.⁵⁷ The Attorney Examiners overruled these objections stating that historically year specific information has been kept confidential.⁵⁸ The Conservation Groups filed a motion for reconsideration on this issue which the Attorney Examiners denied.⁵⁹ Because the Attorney Examiners failed to

⁵⁶ *In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d 439, ¶21 (2016); *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

⁵⁷ Tr. Vol. II, at 280-285.

⁵⁸ *Id.*, at 285.

⁵⁹ Attorney Examiner Entry Denying Motion for Reconsideration filed September 6, 2018. ("Attorney Examiners' Entry".)

reverse their mistake and failed to satisfy the elements of the trade secret statute in making their determination, the Commission must correct this error.

Ohio Revised Code sections 4905.07 and 4901.12 require that all proceedings before the Commission and all documents and records in its possession be made publicly available except in specific, limited circumstances. Documents must be made public unless they fall into a set of narrow exemptions for information that is traditionally outside of the public domain, including trade secrets.⁶⁰

R.C. 1333.61(D) defines “trade secret” as information that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Whether information constitutes a trade secret is a question of fact.⁶¹ The presumption of public access to Commission documents is liberally construed.⁶²

The burden of demonstrating an exemption from the baseline rule that all Commission documents are open to the public falls squarely on the party seeking to keep

⁶⁰ See R.C. 149.43(A)(1); *State ex Tel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000) (noting that while trade secrets are not expressly listed as an exemption in the Ohio Public Records Law, they fall into the exception for records protected by state or federal law).

⁶¹ See *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 401, 732 N.E.2d 373 (2000).

⁶² See *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 170, 680 N.E.2d 956 (1997).

information from the public—in this case, Duke.⁶³ That burden is high. The state of Ohio has “a long-standing public policy committed to open public records.”⁶⁴ Indeed, all doubts as to the trade secret status of a given document must be resolved in favor of disclosure.⁶⁵

Finally, any decision to grant trade secret or proprietary status to any information must be supported by record evidence.⁶⁶

A. Duke failed to offer any evidence to support its claim for trade secret status for the Rider PSR Annual Margin Projection and, in fact, the undisputed evidence shows that there would be no harm from public release of this information.

At the hearing, Duke Witness Rose testified that the Rider PSR Annual Margin Projection, if made public, would not enable a competitor to calculate OVEC’s coal price forecast.⁶⁷ Mr. Rose also testified that, if the numbers in that column were made public, it would not enable a competitor to calculate OVEC’s projected capital spending.⁶⁸ Mr. Rose further testified that publicizing the information in the column at issue would not enable a competitor to calculate any specific parameter.⁶⁹ Instead, he believes, it will

⁶³ See, e.g., *Besser*, at 400.

⁶⁴ *State ex rel. Cincinnati v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 8; accord *State ex rel. Plain Dealer v. Ohio Dep’t of Ins.*, 80 Ohio St.3d 513, 518, 687 N.E.2d 661 (1997) (noting that government records are public, “subject to only a few very limited and narrow exceptions”) (citation omitted).

⁶⁵ *State ex rel. Bardwell v. Cuyahoga Cty. Bd of Comm’rs*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274, ¶ 10.

⁶⁶ R. C. 4903.09; see *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶39.

⁶⁷ Tr. Vol., at 279-280.

⁶⁸ *Id.*, at 280.

⁶⁹ *Id.*

reveal an “overall competitive position” only.⁷⁰ Mr. Rose did not testify that providing “overall competitive position” evidence in public would somehow cause any competitive harm.

In fact, year-by-year OVEC costs have already been publicly disclosed in Duke’s prior ESP case, as well as AEP Ohio proceedings regarding its OVEC share, without any evidence or claims of “competitive harm.”⁷¹ In the *Duke ESP 3 Case*, parties argued for the public disclosure of year-by-year cash flow projections for OVEC, in part because the same information had been treated as public, non-trade-secret information in AEP Ohio’s concurrent ESP proceeding on OVEC. Amy Spiller, on behalf of Duke, stated in response that “to the extent that the Commission recognized that the public has a right to know that number in the AEP proceeding and to the extent that the public’s being asked to pay this cost, then we think it similarly should be treated as a public number.”⁷² Yet now, when these projects show significant costs for customers, Duke suddenly suggests that any year-by-year information will in fact cause competitive harm with no support for that conclusory assertion.

Likewise, Duke relied on conclusory statements and arguments with no evidentiary support in the record in an effort to rebut several parties’ request that this information be made public. Duke stated that this information demonstrates a “potential outlook” and could have impacts on Duke’s ability to obtain financing, despite the fact that OVEC’s current negative financial outlook is public knowledge from, among other

⁷⁰ *Id.*

⁷¹ *Duke ESP 3 Case*, OCC Exhibit 4, filed on November 12, 2014.

⁷² *Duke ESP 3 Case*, Tr. Vol. V, at 1129.

sources, the FirstEnergy Solutions bankruptcy proceeding.⁷³ However, despite having the opportunity to do so during the confidential portion of Mr. Rose’s testimony, Duke never offered any evidence in support of its position that the Rider PSR Annual Margin Projection information would reveal anything beyond the well-known fact that OVEC is in financial difficulty. Thus, there is no record basis for finding that this Rider PSR Annual Margin Projection information is a trade secret under Ohio law.

Duke’s arguments, unaccompanied by any factual support and inconsistent with its past position regarding the same type of information, do not satisfy the high burden placed on the utility to prove trade secret status.⁷⁴ Simply put, the law requires Duke to demonstrate, with factual evidence, that there is independent economic value, actual or potential, to the information not being known or readily attainable by proper means. Duke has failed to do so, and therefore there is no reason to keep this information confidential.

Duke’s first argument that these “potential outlooks” may impact its ability to obtain financing is meritless. Duke offers no evidence to support this theory and it is not clear what financing Duke is referring to or how the revelation of Duke’s projected annual losses under Rider PSR could even theoretically have any such impact on its

⁷³ Tr. Vol. II, at 281.

⁷⁴ See *Besser*, 89 Ohio St.3d at 400-401, 403, 732 N.E.2d 373 (holding that “conclusory statements” cannot establish that a document “retains any potential economic value” where the statements are not supported by “any factual evidence”; rather, a party must provide “specific, credible evidence” in support of its trade secret claim); see also *Arnos v. MedCorp, Inc.*, 6th Dist. Lucas No. L09-1248, 2010-Ohio-1883, ¶ 28 (rejecting trade secret claim based on affidavit asserting that release of documents would reveal a valuable accounting process, where it was not supported by “any factual detail”).

finances. The fact that Duke is likely to lose money on its OVEC contract is already public. And any theory that the revelation of annual losses would somehow harm Duke was not pursued by the admission of evidence at the hearing.

Duke's second argument, that future-looking information has previously been protected by the Commission is similarly meritless. While Commission precedent is to some extent instructive, when it comes to trade secret determinations each decision must be made based on the evidence in the record. R.C. 4903.09; *see In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Op. No. 2018-Ohio-229, ¶ 39. It is not relevant what the Commission has done in past cases with entirely different information and entirely different evidence.

The only piece of evidence Duke did proffer was Witness Rose's statement that while no specific parameters could be calculated from publicizing the information, an "overall competitive position" may be ascertainable.⁷⁵ In addition to already being public information (in the FirstEnergy bankruptcy proceeding, among other sources), this statement is far too general to satisfy the high burden required as a conclusory statement. An "overall competitive position" is already readily determined by the information Duke already agreed to release, and is confirmed by public information filed at the Federal Energy Regulatory Commission and in other venues such as the bankruptcy proceeding involving FirstEnergy Solutions. Taking that general, publicly available knowledge, along with the publicly available aggregate number would likely produce a similar

⁷⁵ Tr. Vol. II, at 280.

understanding of Duke/OVEC's "overall competitive position" as the Rider PSR Annual Margin Projection information.

Finally, R.C. 4903.09 requires all decisions by the Commission to be based on findings of fact and contain citations to the evidence of record which supports those decisions. Duke failed to offer any evidence on which the Attorney Examiners could reasonably rely, and therefore the Rider PSR Annual Margin information does not qualify for trade secret protection. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶39.

Despite all this law to the contrary, in the entry denying the Conservation Groups' motion, the Attorney Examiners noted that Mr. Rose testified that if the information was revealed, it would depict "what's going on at the plant" and expose an overall competitive position, and denied the motion (Confidential Tr. II at 280). The projected annual numbers relate to power plants that participate in the competitive wholesale market and maintain independent economic value. Thus, they qualify as trade secrets and should remain confidential."⁷⁶ A single, unsupported, and conclusory statement is not enough to satisfy the statute and the Commission should correct this error.

Ohio law requires transparency and openness in public utility proceedings, except in rare instances, and Duke failed to satisfy its burden to prove that the information seeking to be protected is a trade secret. Therefore, the Conservation Groups, respectfully request that the Commission find that the Rider PSR Annual Margin

⁷⁶ Attorney Examiners' Entry at ¶8.

information should be public in accordance with Ohio law, Ohio Supreme Court precedent, and sound public policy.

IX. Conclusion

On its own, Rider PSR burdens Duke's customers with significant projected costs and the risk of even worse outcomes in light of the FES bankruptcy. The signatories to the Stipulation have not offered any evidence that other benefits outweigh these negative effects on ratepayers and the public interest. Therefore, the Conservation Groups urge the Commission to reject the Stipulation, including Duke's Rider PSR proposal.

Dated: September 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Conservation Groups' Post-Hearing Brief (Public Version) has been served upon the following parties via electronic mail on September 11, 2018.

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