

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates.)))	Case No. 17-32-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.))	Case No. 17-33-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)))	Case No. 17-34-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.)))	Case No. 17-872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.)))	Case No. 17-873-EL-ATA
In the Matter of the Application of Duke Energy Ohio Inc., for Approval to Change Accounting Methods.)))	Case No. 17-874-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
In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards Pursuant to Chapter 4901:1-10, Ohio Admin. Code.))))))	Case No. 16-1602-EL-ESS

INITIAL BRIEF OF INTERSTATE GAS SUPPLY, INC.

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I. INTRODUCTION

Ohio law prohibits the Public Utilities Commission of Ohio (“Commission”) from requiring distribution customers to pay for competitive services. Despite the General Assembly’s mandate, the Stipulation and Recommendation (“Stipulation”) seeks to rebundle competitive costs into distribution rates at every turn. Indeed, there is a subsidy for nearly every competitive service imaginable.

- Subsidies to the Standard Service Offer (“SSO”) price.
- Subsidies to battery technology to provide market-based wholesale services.
- Subsidies to Duke Energy Ohio, Inc.’s (“Duke”) legacy investment in old and inefficient power plants.

In areas where the Stipulation is not directly subsidizing Duke’s competitive services, it often indirectly creates a launching pad for future filings to uniquely benefit Duke without any parameters to protect the competitive market. Given these structural flaws, the Commission should not authorize the Stipulation without substantial modification.

Specifically, the Commission should condition approval of the Stipulation on the following modifications:

- Unbundling SSO-related costs unlawfully and unreasonably proposed for recovery through non-competitive distribution rates.
- Phasing out Duke’s time of use rates, or, at a minimum, eliminating distribution-related subsidies to such rates.

- Rejecting the proposed Supplier Cost Reconciliation (“SCR”) Rider “circuit breaker”, which would provide an unlawful and unreasonable subsidy to the SSO.
- Rejecting Duke’s request for distribution customers to back-stop Duke’s utilization of battery storage to provide competitive wholesale services.
- Ensuring that Duke’s upcoming application to upgrade its customer information system is designed to advance the competitive market.
- Rejecting the patently unlawful and deceptively named Price Stabilization Rider (“PSR”).

The reasons to support these modifications are discussed further below.

II. BACKGROUND

This Stipulation proposes to resolve four outstanding proceedings which were initially proposed in separate dockets (ten case docket numbers). Therefore, a brief history of the proceedings is necessary to place the Stipulation within the appropriate context.

A. Duke’s Existing ESP Case

Some of the issues before the Commission are an extension of issues raised in prior cases. For example, in the last ESP case, IGS raised concerns about Duke’s recovery of SSO-related costs through distribution rates and Duke’s proposal to establish the PSR to collect costs associated with its investment in the Ohio Valley Electric Corporation (“OVEC”). The Commission declined to substantively approve either proposal, delegating the matters to separate proceedings.

With respect to appropriately unbundling costs from distribution rates to the SSO, the Commission acknowledged the importance of IGS' argument, but indicated that "the Commission believes these issues are better suited for another forum, such as a distribution rate case"¹

With respect to the PSR, which would subsidize Duke's investment in OVEC, the Commission rejected Duke's request to populate the PSR. The Commission stated, "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."² Although the Commission rejected Duke's initial request to recover OVEC-related costs through the PSR, the Commission indicated that Duke may file for cost recovery in a future proceeding to the extent that Duke can satisfy several conditions, including:

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.³

Of course, Duke never claimed that OVEC would retire in the absence of approval of the PSR. Moreover, Duke has since transferred its remaining generating assets other than OVEC.

B. The Distribution Rate Case

¹ 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 Nos. 14-841-EL-SSO, *et al.*, Opinion and Order 86 (Apr. 2, 2015).

² *Id.* at 46.

³ *Id.* at 47.

On March 2, 2017, Duke filed an application to increase its distribution rates, for tariff approval, and to change its accounting methods (“Distribution Case Application”). The Staff Report of Investigation (“Staff Report”) was filed with the Commission on September 26, 2017, setting forth the Commission Staff’s (“Staff”) findings regarding the Application.

On October 26, 2017, IGS submitted objections to the Staff Report. As is relevant to the Stipulation, IGS objected to the Staff Report’s failure to recommend that Duke unbundle from distribution rates costs related to the provision of competitive generation service via the SSO.⁴ Many of the costs necessary to support the SSO are proposed for recovery in Duke’s allowance for operation expense (operation and maintenance expense or “O&M”). These costs are identified and supported in the C-Schedules attached to the Application. The Staff Report provides an analysis of the costs contained on these schedules. But, absent from the Staff Report is any recommendation to appropriately refunctionalize to the SSO costs that are necessary to support that service. The operation and maintenance expense categories that the Staff Report failed to analyze and allocate to the default service include:

- (1) Call center infrastructure and employees to maintain appropriate customer service for SSO customers;⁵
- (2) Outside and inside legal, regulatory, and compliance personnel to comply with the regulatory rule requirements for the SSO;

⁴ Objections of Interstate Gas Supply, Inc. and Summary of Major Issues at 4-7 (Oct. 26, 2018).

⁵ For example, the Stipulation would permit Duke to collect \$5,107,749 in call center expenses through electric distribution rates. IGS Ex. 11 (Duke Response to IGS-02-010, Case Nos. 17-32-EL-AIR, *et al.*)

- (3) IT employees, infrastructure, and software;
- (4) Office space for employees;
- (5) Administrative and human resources staff to support the employees;
- (6) Office supplies;
- (7) Accounting and auditing services;
- (8) Printing and postage to communicate with customers;
- (9) Uncollectible expense, to the extent that a purchase of receivable program contains a discount rate;
- (10) The regulatory assessments for the PUCO and the Ohio Consumers' Counsel ("OCC") that are based on SSO generation revenue, but are recovered through distribution rates;
- (11) Cash Working Capital.⁶

These categories of cost are mainly identified in the following FERC Accounts (903-905; 908-910; 912; 920-935; 408). Each of the aforementioned expenses and investments are used to support the SSO. Moreover, each of these services reflect costs that CRES suppliers must incur to support their own rates.

One of the most egregious subsidies related to Duke's request to collect its OCC and PUCO assessments through distribution rates. Under Ohio law, these annual

⁶ Although the Staff Report recommends that Duke not collect a Cash Working Capital expense, this recommendation does not change the fact that Duke does in fact incur a capital cost to pay auction suppliers. Staff Report at 11. By failing to allocate a cash working capital requirement to the SSO rate, Duke thereby subsidizes this cost through revenue collected through distribution rates.

assessments are directly related to a utility's—a CRES providers is considered a utility for purposes of the assessment—total intrastate revenues, which includes SSO revenue.⁷ For example, if Duke collected \$300 million in SSO revenue⁸ and a CRES provider collected \$300 million revenue, both would pay the same assessments for their generation-related revenue.⁹ It defies reason and principles of fair play to permit Duke to recover its assessment through non-competitive distribution rates while CRES providers must collect their assessments through their competitive service rates.

In addition to the internal costs that CRES incur, CRES providers often must pay Duke additional fees, for example, switching fees, billing fees, and interval data fees.¹⁰ Yet, customers are not required to pay switching fees to return to the SSO.¹¹ Similarly, Duke charges per bill fees to CRES providers to utilize the bill ready function.¹² Finally, Duke charges CRES providers \$32 for each interval data request.¹³ These fees have accounted for millions of dollars over the last few years. Each of the fees discussed above are in addition to and apart from the substantial, non-wholesale costs that CRES providers must incur to make a competitive product available.

⁷ R.C. 4911.18; R.C. 4905.10.

⁸ Because Duke also collects revenue related to its distribution services, it would pay an additional assessment related to the distribution revenue it collects. IGS is not proposing to allocate this portion of Duke's PUCO and OCC assessments to the SSO.

⁹ Tr. Vol. XI 1929-30.

¹⁰ IGS Ex. 8 (Duke Response to IGS-INT-01-016(b), Case Nos. 17-1263-EL-SSO, *et al.*). The terms of this charge are set forth on Tariff Sheet 52.4.

¹¹ *Id.* at (a). The terms of this charge are set forth on Tariff Sheet 52.4.

¹² IGS Ex. 8 (Duke Response to IGS-INT-01-17, Case Nos. 17-1263-EL-SSO, *et al.*).

¹³ IGS Ex. 8 (Duke Response to IGS-INT-02-01(h), Case Nos. 17-32-EL-AIR, *et al.*). The terms of this charge are set forth on Tariff Sheet 52.4.

In addition to failing to unbundle SSO-related costs, the Staff Report failed to recommend any reduction or elimination of the fees that Duke charges to CRES providers or shopping customers. Thus, IGS and RESA objected to the Staff Report's failure to analyze whether any supplier fees or charges contained on Tariff Sheet 52.4 are excessive. The specific details supporting these objections are discussed later in this brief.

C. The ESP Case

On June 1, 2017, Duke filed an application to establish an SSO in the form of an ESP (ESP Application). Among other things, the Application proposed a PowerForward Rider, the deceptively named PSR, and the Distribution Capital Investment ("DCI") Rider. The PowerForward rider would permit Duke to recover costs associated with the Commission's PowerForward initiative as well as costs associated with battery investments. The PSR would permit Duke to recover through a non-bypassable rider the net costs associated with its power purchase agreement with OVEC. The specific details associated with the PSR were addressed more fully in a separate docket discussed below.

D. The Price Stabilization Rider Case

Although the Supreme Court of Ohio issued an order on April 21, 2016, which effectively took the Commission out of the generation business,¹⁴ on March 30, 2017, Duke filed an application to modify the PSR. The application was nearly identical to the request the Commission rejected in the ESP case.

¹⁴ *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 444-449 (2016).

The PSR proposal relates to Duke's 9% ownership interest in OVEC and its two over a half-century old coal plants. As a sponsoring company of OVEC, Duke has entered into an Intercompany Power Agreement ("ICPA") with the other OVEC sponsoring companies that requires Duke to pay a traditional cost-based rate, including a rate of return and variable costs, to OVEC.¹⁵ In exchange for these payments, Duke receives a pro-rata portion of the capacity and energy generated from the OVEC units.

The PSR proposal would shift the cost and risk of OVEC ownership to Duke distribution customers. Under the proposal Duke would sell the energy and capacity from the OVEC coal plants into PJM Interconnection, LLC's ("PJM") wholesale capacity and energy markets.¹⁶ If the wholesale market revenues that Duke receives are less than the cost-based rate that Duke must pay to OVEC under the ICPA, then Duke would collect the difference from its distribution customers through the PSR.¹⁷ Conversely, if the wholesale revenues are greater than the cost-based rate that Duke must pay to OVEC, then Duke would provide a credit to its distribution customers through the PSR. Under either of these scenarios, Duke is made whole for the amount of money it is required to pay OVEC.

E. The Reliability Standards Case

Finally, on July 22, 2016, Duke filed an application to establish reliability performance standards. Although Duke has continually increased its total recovery of

¹⁵ As a 9% owner of OVEC, Duke pays a cost-based rate to itself under the ICPA. Tr. Vol. I at 197.

¹⁶ Duke Ex. 29 at 7.

¹⁷ *Id.* at 4-8.

distribution-related revenue, it has often failed to satisfy its reliability performance standards.

F. The Stipulation and Recommendation

On April 13, 2018, certain parties entered a Stipulation to resolve several different cases, including but not limited to Duke's application to increase distribution rates, Duke's application to establish an SSO in the form of an ESP, and Duke's application to modify the PSR. The Stipulation failed to address IGS' objection to the Staff Report's failure to properly unbundle SSO-related costs proposed for recovery in distribution rates. Moreover, among other things, the Stipulation proposed that the Commission authorize the PowerForward Rider, the PSR including a retroactive ratemaking provision to collect lost revenues since January 1, 2018, the SCR Rider to potentially subsidize the SSO rate, and extension of Rider DCI that was authorized under the prior ESP.

Regarding to the Distribution Case Application, the Stipulation proposed that Duke decrease its base distribution rates.¹⁸ The Stipulation failed to address IGS' objection to the Staff Report's failure to unbundle SSO-related costs; thus, the Stipulation would permit Duke to recover SSO-related costs through distribution rates.

Regarding the ESP Application, the Stipulation proposed that Duke extend the DCI, subject to annual cost caps. "Capital costs included in Rider DCI shall be those recorded in FERC Accounts 360 through 374."¹⁹ Further, the Stipulation permits Duke to recover through Rider DCI up to \$20 million associated with battery storage "for the

¹⁸ This proposed recommendation is deceptive, given that the Stipulation permits Duke to increase total distribution rates through the rider mechanisms proposed under the ESP.

¹⁹ Joint Ex. 1 at 12.

purpose of deferring circuit investments or addressing distribution reliability issues.”²⁰ In order to qualify for cost recovery under the DCI, the battery investments “[m]ust qualify as distribution equipment under the FERC uniform system of accounts authorized for collection via the Rider DCI and subject to the Rider DCI caps.”²¹

Despite the clear qualifications for cost recovery under the DCI, Duke sought to expand the services it may provide with battery resources beyond distribution service to include PJM wholesale market services, which would be recorded in non-qualifying FERC accounts.²²

The proposed PF Rider has three components:

1. Incremental costs associated with the Commission’s PowerForward initiative.
Such costs shall only be authorized following Commission approval in a subsequent proceeding.²³
2. Recovery of costs associated with early retirement and replacement of Duke’s ineffective advanced metering infrastructure (“AMI”), as well the provision of interval customer energy usage data (“CEUD”) to customers, CRES providers, and third parties, and settlement of CRES PJM statements based upon CEUD for all customers.²⁴

²⁰ *Id.* at 13.

²¹ *Id.*

²² See Duke Ex. 16. See *also* RESA/IGS Ex. 4.

²³ Joint Ex. 1 at 16-18.

²⁴ *Id.*

3. Provisions related to the implementation of an infrastructure modernization plan, as well as a proposal to upgrade the customer information system (“CIS”). Cost recovery will be the subject of a separate proceeding. The Stipulation, however, did not require Duke to include a proposal for supplier consolidated billing or non-commodity billing functionality for CRES providers—even though Duke offers that capability to its affiliate, Duke Energy One, Inc.²⁵

Regarding the PSR, the Stipulation largely recommends approval of the PSR as originally filed by Duke, with some minor adjustments which do not provide significant value.²⁶ Based upon Duke’s own testimony, the PSR is projected to be a charge on day one of the ESP and remain a charge for the duration of the ESP.²⁷ Indeed, the Stipulation would allow Duke to retroactively collect from customers the net losses associated with its OVEC interest going back to January 1, 2018.²⁸

In conjunction with the filing of the Stipulation, Duke moved to consolidate the proceedings that are subject to the Stipulation. Intervenor the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, the Office of the Ohio Consumers’ Counsel, and the Retail Energy Supply Association and IGS submitted a memorandum in opposition, noting the different statutory structures applicable to distribution rate cases and SSO cases. On May 9, 2018, the Attorney Examiner granted Duke’s motion to consolidate, noting that the

²⁵ *Id.*

²⁶ *Id.* at 18-20. For example, Duke may not collect costs associated with forced outages that exceed 90 days and capacity performance assessments are excluded. *Id.* at 19.

²⁷ Tr. Vol. V at 957 L 18-22; Tr. Vol. V at 945 L 20 to 946 L 20.

²⁸ *Id.* at 19.

Commission will respect the specific statutory criteria applicable to distribution rate applications and ESP applications while hearing evidence within the context of a combined hearing and briefing process.

III. SETTLEMENT EVALUATION CRITERIA AND LEGAL STANDARD

Before approving a contested settlement, the Commission must find that: (1) the settlement is a product of serious bargaining among capable, knowledgeable parties; (2) the settlement, as a package, benefits ratepayers and the public interest; and; (3) the settlement package does not violate any important regulatory principles or practices.²⁹ A settlement is not evidence and it is not binding on the Commission. It is a recommendation by parties to a proceeding on how the Commission should address and resolve contested issues and nothing more. A settlement cannot provide the Commission with authority. A settlement does not allow the Commission to disrespect procedural or substantive requirements established by the General Assembly or the Commission's rules.

For example, Monongahela Power relied upon a settlement for its authority to end the five-year market development period early. The Ohio Supreme Court ("Supreme Court") rejected the claim that the settlement provided support for the early termination, stating:

Nevertheless, to the extent that Section IV of the Stipulation approved by the commission in the ETP Order can be considered an order authorizing the early end of Mon Power's MDP, that order was premature. *It was based upon an optimistic assumption that the requisite levels of the switching rate or effective competition would be achieved by December 31, 2003, an assumption that proved to be unwarranted, making any such order ending*

²⁹ *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St.3d 123, 126 (1992). See, also, *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St.3d 81, 82-83 (2002).

*the MDP unenforceable because the order exceeded the statutory authority of the commission.*³⁰

Here, the Commission must navigate to distinctly different statutory schemes: Chapter 4909 and Chapter 4928 and ensure that each statute is applied in a lawful manner to the facts of this case.

For example, the Stipulation recommends that the Commission exercise its authority under Chapter 4909 to permit Duke to recover SSO-related costs through distribution rates. The General Assembly eliminated the Commission's authority to authorize the recovery of competitive services through non-competitive distribution rates. Moreover, in violation of Chapter 4928 the Stipulation proposes to permit Duke to recover the equivalent of transition revenue long after the General Assembly permitted such recovery. Thus, the settlement violates Ohio law, discriminates against choice customers, and is contrary to the public interest.

IV. ARGUMENT

A. The Commission must unbundle SSO-related costs from distribution rates

The record is uncontroverted that the Stipulation would permit Duke to recover SSO-related costs through distribution rates.³¹ This is unlawful and unreasonable.

³⁰ *Monongahela Power Co. v. Pub. Util. Comm'n.*, 104 Ohio St.3d 571, 2004-Ohio-6896 at 26 (2004) (emphasis added).

³¹ Tr. Vol. XI at 1896-97 (Duke incurs call center expenses related to the SSO); Tr. Vol. XI at 1897 (Duke incurs costs related to SSO billing functionality); Tr. Vol. XI at 1897 (Duke incurs costs to modify bypassable SSO rates; Duke incurs IT expenses related to the SSO); Tr. Vol. XI at 1906, 1929-1930 (A portion of Duke's PUCO and OCC assessments is the result of the SSO revenue it collects); Tr. Vol. V at 990-991 (Duke incurs call center expenses related to the SSO); Tr. Vol. V at 1011-12 (regulatory expenses related to the SSO).

RESA and IGS submitted the testimony of Edward Hess in this proceeding to provide a recommendation to effectively remove SSO-related costs from distribution rates and refunctionalize those costs to SSO service.³² Mr. Hess proposed a lawful and reasonable methodology to refunctionalize SSO-related costs to the SSO, whereas the result proposed by the Stipulation is patently unlawful and unreasonable.

Mr. Hess recommended that Duke unbundle the distribution costs required to process and administer the SSO and allocate those costs to SSO service directly rather than allocating those costs to the distribution service rates paid by all customers. Mr. Hess testified it is unlawful and unreasonable to consider these costs distribution related. Mr. Hess determined that “The SSO rate is artificially low because it only recovers commodity costs. It does not recover the additional costs necessary to process and administer SSO service.”³³ Moreover, “Artificially low SSO rates have a negative effect on competition.”³⁴ And “[t]he artificially low default rate makes customers less likely to shop.”³⁵ Mr. Hess observed that SSO subsidization clearly has had a detrimental impact on the market:

The SSO price is a product that all products compete against. According to the PUCO shopping statistics, 53% of residential Duke customers receive service on the utility SSO rate.³⁶ The SSO product has by far the largest market share for the residential customer class. To the extent that the SSO is subsidized and artificially low, it harms all other products that must compete against the SSO. Ultimately, subsidizing the SSO leads to less

³² RESA-IGS Ex. 1.

³³ *Id.* at 9.

³⁴ *Id.* at 10.

³⁵ *Id.*

³⁶ <https://www.puco.ohio.gov/industry-information/statistical-reports/electric-customer-choice-switch-rates-and-aggregation-activity/electric-switch-rates-by-customer/customers-2016-pdf/>.

competition in the Duke service territory and fewer products being available to customers.³⁷

Consequently, he recommended that the SSO-related costs proposed for recovery in this case be refunctionalized to SSO rates as they relate to the provision of competitive service. He proposed a non-bypassable credit and avoidable charge rider to achieve this result. The net impact is revenue neutral to Duke. Based upon the Staff Report, Mr. Hess determined that the following costs would be reallocated to the SSO:

	Residential	Comercial	Street Lighting	OPA	Industrial
Credit Rate for All Customers	\$ (0.002843)	\$ (0.000346)	\$ (0.001026)	\$ (0.000087)	\$ (0.000014)
Avoidable Rider to Non-Shopping Customers	\$ 0.005747	\$ 0.001556	\$ 0.003097	\$ (0.000366)	\$ 0.002047

The result of Mr. Hess' allocation is three-fold. First, it ensures that non-shopping customers pay for all the services that they receive.³⁸ Second, it ensures that shopping customers are not charged for services that they do not receive.³⁹ Third, the ultimate result of his proposed allocation is to eliminate an existing subsidy that artificially lowers the price of SSO service.⁴⁰ Thus, Mr. Hess' proposed allocation provides a more level playing field between the SSO and services available in the competitive market.⁴¹ Unbundling and reallocating SSO-related costs to the non-shopping customers and adding the cost to the advertised price-to-compare will continue the Commission's long-standing practice of appropriately allocating costs to cost causers as well as eliminating

³⁷ RESA-IGS Ex. I at 10.

³⁸ *Id.* at 4-5.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 11.

barriers for customers to leave the SSO and shop for a competitive retail supplier.⁴² This is also consistent with the State's policy to ensure the availability of *unbundled* and comparable retail electric service and corrects for the current problem of subsidization by the regulated utility.⁴³

1. The Commission Lacks authority to Authorize Recovery of SSO costs through Non-Competitive Distribution Rates

Prior to 1999, Ohioans received one bundled rate for all retail electric services. Senate Bill 3 restructured the retail electric market, separating the distribution, transmission, and generation functions that were traditionally provided through pancaked bundled rates. The purpose of unbundling was to separate the competitive and non-competitive functions so that customers could “shop” for their competitive retail electric service without paying for the cost of utility provided generation. Prior to restructuring, all retail electric services were regulated under Chapter 4909. Under this traditional form of regulation, commonly referred to as economic regulation, the Commission established retail electric rates based upon a formula.⁴⁴ The Commission could not deviate from the statutory formula—“Stated differently, the Commission may not legislate in its own right.”⁴⁵

The Commission has no authority to regulate or provide compensation to support competitive retail electric service through base distribution rates established under Chapter 4909. Indeed, the General Assembly specifically provided that “a *competitive*

⁴² *Id.* at 4.

⁴³ *Id.* at 4-5, 11.

⁴⁴ *Office of Consumers' Counsel v. Pub. Util. Comm'n*, 67 Ohio St. 2d. 153 (1981).

⁴⁵ *Id.* at 166.

*retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters **4901. to 4909.**, 4933., 4935., and 4963.”* R.C. 4928.05(A)(1) (emphasis added). SB 3 removed the Commission’s jurisdiction to regulated competitive retail electric service under Chapter 4909. In other words, the Commission lacks authority to authorize the recovery of costs related to competitive retail electric services in a distribution rate case filed under 4909.18.

By law, the SSO is a utility offering of a competitive retail electric services.⁴⁶ The record is uncontroverted that the Stipulation would permit Duke to recover SSO-related costs through distribution rates authorized under R.C. 4909.18.⁴⁷ Moreover, these costs are comparable to the costs that CRES providers must incur simply to make a competitive product available. Thus, the Stipulation proposes recovery of competitive retail electric service costs through distribution rates. The Stipulation proposes an outcome outside the Commission’s jurisdiction.

Indeed, the Staff Report appears to recognize the merit of this reasoning. Specifically, the Staff declined to recommend that Duke recover through distribution rates litigation expenses related to its ESP case.⁴⁸ “Staff finds that the costs associated with

⁴⁶ R.C. 4928.03; RC. 4928.141 (“a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.”).

⁴⁷ Tr. Vol. XI at 1896-97 (Duke incurs call center expenses related to the SSO); Tr. Vol. XI at 1897 (Duke incurs costs related to SSO billing functionality); Tr. Vol. XI at 1897 (Duke incurs costs to modify bypassable SSO rates; Duke incurs IT expenses related to the SSO); Tr. Vol. XI at 1906, 1929-1930 (A portion of Duke’s PUCO and OCC assessments is the result of the SSO revenue it collects); Tr. Vol. V at 990-991 (Duke incurs call center expenses related to the SSO); Tr. Vol. V at 1011-12 (regulatory expenses related to the SSO).

⁴⁸ Staff Report at 13.

the litigation of the current ESP case are not appropriate to include for ratemaking purposes.”⁴⁹ As Staff witness Lipthrott testified, Duke attempted to inappropriately functionalize these costs to distribution service.⁵⁰ The additional costs identified by Mr. Hess are no different.

The Commission’s authority to supervise and regulate the SSO is limited to R.C. 4928.141-144. “Nothing in this division shall be construed to limit the commission’s authority under sections 4928.141 to 4928.144 of the Revised Code, On and after the starting date of competitive retail electric service.”⁵¹ Of those statutes, the Commission’s ability to establish rates is limited to R.C. 4928.142 and 4928.143. Although electric security plans are typically referred to as SSOs, in fact, only the portion of the electric security plan that relates to competitive retail electric service comprises the SSO.

Moreover, R.C. 4928.143(b)(2)(g) explicitly contemplates recovering all costs related to SSO service through an SSO. The statute provides for SSO cost recovery for items “relating to transmission, ancillary, congestion, *or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer.*”⁵² While Ohio law dictates recovery of SSO related costs through the SSO, here, the Stipulation proposes that the Commission authorize the recovery of competitive retail electric service-related costs under Chapter 4909 and to recover such costs through

⁴⁹ *Id.*

⁵⁰ Tr. Vol. XI at 1838 (Q. Is the Staff indicating that the ESP-related litigation costs should not be functionalized to distribution service? A. Yes, Sir.”).

⁵¹ R.C. 4928.05(A)(1).

⁵² R.C. 4928.143(b)(2)(g)(emphasis added).

non-competitive distribution rates. This outcome is barred by statute, policy, and violates the public interest. Therefore, the Commission must modify the stipulation and recommendation to properly reallocate costs related to the SSO to that service.

2. The Stipulation proposes an Outcome that violates State Policy and Precedent

Ohio law requires the Commission to “[e]nsure the availability of unbundled and comparable retail electric service.”⁵³ Ohio policy further requires the Commission to ensure that customers have “nondiscriminatory, and reasonably priced retail electric service.”⁵⁴ Likewise, the Commission must “[e]nsure 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.”⁵⁵

The Supreme Court has noted that the General Assembly “restructured Ohio’s electric-utility industry to foster retail competition in the generation component of electric service.”⁵⁶ To that end, the General Assembly “required the unbundling of the three major components of electric service — generation, distribution, and transmission — and the

⁵³ R.C. 4928.02(B); *see also* R.C. 4928.05(A)(1) eliminating authority to apply traditional regulatory authority to unbundled competitive services.

⁵⁴ R.C. 4829.02(A).

⁵⁵ R.C. 4928.02(H).

⁵⁶ *Industrial Energy Users-Ohio v. Pub. Util. Comm’n*, 117 Ohio St. 3d 486, 487 (2008).

components that make up the three major service components.”⁵⁷ “In short, each service component was required to stand on its own.”⁵⁸

The Court has rebuffed prior attempts to rebundle the recovery of competitive services through non-competitive distribution rates. For example, in *Elyria Foundry*, 14 Ohio St.3d 305 (2007), the Commission authorized FirstEnergy to recover SSO-related fuel costs through distribution rates. Following an appeal, the Court held that “[f]uel is an incremental cost component of generation service. Thus, by allowing that generation-cost component to be deferred and subsequently recovered in a distribution rate case, or alternatively allowing FirstEnergy to apply generation revenues to reduce distribution expenses, the commission violated R.C. 4928.02(G).”⁵⁹ Here, the record evidence shows that the Stipulation would permit Duke to recover through distribution rates costs components related to the provision of the competitive SSO. Rather than requiring SSO service to “stand on its own”, the Stipulation would permit Duke to bundle components of the SSO into distribution rates and therefore provide the SSO with an anticompetitive subsidy. Moreover, the subsidy is being paid for by shopping customers; therefore, it is discriminatory. The Stipulation proposes a result that violates Ohio law and Supreme Court precedent that requires comparable and unbundled rates.

3. Neither the Staff nor OCC have justified subsidizing the SSO

In response to RESA’s/IGS’ objection and testimony, the Staff presented the testimony of one witness, Craig Smith.⁶⁰ Mr. Smith claimed that Staff failed to attempt to

⁵⁷ *Industrial Energy Users-Ohio v. Pub. Util. Comm’n*, 117 Ohio St. 3d 486, 487 (2008).

⁵⁸ *Migden-Ostrander v. Pub. Util. Comm’n*, 102 Ohio St. 3d 451, 452-53 (2004).

⁵⁹ *Id.* at 315

⁶⁰ Staff Ex. 15.

quantify the SSO subsidy because the Commission never directed it to evaluate the issue.⁶¹ Yet, Mr. Smith conceded that the Stipulation would authorize Duke to recover SSO-related costs through its distribution rates.⁶² But he further claimed that a comprehensive study would be required to evaluate the subsidy, and it is unclear if the Company could perform one given its accounting system.⁶³ Finally, he claimed that before an allocation should occur, Staff would have to compare the cost of providing services to SSO customers and choice customers to see if there are different costs.⁶⁴ At the same time, Mr. Smith claimed that it is fine to directly allocate fees and charges to Choice customers.⁶⁵ OCC reiterates many of Staff's arguments and also argues that RESA/IGS witness Hess' proposal would create an intraclass subsidy.⁶⁶ Staff's and OCC's positions lacks merit.

First, the Commission previously determined that parties in Duke's next distribution rate case should closely evaluate whether Duke has proposed recover of SSO-related costs through distribution rates. Staff's claim ignores the Commission's prior Order in Duke's last ESP case.⁶⁷

⁶¹ *Id.* at 5-6.

⁶² Tr. Vol. XI at 1896-97 (Includes call center expenses related to the SSO); Tr. Vol. XI at 1897 (Costs related to SSO billing functionality); Tr. Vol. XI at 1897 (Costs to modify bypassable SSO rates; Duke incurs IT expenses related to the SSO); Tr. Vol. XI at 1906, 1929-1930 (A portion of Duke's PUCO and OCC assessments is the result of the SSO revenue it collects).

⁶³ Staff Ex. 15 at 6.

⁶⁴ *Id.*

⁶⁵ *Id.* at 7.

⁶⁶ OCC Ex. 22 at 3.

⁶⁷ *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 Nos. 14-841-EL-SSO, *et al.*, Opinion and Order 86 (Apr. 2, 2015).

Second, Staff is incorrect that Duke's accounting system is a barrier to unbundling costs here. As Duke, Staff, OCC, and RESA/IGS testified, it is industry practice to utilize allocation factors to allocate costs when a direct allocation cannot be performed or if it would be cost prohibitive.⁶⁸ Indeed, as Duke testified, a direct allocation of costs can only be performed in very limited circumstances.⁶⁹ Allocation factors—such as the ones utilized by witness Hess—are used to allocate costs in the majority of circumstances.⁷⁰

Third, Staff proposed an unlawful framework for unbundling SSO-related costs. It is irrelevant that Duke incurs costs related to SSO customers and Choice customers. For purposes of determining the scope of regulation under Chapter 4909, the law focuses on services. Particularly, the law exempts from regulation under Chapter 4909 competitive services, such as the SSO. Thus, regardless of whether Duke incurs costs related to the choice market, the Commission lacks authority to regulate SSO services through base distribution rates under Chapter 4909.

Moreover, the Staff's position represents a fundamental misunderstanding of Ohio law and the competitive and non-competitive services that Duke provides. While the Staff attempts to focus on costs related to types of customers, the important question is the services to which the cost relates. Duke provides only one competitive retail electric service—the SSO. While Duke incurs costs related to the facilitation of retail electric choice, these services are distribution-related services that should be collected from all customers. When Duke incurs a cost related to retail electric choice, it is often because it

⁶⁸ Tr. Vol. III at 689-75; Tr. Vol. V at 894; Tr. Vol. V at 981, 985, 1008-13; Tr. Vol. XIII at 2085.

⁶⁹ Tr. Vol. III at 689-70.

⁷⁰ See footnote 68.

is the only entity that can provide the service—such as providing historical usage information. Therefore, these monopoly services are distribution-related. As such, the Staff's proposed framework proposes a flawed apples-to-oranges comparison that fails to justify subsidizing competitive services under the Commission's traditional statutory authority.

Finally, OCC's claim that Mr. Hess' proposal would create an intraclass shift in costs and revenues lacks merit. OCC witness Willis testified that he didn't evaluate Mr. Hess methodology in any detail.⁷¹ Moreover, he couldn't opine whether the \$700,000 revenue shift had a rate impact—or whether it would simply be lost in the rounding.⁷² In any event, Mr. Willis testified that such revenue and cost shifts are common in utility rate making due to rate design.⁷³ As several witnesses in this case testified, rate design is an art, not a science.⁷⁴ Therefore, OCC's red herring provides no basis to justify providing a \$20+ million annual subsidy to the SSO.

4. It is unlawful and unreasonable to impose historical usage fees and switching fees on CRES Providers and customers, especially while the same services are provided to the SSO for free

The Stipulation proposes that SSO-related costs be recovered through distribution rates. But, at the same time, it proposes to continue to recover fees directly from shopping customers and CRES providers. Thus, the Stipulation proposes a paradigm that turns Ohio law upside down: the cost of monopoly-based noncompetitive services are

⁷¹ Tr. Vol. XIII at 2087.

⁷² *Id.*

⁷³ *Id.* at 2090.

⁷⁴ *Id.*; Tr. Vol. III at 670; Tr. Vol. V at 1013.

recovered only from shopping customers, and costs to support competitive-based SSO services are socialized.⁷⁵ This is unlawful, unreasonable, and fundamentally unfair. Therefore, the Commission should direct Duke to eliminate its historical usage fees and switching fees.

B. The Commission should reject the SCR circuit breaker

The Stipulation provides that the SCR rider shall be initially bypassable. But, it Duke may file an application to convert it to become non-bypassable if its unrecovered balance exceeds 10% of SSO revenue.⁷⁶ The proposed “circuit breaker” is unlawful and unreasonable. Indeed, the Commission previously determined such a provision was unlawful in Duke’s Market Rate Offer case:

In considering Duke's request to include a "circuit breaker" provision in Rider SCR, the Commission does not believe that such a provision would advance the policy of the state as articulated in Section 4928.02, Revised Code. Specifically, Section 4928.02(H), Revised Code, provides that it is the policy of the state to avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. If Duke were permitted to recover the costs included in; Rider SCR from shopping customers, under any circumstances, we believe that it would create an anticompetitive subsidy.⁷⁷

Thus, the proposed SCR circuit breaker is anticompetitive and would artificially depress the SSO price at the expense of shopping customers. The Commission should follow its prior precedent and reject the proposed circuit breaker, which is inconsistent with state policy and Ohio law.

C. Time of use rates should not be subsidized; they should be phased out

⁷⁵ *Id.* at 2105.

⁷⁶ Joint Ex. 1 at 6.

⁷⁷ *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 63.

The Stipulation proposes to permit Duke to continue offering time of use rates. Ohio law favors competitive markets and solutions.⁷⁸ Therefore, default service should not be in the role of providing time-differentiated pricing, which would be better provided by the competitive market. Further, placing the utility in the role of providing time-differentiated pricing will diminish customers' incentive to engage with the competitive marketplace.

Moreover, to the extent that Duke is permitted to offer time of use rates, such rates should be dictated by market prices. Duke should be prohibited from subsidizing any product offerings. Thus, Duke should be required to structure any time of use offerings to recover all commodity and overhead costs, with no recovery through distribution rates. Recovery of costs through distribution rates would provide time of use rates with an unlawful and unreasonable subsidy. Such recovery would be particularly anticompetitive given that Duke has failed to comply with the stipulation in case No. 11-3549, which required it to make interval data available to CRES suppliers.⁷⁹ Consequently, only Duke may offer time of use rates to customers on the SSO.

Accordingly, the Commission should direct to phase out its time of use rates, and, in the interim, it should prohibit Duke from subsidizing such product offerings.

D. The Stipulation prohibits Duke from utilizing batteries in wholesale markets

Despite the clear qualifications for cost recovery under the DCI, Duke has sought to expand the services it may provide with battery resources beyond distribution service

⁷⁸ R.C 4928.02.

⁷⁹ See *also* Objection to Staff Report of Investigation and Summary of Major Issues at E1.

to include PJM wholesale market services, such as the frequency regulation market. Duke's proposal is unlawful and violates the express limitations in the Stipulation.

Initially, Duke's proposed expansion of the services it may provide using battery technology exceed the scope of the Stipulation. The Stipulation explicitly provides that Duke may invest in battery storage "for the purpose of deferring circuit investments or addressing distribution reliability issues."⁸⁰ As testified by RESA/IGS witness Haugen (and confirmed by Duke's own witness⁸¹), frequency regulation is a competitive service:

Frequency Regulation (FR) in the PJM market is a competitive service that corrects for short-term changes in electricity. It matches up generation and demand more quickly than many of the steam units to help the grid maintain the desired electrical frequency and operate normally. Market participants submit their offer price the day before the operating day and can adjust the MW capability hourly through the operating day. PJM runs an hourly auction for the service which sets the hourly price and determines which units will provide the service based on the lowest price offers and historical performance.⁸²

The frequency regulation market is completely unrelated to "deferring circuit investments" or "distribution reliability." Thus, Duke's proposed new services would violate the express terms of the Stipulation.

Second, Duke's proposed provision of competitive services does not qualify for cost recovery of the express terms of the Stipulation. In order to qualify for cost recovery under the DCI, the battery investments "[m]ust qualify as distribution equipment under the FERC uniform system of accounts authorized for collection via the Rider DCI and subject

⁸⁰ Joint Ex. 1 at 13.

⁸¹ Tr. Vol. III at 578.

⁸² RESA-IGS Ex. 4 at 5.

to the Rider DCI caps.”⁸³ FERC has issued explicit accounting rules applicable to battery resources.

FERC concluded that “where an energy storage asset performs multiple functions, it is imperative that costs associated with each function be transparent and allocable to the function performed so that cross-subsidization of costs can be prevented.”⁸⁴ To that end, FERC has created several different accounts to ensure that battery costs are allocated between generation, transmission, and distribution consistent with the services that they provide.⁸⁵ As IGS/RESA witness Haugen testified:

[I]f [batteries] operate in wholesale markets, they would not qualify as a distribution resource under Account 363. They would be providing a wholesale service and receiving revenue from the PJM wholesale markets. Given that fact, the more appropriate account to record such battery assets is FERC Account 348, which relates to Energy Storage Equipment—Production.⁸⁶

Consequently, the Commission should prohibit Duke from utilizing battery resources to participate in wholesale markets as it would contravene the explicit terms of the Stipulation.

Third, Duke’s proposal would violate Ohio law, which requires unbundled rates and prohibits subsidies flowing from distribution services to competitive services and vice versa. Duke’s proposal would rebundle into distribution rates costs related to assets that provide competitive wholesale services. The impact of this rebundling is to subsidize

⁸³ Joint Ex. 1 at 13.

⁸⁴ FERC Order 784, Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies at Para. 136, 144 FERC ¶ 61,056 (Jul. 18, 2013).

⁸⁵ IGS Ex. 9. *See also* FERC Uniform System of Accounts.

⁸⁶ RESA-IGS Ex. 4 at 6.

Duke's provision of competitive services at the wholesale level. Thus, Duke's proposal violates R.C. 4928.02(B) and (H).

The impact of Duke's proposed subsidy on the wholesale market should not be taken lightly. The frequency regulation market is highly competitive.⁸⁷ It "establishes uniform prices for this ancillary service throughout all of PJM" and "rewards efficient sellers and drives inefficient sellers out of business."⁸⁸ Duke's proposal would allow it to "receive a different level of compensation in addition to the uniform clearing price."⁸⁹ Thus, Duke would be permitted to participate in the wholesale market without "the risks that apply to other resources participating in that market."⁹⁰

IGS has invested considerably in physical resources, many of which are in Ohio, which would be in direct competition with the proposed batteries in the PJM FR market.⁹¹ IGS must recover revenues from that investment exclusively through frequency regulation markets. Conversely Duke is seeking to make a similar investment backstopped by all distribution ratepayers. If the Commission were to approve such a scheme, ultimately the consequence would be to push private investment dollars away from the battery storage and the competitive frequency regulation market.

Fourth, in addition to explicitly violating Ohio law, Duke's requested authorization to participate in the competitive wholesale market cannot be authorized in an ESP. While there may be some latitude to authorize provisions related to distribution modernization,

⁸⁷ RESA-IGS Ex. 4 at 5, 7-8.

⁸⁸ *Id.* at 7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 8.

the Commission's statutory grant of authority does not extend to participation in wholesale markets.

Fifth, indulging Duke's proposal is not in the public interest. The Stipulation proposes that Duke invest in batteries when prudent to defer circuit upgrades or improve distribution reliability. Duke fails to address or disclose that these battery applications may have very different impacts on the useful life of batteries than its desired wholesale market activities. The more a battery is cycled, the quicker it reaches the end of its useful life.⁹²

It is well documented that the frequency regulation market has a destructive impact on the useful life of battery storage relative to other applications.⁹³ Thus, such participation would accelerate the rate of depreciation of the battery resources relative to the distribution-related purposes proposed by the Stipulation. Given this fact, Duke's proposed wholesale market participation would reduce the value to customers of any potential circuit upgrade deferral. Or even worse, it could leave the Commission in the unenviable position of having to consider yet another request for accelerated depreciation—like the smart meter request at issue in this case—because Duke's technology must be retired early. While it would be unlawful to permit recovery of accelerated depreciation necessitated by utilization of a distribution asset to participated in the competitive market, the Commissions should not risk that happening in the first place.

⁹² Tr. Vol. III at 580-81.

⁹³ Tr. Vol. III at 581-82. *See also id.* at 582 ("[t]he frequency regulation market causes a battery to charge or discharge very rapidly, correct? A. That's correct.").

Accordingly, the Commission should prohibit Duke from participated in wholesale markets with subsidized battery resources.

E. The Commission should direct Duke’s PF filing to consider a market-based option, propose a process to Implement Supplier Consolidated Billing Functionalities, and non-commodity billing

The Stipulation recommends that the Commission approve the third component of the PowerForward Rider, which provides for recovery of the costs associated with an infrastructure management plan. The infrastructure management plan will include a proposal to upgrade Duke’s Customer Information System (“CIS”), and “will be filed in a separate proceeding and subject to hearing.”⁹⁴ Based upon Duke’s responses to discovery, the estimated cost of the proposed CIS for its Ohio electric customers is between 45-50 million dollars.⁹⁵

Despite the hefty price tag, Duke has failed to commit to design the CIS to enable CRES suppliers to offer supplier consolidated billing.⁹⁶ While Duke has acknowledged that the proposed CIS could be *capable* of listing non-commodity charges as a separate line item on customer billing statements, it has not committed to design the system to incorporate that functionality.⁹⁷

Fundamentally, the Stipulation delegates the authority for Duke to design a CIS system whose scope and capabilities won’t be known until after Duke submits its supplemental infrastructure management plan filing. What’s more, Duke has previously

⁹⁴ Joint Ex. 1 at 17.

⁹⁵ IGS Ex. 11 (Duke Response to IGS-INT-01-007, Case No. 17-0032-EL-AIR).

⁹⁶ RESA-IGS Ex. 5, MW-1 (Duke Response to IGS-INT-01-022(d), Case Nos. 17-1263-EL-SSO, *et al.*).

⁹⁷ RESA-IGS Ex. 5, MW-1 (Duke Response to IGS-INT-01-020(c) and (d), Case Nos. 17-1263-EL-SSO, *et al.*).

implemented non-commodity billing services and interval meter data management systems that were designed to create barriers to CRES provider participation.⁹⁸ Given the billing system's uncertainties, and Duke's penchant for implementing billing programs that often exclude functionality for CRES providers, as a prerequisite to the infrastructure management plan the Commission should require Duke to implement CIS-specific design parameters that contemplate a market-based option, supplier consolidated billing, and non-commodity billing.

1. Market-based solution

Duke has yet to disclose the cost of upgrading the CIS, but it is tentatively projected to cost at least \$45-50 million. While it may cost this much for Duke to construct the CIS, there may be a cheaper market-based option.⁹⁹ Thus, in Duke's filing, the Commission should also require Duke to evaluate the costs and benefits of transferring all billing responsibilities to CRES providers and SSO auction winners, and compare these costs and benefits to those expected from an enhanced CIS.¹⁰⁰ Given the magnitude of Duke's projected new billing system, there may be more reasonably priced means through which shopping and non-shopping Duke customers can receive their retail electric bill. Moreover, a market-based solution would place the risk of investment on suppliers rather than customers.¹⁰¹

2. Supplier Consolidated Billing

⁹⁸ RESA-IGS Ex. 5 at 15.

⁹⁹ RESA-IGS Ex. 5 at 8.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

The Commission should direct Duke to include in its infrastructure management plan a process that can, and will, enable supplier consolidated billing for CRES providers.¹⁰² Supplier consolidated billing is the inverse of the traditional utility billing model in that a customer's supplier, rather than the utility, issues a single bill that contains the customer's generation, supply, and distribution charges. Under the supplier consolidated billing model, the customer's supplier also assumes the responsibility of collecting the utility's distribution receivables.¹⁰³ CRES providers that participate in a supplier consolidated billing program are subject to the specific consolidated billing requirements enumerated in OAC 4901:1-21-18.

Duke is unwilling to commit to design its CIS system proposal to enable supplier consolidated billing capabilities.¹⁰⁴ Duke takes the position that it is unable to determine whether the proposed billing system will enable supplier consolidated billing "until after the Initiate (analyze) and Design phase of the project is complete."¹⁰⁵ Although Duke has indicated that its Initiate and Design phases were set to begin in 2018,¹⁰⁶ it has not provided any updates on the proposed billing system's design capabilities as of the date of this filing.

Given that Duke has indicated that its proposed billing system will cost Ohio ratepayers between 45-50 million dollars, it would be patently unreasonable for Duke to

¹⁰² *Id.* at 8-11.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at MW-1 (Duke Response to IGS-INT-01-022(d)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

develop a billing system that does not reflect market conditions and incorporate supplier consolidated billing into its program design. Supplier consolidated billing will enable CRES providers to offer more innovative products and services through direct billing options, and should eliminate the need for a supplier to utilize dual billing¹⁰⁷ for non-commodity services in the Duke service territory. If Duke is sincere in its desire to offer customers bill formatting improvements that best serve the needs of customers in its service territory, then the proposed billing system should be designed to accommodate the needs of both CRES and SSO customers. Accordingly, the Commission should direct Duke to include in its infrastructure management plan a CIS program design that will enable supplier consolidated billing for CRES providers.

3. Non-Commodity Billing

The Commission should also direct Duke to include in its infrastructure management plan a CIS program design that can, and will, facilitate non-commodity billing for CRES providers.¹⁰⁸

Non-commodity billing refers to the placement of charges related to products and services other than retail electric service on the utility consolidated bill.¹⁰⁹ Non-commodity products and services include, but are not limited to, smart thermostats, home protection, and other load control products that enable customers to use electricity more efficiently, reduce energy costs, and enhance electric reliability on the grid.¹¹⁰

¹⁰⁷ See *Id.* at 9. Under a dual billing option, CRES providers must issue a separate bill for electric generation charges, and Duke still issues a bill for distribution charges. Few CRES suppliers elect dual billing for residential customers because of the inconvenience associated with managing two separate bills.

¹⁰⁸ *Id.* at 11-15.

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.* at 13.

Duke acknowledges that under its current CIS it lists non-commodity items on customer billing statements for its affiliate, Duke Energy One.¹¹¹ Nevertheless, Duke has rejected formal requests from IGS to similarly place its non-commodity charges on the utility bill.¹¹² Duke also acknowledges that its proposed CIS design can list non-commodity charges as a separate billing line item, yet it won't commit to knowing whether the system will be configured to facilitate CRES non-commodity billing "until the Design phase of the project is complete."¹¹³

Under R.C. 4905.35(A), a public utility is prohibited from giving "any undue or unreasonable advantage to any person, firm, corporation, or locality, or subject any person, firm, *corporation, or locality to any undue or unreasonable prejudice or disadvantage.*" (emphasis added). Moreover, R.C. 4928.17(A)(2) and (3) expressly prohibit Duke from providing *any affiliate or part of its business engaged in the supply of nonelectric products and services* with an unfair competitive advantage through the preferential use of its utility billing and mailing systems.

Ensuring a level playing field in the design of Duke's new CIS is tantamount for ensuring compliance with R.C. 4905.35(A) and 4928.17(A)(2)-(3). Given Duke's reluctance to offer CRES providers the same, or similar, billing functionalities it offers its affiliates, and its acknowledgement that the scope of the proposed system's billing functionalities for CRES providers are largely unknown, the Commission should direct

¹¹¹ *Id.* at MW-1 (Duke Response to IGS-INT-01-020(b)).

¹¹² RESA-IGS Ex. 5 at 12.

¹¹³ *Id.* at MW-1 (Duke Response to IGS-INT-01-020(d)) (emphasis added).

Duke to include in its infrastructure management plan a CIS program design that will enable non-commodity billing for CRES providers.

F. The Commission should reject Rider PSR

The PSR proposal would shift the cost and risk of OVEC ownership to Duke customers. If the wholesale market revenues that Duke receives are less than the cost-based rate that Duke must pay to OVEC under the ICPA, then Duke would collect the difference from its distribution customers through the PSR.¹¹⁴ Although the Commission wisely rejected Duke's last proposal to subsidize its uneconomic interest in OVEC, Duke was not deterred from seeking a second bite at the apple.

The Stipulation would allow Duke to retroactively collect from customers the net losses associated with its OVEC interest going back to January 1, 2018. Based upon Duke's own testimony and projections, the PSR will be an \$18 million charge on day one and continue to be a charge in each and every year of the ESP.¹¹⁵ Indeed:

Mr. Rose concluded in his base case that the present value of the company's request will cost customers approximately \$77 million dollars under his base scenario or approximately \$66 million in his other scenario that he describes as AEO 2018 Reference Case.¹¹⁶

As more fully explained in this brief, the Commission should not indulge Duke's PSR request. Specifically:

- The PSR is contrary to Ohio Law;

¹¹⁴ Duke Ex. 29 at 7.

¹¹⁵ Tr. Vol. V at 957 L 18-22; Tr. Vol. V at 945 L 20 to 946 L 20.

¹¹⁶ RESA-IGS Ex. 1 at 27.

- The PSR provides no hedge to Duke customers; rather it insulates Duke's shareholders against market risk.

Accordingly, the PSR is unlawful and should be rejected.

1. The PSR is equivalent to a transition charge

During the process of restructuring Ohio's energy markets, the General Assembly provided utilities with a one-time opportunity to file an application to recover prudently incurred generation investment that would not be recoverable in a competitive market.¹¹⁷ R.C. 4928.31-4928.40 *et seq.* This investment is commonly referred to as stranded costs or transition costs, which utilities may collect through transition revenue riders. Transition revenue was quantified by comparing the difference of the unbundled generation revenue that a utility could collect prior to restructuring and expected market revenue generation resources it would receive in a competitive market.¹¹⁸ Most Ohio utilities performed a comparison to determine whether the revenue produced by the generating assets in a competitive market would allow the utility to recover the net book value of those assets in existence on December 31, 2000.¹¹⁹

The deadline for recovery of generation-related transition revenue ended on December 31, 2005¹²⁰ with the end of the market development period.¹²¹ After that point,

¹¹⁷ RESA-IGS Ex. 1 at 18-19.

¹¹⁸ *Id.* at 19-22.

¹¹⁹ *Id.* at 20.

¹²⁰ *Id.* at 21; R.C. 4928.38.

¹²¹ Utilities were allowed to recover regulatory assets until December 31, 2010.

the utility shall be on its own in the competitive market and shall not recover any additional transition revenue **or equivalent revenue**:

The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.¹²²

See also *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 444-449 (2016) (hereinafter “*AEP ESP II Decision*”); see also *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166 (2016) (hereinafter “*DP&L ESP II Decision*”). Interpreting this statutory language, the Court has determined that the Commission lacks authority to authorize utilities to recover out-of-market costs from all customers: “the commission lacked authority to approve the RSR, since it allowed the company to recover costs that are otherwise unrecoverable in the competitive generation market. We find this argument well taken.” *AEP ESP II Decision* at 443. Thus, following the market development period (2005), the utility may not receive handouts from all distribution customers to make up for a shortfall in market-based compensation.

The Stipulation would permit Duke to collect above-market revenue through a non-bypassable charge to shore up its bad OVEC investment.¹²³ By providing Duke with out-of-market compensation for its OVEC-related losses, the Stipulation would allow Duke to collect the transition revenue or equivalent revenue in violation of R.C. 4928.38 and the

¹²² R.C. 4928.38 (emphasis added).

¹²³ RESA-IGS Ex. 1 at 26-28.

Supreme Court of Ohio's precedent in the *AEP ESP II Decision* and *DP&L ESP II Decision*.¹²⁴

Duke's claim that the PSR is a hedge against rising wholesale prices does not save it from being a transition charge. This reasoning is contradicted by Duke's own testimony, which indicates that the rider will be a charge and the purpose of the rider is to insulate Duke from the risk associated with the wholesale market.¹²⁵ This purpose is wholly inappropriate, given that "the utility shall be fully on its own in the competitive market."¹²⁶

Moreover, calling the PSR a "hedge" does not change the character of the charge at issue. The Supreme Court has noted, labels are irrelevant—the Court will look to the underlying nature of the charge. And if the charge allows the utility to collect out-of-market revenue from all customers, it is a transition charge:

The fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the company is receiving the equivalent of transition revenue under the guise of the RSR. The commission's overly narrow definition of transition revenue overlooks that R.C. 4928.38 bars "the receipt of transition revenues *or any equivalent revenues* by an electric utility" after 2010. (Emphasis added.) By inserting the phrase "any equivalent revenues," the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name. Therefore, we find that the commission erred in focusing solely on whether AEP had sought to receive transition revenues that are now barred.

In sum, we find that the commission erred in focusing solely on whether AEP had expressly sought to receive transition revenues *rather than looking at the nature of the costs recovered through the RSR*. R.C. 4928.38 bars the "the receipt of transition revenues *or any equivalent revenues* by an

¹²⁴ *Id.*

¹²⁵ Tr. Vol. IV at 726 L 1-5.

¹²⁶ R.C. 4928.38.

electric utility." Based on the record before us, *we find that the PSR in this case recovers the equivalent of transition revenue and the commission erred when it found otherwise.*

AEP ESP II Decision at 445 (emphasis added); *see also DP&L ESP II Decision*. Notably, in these cases, the Court reversed "stability charges" authorized under R.C. 4928.143(B)(2)(d) as providing untimely and unlawful transition revenue.

Here, Duke acknowledges in several portions of its own testimony that the purpose of the PSR is to permit Duke to collect out-of-market revenues from all customers to insulate Duke from the impact of the competitive market.¹²⁷ The PSR guarantees that Duke may recover the prudently incurred investment cost of generation assets from all distribution customers regardless of the market price. The structure of the PSR is nearly identical to the formula for determining transition revenue.¹²⁸ The PSR charge is based on whether the OVEC units' market-based revenues recover their net book value plus a rate of return on that investment.¹²⁹

Accordingly, the PSR would allow Duke to collect transition revenue that is otherwise not recoverable in a competitive market. Therefore, it should be rejected.

2. The PSR is not authorizable under R.C. 4928.143

The Supreme Court of Ohio has indicated that the Commission may approve only ESP provisions authorized by R.C. 4928.143. *In re Application of Columbus Southern Power*, 128 Ohio St. 3d 512, (2011). R.C. 4928.143 provides only two instances in which the Commission may authorize nonbypassable generation-related riders: divisions (B)(2)

¹²⁷ Tr. Vol. IV at 726 L 1-5.

¹²⁸ RESA-IGS Ex. 1 at 26-28.

¹²⁹ *Id.*

(b) and (c). Under those two divisions, a nonbypassable charge is available to recover costs associated with generating facilities *under construction or constructed after 2009* that meet additional statutory requirements. The General Assembly's specific directive that a non-bypassable generation-related charge may be authorized under these two sections indicates a lack of authority to authorize such a charge in any other circumstances. The Supreme Court has stated:

As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where, as in the cases *sub judice*, the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions.

Montgomery County Bd. of Com'n's v. Pub. Util. Comm'n of Ohio, 28 Ohio St.3d 171, 175 (1986) (citations omitted). Because the PSR does not pertain to the construction of new generation or otherwise satisfy the criteria of divisions (b) and (c), it cannot be lawfully authorized in an ESP. Therefore, the Commission should reject it.

Further, the Commission must reject the PSR because it violates bedrock principles of Ohio law and policy, which prohibit subsidies to the generation portion of the business. "Pursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A)." *Industrial Energy Users-Ohio v. Pub Util. Comm'n*, 2008-Ohio-990 at ¶6. Thus, generation is no longer subject to the Commission's economic regulation.

Unbundling regulated and unregulated services "ensured that distribution service would not subsidize the generation portion of the business. In short, each service component was required to stand on its own." *Migden-Ostrander v. Pub. Util. Comm'n*,

102 Ohio St.3d 451. 453 (2004). These regulatory principles are codified in R.C. 4928.02(H). That section prohibits “the recovery of any generation-related costs through distribution or transmission rates.” To that end, the Commission has held that R.C. 4928.02(H) prohibits nonbypassable charges that are designed to collect generation-related costs.¹³⁰

The PSR is undeniably linked to Duke’s ownership interest in two generating assets. It would require Ohio customers to guarantee Duke’s investment in these resources. In short, it is unlawful for the Commission to ensure that distribution customers provide out-of-market compensation to support Duke’s uneconomic investment in generation resources.

3. The PSR is Not a Hedge for Customers

In addition to the various legal concerns identified above, the PSR simply will not provide any value for customers. Duke claims that the PSR is a hedge for customers against volatile electric prices. In reality, the PSR is a hedge to guarantee Duke’s earnings.

The overwhelming majority of evidence in the record demonstrates that PSR is merely intended to prop up Duke’s earnings. The Commission now has several years of experience with OVEC, and one thing is clear. These assets are simply not efficient or profitable. By Duke’s own admission, for some time, OVEC has cost more to operate than the market revenues it earns. Duke’s own expert witness, Judah Rose, testified in this proceeding that under the two scenarios he modeled, OVEC is will cost customers

¹³⁰ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012).

approximately \$77 million dollars under his base scenario or approximately \$66 million on a net present value basis.

Indeed, Mr. Rose is so confident that the OVEC assets will be a drag on earnings that he submitted testimony in the US Bankruptcy Court recommending that FirstEnergy Solutions be permitted to terminate its obligations under the ICPA in order to reduce future laws. In that case, Mr. Rose testified that:

Market circumstances have resulted in an extended period of commodity prices and REC prices much below those prices found in the Executory PPAs. The main drivers to the collapse in prices include:

- Lower natural gas prices due to continued improvements in natural gas fracking;
- Excess generating capacity due in part to lower than expected load growth;
- Lower cost of construction for renewable technologies, and/or improved performance (e.g., higher capacity factors); and
- Surplus of RECs.¹³¹

Mr. Rose further determined in that case—with respect to the same assets—“[t]aken together, these market forces have decreased wholesale electricity prices, and prices of RECs, to levels not envisioned at the time the Executory PPAs were signed. *Such market forces have prevailed for the last three to four years and are now expected to continue for the next few years, at a minimum.*”¹³² In all scenarios, OVEC is proposed to lose money: “The estimated costs reflect an expected or base case. This case is based on available information about market and regulatory conditions. *I have also examined*

¹³¹ Sierra Club Ex. 1 at 4.

¹³² *Id.* (emphasis added).

sensitivity cases and all cases show high estimated damages."¹³³ Although FES owned half of Duke's interest in OVEC, "ICF has calculated that FG would lose \$268 million on an undiscounted basis if FG was required to perform under the OVEC ICPA through the end of the contract term."¹³⁴

Moreover, to the extent that the bankruptcy court indulges Mr. Rose's recommendation, it is possible that Duke and the remaining sponsoring companies may be stuck holding the bag to pick up FES' share.¹³⁵

In any event, even if there was some potential change that the OVEC assets may one day turn a profit, even a 180 degree turnaround would not support a conclusion that the PSR is a hedge. The dollar per megawatt hour impact is simply too small to make a difference. For example, Duke witness Wathen testified that if Mr. Rose's projections are correct, the PSR would be a monthly charge in the range of \$.60 to \$.80, assuming annual losses of \$12 million to \$14 million.¹³⁶ Logically, if the PSR were to miraculously become a credit for \$12 to \$14 million gains, it would be a credit of \$.60 to \$.80 per month. Because a typical residential customer bill exceeds \$100 per month, the PSR provides nothing but a de minimis impact—it is no hedge value whatsoever. Rather, it is simply an unlawful and unreasonable line item nuisance to protect Duke's shareholders.

Rather than providing a hedge, the PSR undermines the ability for a customer to have stability. It injects an unknown variable—albeit a small one—into the bill that is completely outside the customers' control. If a customer has a desire for a hedge or

¹³³ *Id.* at 6 (emphasis added).

¹³⁴ IGS Ex. 2 at 8.

¹³⁵ Tr. Vol. I at 204-206.

¹³⁶ Tr. Vol. V at 956 L 12-14.

certainty, they can contract with a CRES provider for a fixed price rate, or a “flat bill” product that does not change with usage.

4. If the Commission Approves the PSR, it Should be Bypassable and Limited to OVEC.

IGS adamantly opposes the PSR. But, if it is approved, it should be bypassable and only for the duration of Duke’s ESP. While a PSR of any form would be anticompetitive, a bypassable PSR would at least not require all distribution customers to subsidize a competitive service and it would not send as negative of a signal to other generators in the market. Moreover, it would preserve customers’ right to choose—as is their right under Ohio law.

V. CONCLUSION

The Commission’s framework for evaluating Stipulations requires it to consider both the law and the public interest. The proposed Stipulation violates both requirements. It contains numerous proposals designed to insulate Duke and the SSO from the risks and costs that all other market participants must bear. The Stipulation proposes to achieve this outcome on the backs of all distribution customers. Therefore, the Commission should not authorize the Stipulation without significant modification.

Specifically, the Commission should condition approval of the Stipulation on rejecting all proposals to subsidize the SSO, rejecting Duke’s proposal to subsidize batteries that provide competitive services, rejecting the proposal to provide transition revenue to Duke’s old, efficient power plants. Moreover, the Commission should not squander this opportunity to order specific parameters for Duke’s upcoming CIS application. This is an opportunity to ensure that Duke considers all prudent options and designs its new system to advance the competitive market—as opposed to simply the

Duke family of companies. These modifications are necessary to bring the Stipulation into line with Ohio law and to protect the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of Interstate Gas Supply, Inc. was served via regular electronic transmission to the persons listed below, on September 11, 2018.

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