

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' REPLY BRIEF
REGARDING RIDER PSR**

Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, Environmental Defense Fund, and Sierra Club (collectively, the “Conservation Groups”) hereby submit this Reply to the arguments made by Duke Energy Ohio (“Duke”) and Commission Staff regarding the Price Stabilization Rider (“Rider PSR”).¹ In their Initial Briefs, Duke and Staff spend more words describing the outcome of other utilities’ cases than they do explaining how the facts of this case show Rider PSR would impact Duke’s customers—and for understandable reason. Duke’s own evidence shows its customers would lose \$77 million, even without any consideration of the impact of the FirstEnergy Solutions (“FES”) bankruptcy on the Ohio Valley Electric Corporation (“OVEC”), if Rider PSR were approved.

The justifications offered by Duke and Staff for Rider PSR all fail to demonstrate why the Commission should throw good money after bad in light of evidence exclusively showing that OVEC is losing millions of dollars a year now, and is likely to continue to do so through the life of the rider. Even Staff does not stand by the argument that Rider PSR would itself benefit customers, instead pointing to other benefits of the proposed Stipulation package, although none of those are sufficient to outweigh the projected costs

¹ To conserve the Commission’s and the parties’ resources, the Conservation Groups are filing this joint Reply Brief Regarding Rider PSR. Ohio Environmental Counsel and Environmental Defense Fund are contemporaneously filing a reply brief on net metering and data access issues.

to Duke customers of subsidizing OVEC. Meanwhile, Duke's hedge theory suffers from the fatal flaw that its own evidence shows that Rider PSR would be a charge in every year, with no record evidence to support any reasonable hope of a more favorable outcome. Duke has likewise failed to submit sufficient evidence to demonstrate the need for a bailout to support its credit rating. And neither the history of OVEC nor the Commission's consideration of other utilities' cases involving OVEC justifies approving Rider PSR on this record. For the reasons offered in our Initial Brief and in this Reply, the Conservation Groups ask that the Commission reject the Rider PSR provision of the Stipulation.

I. Duke and Staff have not shown that the overall package is in the public interest.

Duke and the other signatories to the Stipulation have failed to carry their burden to show that the projected costs of Rider PSR, and the risk of still higher costs, are part of an overall package that benefits customers and the public interest. R.C. 4928.143(C)(1); *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. Fundamentally, this task requires the supporters of the Stipulation to recognize the negative impacts of requiring Duke’s customers to subsidize uneconomic coal-burning plants, to the tune of \$77 million or more over the next 6 ½ years, and to justify those impacts based on other benefits achieved through the Stipulation. They have not done so.

Duke continues to represent Rider PSR as an independent benefit of the Stipulation, despite its own best-case forecast that subsidizing the uneconomic OVEC coal plants will cost its customers \$77 million.² These arguments are inconsistent with Staff’s own acknowledgment that “Company Witness Rose’s current forecast”—the most optimistic one in the record—“projects a negative result for Rider PSR, when sunk cost[s] are included,” and therefore Rider PSR must be offset by some other benefits of the Stipulation.³

For the Commission to approve the Stipulation under the applicable standard, it must explicitly determine which of these arguments it is accepting based on the record: is the Stipulation beneficial as a package because Rider PSR itself provides benefits to

² See Duke Brief at 32-44.

³ Staff Brief at 37-38.

customers and the public interest, or because other benefits in the Stipulation offset the projected costs to customers? *See Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999). If it is the former, the evidence in the record does not support a determination that Rider PSR will benefit customers and the public interest, as discussed further below and in our Initial Brief.⁴ If it is the latter, then the same problem applies since neither Duke nor Staff have shown that other benefits of the proposed Stipulation are worth customers paying \$77 million to Duke shareholders and taking on the risk of paying even more if the FES bankruptcy shifts additional OVEC costs onto Duke.

The primary quantitative benefit that Duke identifies in the proposed Stipulation is an annual decrease of \$19.2 million in base rates.⁵ However, this purported rate decrease is near the top of the range in the original Staff Report, which recommended an \$18.4 to \$28.9 million decrease.⁶ Given that a \$19.2 million decrease is almost a best-case scenario for Duke unless the Company had been able to convince the Commission to go outside the range recommended by the Staff Report, it is unreasonable to view this Stipulation provision as a gain for customers. Simply put, this near best-case scenario from Duke's perspective (i.e., the smallest possible rate decrease) cannot be viewed as a benefit to customers of the Stipulation. Moreover, the Stipulation also authorizes Duke to recover at least \$42 million per year over base distribution rates through Rider DCI.⁷

⁴ *See* Conservation Groups' Initial Brief Regarding Rider PSR at 9-13.

⁵ Duke Brief at 7.

⁶ Staff Exhibit 1, Staff Report at 6.

⁷ Joint Exhibit 1, Stipulation at 11.

In terms of total quantitative bill impacts, that amount from Rider DCI more than offsets any purported base rate decrease.

Absent any actual monetary benefits to customers from the Stipulation, Duke and Staff provide a laundry list of “qualitative benefits” from the proposed Stipulation that mostly boil down to provisions that commit Duke to do things it already proposed to do, or that allow Duke to recover more money from customers for purposes of providing straightforward utility service.⁸ For example, Duke previously committed to provide the “retail market enhancements” enabled through Rider PF⁹ when the Commission authorized cost recovery for its initial smart meter deployment, and Duke has admitted this Stipulation provides no new, additional benefits—only an avenue for additional cost recovery.¹⁰ Meanwhile, Staff plainly admits that Stipulation provisions like Rider ESRR simply authorize cost recovery for a basic activity—vegetation management—that Duke must perform to avoid outages.¹¹

Even if the Commission concludes that these arguable benefits are worth a projected cost of \$77 million, as Staff contends,¹² neither Staff nor Duke has confronted the risk that Rider PSR may cost far more. As explained in the Conservation Groups’ Initial Brief addressing Rider PSR, OVEC has represented in litigation that FES’s rejection of the Inter-Company Power Agreement (“ICPA”) in its ongoing bankruptcy proceeding could shift “hundreds of millions of dollars” of additional costs onto the

⁸ Duke Brief at 7-8; Staff Brief at 38-44.

⁹ Staff Brief at 38-39.

¹⁰ See OCC Brief at 55 (citing Hearing Transcript Vol. II at 401:25-402:3), 61-63.

¹¹ Staff Brief at 44.

¹² *Id.*

remaining Sponsoring Companies, including Duke.¹³ Duke witness Rose did not account for that risk in his forecast, and neither Duke nor Staff have addressed it in their briefs, treating the Rose projections as a worst-case scenario. Accordingly, none of their arguments about the overall benefits of the proposed Stipulation are adequately based on the undisputed record regarding the risks of putting customers on the hook for a joint venture that is implicated in a co-owner's bankruptcy. Duke and the other proponents of the Stipulation have thus failed to meet their burden to show that the entire Stipulation package will benefit customers and the public interest.

II. Duke's hedge argument ignores the facts in the record in this case.

Duke's only support for the proposition that Rider PSR would operate as a beneficial hedge cracks under any inspection. Duke supports its theory that Rider PSR would promote rate stability with reference to Judah Rose's finding that OVEC costs have been more stable than PJM wholesale electric prices.¹⁴ But this fact does not show that Rider PSR would provide a hedge for customers because in every year Duke's own projections show customers would be charged under the Rider.¹⁵ Duke's evidence shows that the most likely impact of Rider PSR would be an inflationary rider, one that would tend to increase bills only.

Duke has not even bothered to forecast the level to which wholesale market prices would have to sky rocket for Rider PSR to possibly provide a credit to customers—nor

¹³ Conservation Groups' Initial Brief Regarding Rider PSR at 11-13; Sierra Club Exhibit 4, Direct Testimony of Jeremy I. Fisher, Phd ("Fisher Direct Testimony") at 8-16.

¹⁴ Duke Brief at 39.

¹⁵ Conservation Groups' Initial Brief Regarding Rider PSR at 15; Fisher Direct Testimony at 17-18.

the likelihood of such a dramatic price increase. Borrowing Duke's insurance analogy,¹⁶ Rider PSR is a very expensive insurance policy against a dramatic rise in power prices that is far above any forecast in the record of this case. Worse still for Duke's customers, as the Conservation Groups explained in our Initial Brief, OVEC costs face significant uncertainty and, in particular, risk of higher costs than forecasted related to the FES bankruptcy, environmental requirements, and other issues.¹⁷ Thus, Rider PSR is a very expensive insurance policy with no defined payout because OVEC costs may significantly exceed Duke's expectations. Aside from simply asking the Commission to ignore the record (see Section III below), Duke makes no other arguments in support of Rider PSR's purported hedge aspect. As the Conservation Groups explained in our Initial Brief,¹⁸ Duke incorrectly claims that Rider PSR would operate as a beneficial hedge and the Commission should accord this claim no weight when considering the overall public interest of the Stipulation.

III. The Commission should reject Duke's and Staff's attempts to distance themselves from facts in the record.

The Commission should reject the suggestion of Duke and Staff to ignore the evidence in the record regarding Rider PSR. Perhaps understandably given that the record in this case shows that Rider PSR would be terrible for customers, both Duke and Staff encourage the Commission to ignore Duke's forecast of OVEC losses and decide

¹⁶ Duke Brief at 39.

¹⁷ Conservation Groups' Initial Brief Regarding Rider PSR at 11-13; Fisher Direct Testimony at 8-16.

¹⁸ Conservation Groups' Initial Brief Regarding Rider PSR at 14-15.

the case on non-record facts, including by asking the Commission to simply duplicate decisions in other proceedings. The Commission should decline that invitation and instead decide this case on the record before it. *See Ideal Transp. Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 195, 199, 326 N.E.2d 861, 863 (1975) (“the Public Utilities Commission must base its decision upon the record before it”).

Duke offers a few theories on how the Commission might ignore the facts in the record. Duke says that “projections are simply that: projections,”¹⁹ implying the Duke’s estimate of the \$77 million loss could therefore be wrong. In support of this argument, Duke observes that witness Rose’s forecasts are based on “weather-normalized conditions,” and that extreme weather might make Rider PSR more valuable to customers than expected.²⁰ But it is axiomatic that weather conditions could be both more extreme and less extreme than expected, which is why Duke concedes that weather-normalized forecasts are ultimately appropriate.²¹ Generally speaking when winters are warmer than average, for example, as Ohio’s have been the last few years, energy prices and power plant revenues are driven down and costs to customers under the Rider PSR would go up. Duke did not offer any evidence on expected deviation from “normal” weather through 2025, and the Commission should ignore the invitation to speculate about the weather. Duke’s reference to the possibility of extreme weather is simply an invitation to ignore the conclusion of Duke’s economic prediction.

¹⁹ Duke Brief at 40.

²⁰ *Id.* (“history shows that weather is not always normal.”).

²¹ *Id.* (“Rose’s projections are based upon weather-normalized conditions, *as they should be.*”) (emphasis added).

In addition, Duke suggests that the Commission might decide the case by reference to the Commission’s decisions in AEP Ohio’s and DP&L’s proceedings in which OVEC bailouts were approved, claiming that the “only difference” between the OVEC entitlements is the “timing of their proposals to this Commission.”²² This is not so. Another critical difference between the AEP Ohio and DP&L proposals, on the one hand, and the Duke proposal, on the other, is that these other proposals were premised on entirely different factual records. Importantly, neither AEP Ohio’s nor DP&L’s proposals were founded on a record that showed overwhelming losses for customers in every year of the proposed rider. Nor were the AEP Ohio or DP&L proposals decided on a record where one of the OVEC owners, FES, had declared bankruptcy, seeking to avoid paying its share of OVEC costs, which creates a risk that did not exist at the time the previous OVEC shareholder bailouts were decided.

Staff also wrongly encourages the Commission to ignore the facts by arguing that the Commission should look to previous OVEC bailout decisions,²³ and that it has become more difficult to forecast Rider PSR costs due to recent events, in particular purported volatility in the PJM capacity market.²⁴ But Staff’s concern about the difficulty of forecasting PJM capacity market reflects a lack of awareness of the facts in this record. Duke’s forecast through May 2022—i.e., most of the Rider PSR period—relies on PJM capacity prices that are already known, and thus there is no uncertainty in (or difficulty in forecasting) capacity prices for the majority of the Rider period. And

²² *Id.* at 45.

²³ Staff Brief at 74.

²⁴ *Id.* at 36.

Rose's projections after May 2022 assume "higher capacity prices" than those before that date,²⁵ so Duke's projections already assume OVEC will generate higher capacity revenues in the out years of the Rose forecast. For Staff's concern about capacity prices to have any validity, Staff would have to argue that capacity prices are likely to go even higher than Rose has forecast, but there is no evidence in the record supporting such suggestion and Staff does not make that argument.

All the information in the record shows that Duke's customers would pay a significant charge if Rider PSR were approved. The Commission must base its decision in this proceeding on the record in this case.

IV. The conditions in the Stipulation related to OVEC do not meaningfully protect customers, and the Commission should ignore them in determining the public interest.

In support of its theory that Rider PSR is in the public interest, Duke points to certain conditions related to the Rider PSR included in the Stipulation.²⁶ But these conditions are largely meaningless and do not support a finding that Rider PSR is in the public interest.

First, the Stipulation's condition related to forced-outage costs²⁷ provides no meaningful protection to Duke's customers because the likelihood that all eleven OVEC coal-fired units would be simultaneously forced out of service for 90 days—and thus provide zero energy to Duke such that this condition is triggered—is infinitesimally

²⁵ Duke Exhibit 8, Supplemental Testimony of Judah L. Rose on Behalf of Duke Energy Ohio at 13.

²⁶ Duke Brief at 34-35; *see* Stipulation at 19.

²⁷ Duke Brief at 34.

low.²⁸ As a performance guarantee, this condition is nearly useless, absent a catastrophic occurrence that impacted both OVEC plants 180 miles away from each other.²⁹ The Commission should accord it no weight.

Similarly, the “prudency reviews” provision does not protect customers, as the reviews involve Duke’s practices for selling its share of OVEC into wholesale markets only.³⁰ The Commission would audit Duke’s sales practices only—not the underlying OVEC costs or OVEC’s operations. Duke’s ability to manage the sales of OVEC output into the PJM wholesale markets has not been at issue, but the expenditures incurred at OVEC surely are. Duke has no control over OVEC operations, however, so any of OVEC’s imprudent decisions and operations would be passed to Duke’s customers unabated, regardless of this condition. There is no meaningful prudence review that this Commission could undertake with respect to Duke that would impact OVEC’s costs or operations, and the reviews called for by the Stipulation are therefore not meaningful.

Last, the provision that purports to require Duke to use reasonable efforts to transfer its OVEC entitlement³¹ is also meaningless as a customer protection. This condition also has no real meaning because Duke is already under an obligation to divest from OVEC, and has failed to do so. If Rider PSR were approved, Duke would have no incentive to seek to transfer its OVEC share—in fact, the value of that share would be

²⁸ Fisher Direct Testimony at 42.

²⁹ *Id.*

³⁰ *See* Duke Brief at 34.

³¹ *See id.* at 35.

dramatically lower for an entity that did not have guaranteed cost recovery as provided via Rider PSR.

The Stipulation conditions purporting to protect customers from Rider PSR are not meaningful and should be viewed as such.

V. Rider PSR is not justified due to Duke's credit rating concerns.

As the Conservation Groups showed in our initial brief, Duke's credit rating theory suffers from fatal flaws, such as that Duke has not shown that denial of Rider PSR alone would impact Duke's credit rating or that any increased borrowing costs would exceed the costs of Rider PSR.³² In its Initial Brief, Duke does not fill in these factual gaps as necessary to support a bailout premised on credit ratings. Nowhere does Duke demonstrate that denial of Rider PSR by itself would impact Duke's credit rating.³³ Nowhere does Duke argue that changing Duke's credit rating one notch would significantly impact its cost of borrowing.³⁴ Nowhere does Duke compare any increase in borrowing costs to the known costs of Rider PSR.³⁵

In the absence of any analytical support for a credit rating subsidy, Duke makes two broad arguments in favor of a credit-rating bailout, both of which are unavailing. First, Duke offers speculation that if a cash flow to debt measure falls below 19 percent

³² Conservation Groups' Initial Brief Regarding Rider PSR at 21-22.

³³ See Duke Brief at 41-44; see also Hearing Transcript Vol. IV at 715-717 (witness Sullivan acknowledging that Duke did not quantify the impacts of Rider PSR on its credit rating).

³⁴ *Id.*

³⁵ *Id.*

on a “sustained basis” that outcome “could lead” to a credit rating downgrade.³⁶ But Duke does not explain how denial of Rider PSR alone would cause such impact on a sustained basis, especially in light of the “multitude of factors” that impact Duke’s credit rating.³⁷

Second, Duke offers the proposition that credit rating agencies generally increase utilities’ credit scores when state public utility commissions approve cost recovery for utilities.³⁸ While perhaps providing some guidance, this general proposition cannot be relied on to decide a particular case. The Commission should reject Duke’s suggestion that it should do the bidding of the credit rating agencies and instead protect Duke’s customers from Rider PSR.

VI. The history of OVEC does not justify Rider PSR, nor is OVEC especially unique.

Duke attempts to draw on notions of patriotism and national duty as reasons why customers should pay a projected \$18 million charge during 2018 and further charges in every year through 2025.³⁹ Duke’s history of OVEC ignores the most relevant period, the last 15 years. Since the end of the federal program (at which time all federal

³⁶ Duke Brief at 42-43.

³⁷ Hearing Transcript Vol. IV at 716 (witness Sullivan confirming that Duke’s credit ratings are impacted by a “multitude of factors”).

³⁸ Duke Brief at 43-44.

³⁹ *See id.* at 37 (the request to create OVEC “was made in order to advance and protect the interests of the United States.”).

obligations were settled) in 2003,⁴⁰ OVEC has been a joint venture among utilities, without a federal customer.⁴¹

After the end of the atomic program, the OVEC owners have made consequential decisions without any approvals from this Commission. Duke and other joint venture participants decided to extend the term of the OVEC contract twice after the Department of Energy program ended, with the most recent contract extending its term through 2040. All of OVEC's currently held debt (approximately \$1.4 billion outstanding as of October 2017⁴²) was incurred after the Department of Energy program ended, and OVEC has undertaken significant capital spending efforts since that time as well. During the re-negotiation of the ICPA, Duke and the other Sponsoring Companies were under no obligation to extend their own contracts or retain their involvement at OVEC. Indeed, one of the Sponsoring Companies, Allegheny Energy sold its nine percent ownership interest to Buckeye Power in 2004, receiving positive value.⁴³ Duke agreed to extend the ICPA in 2004 and again in 2011 not out of any sense of patriotic duty, but because it thought it would make money on OVEC. Today, instead of Duke's shareholders shouldering the burden of Duke's poor business decision, the Company seeks to impose that burden on its customers in Ohio.

⁴⁰ Fisher Direct Testimony at 31 (explaining that all federal obligations to OVEC were settled at the time of the 2003 termination).

⁴¹ *Id.* at 30-35 (explaining that OVEC has been a private joint venture for many years).

⁴² *Id.* at 10.

⁴³ *Id.* at 32-33.

Duke argues that because OVEC is owned by multiple parties that fact somehow justifies relief under Rider PSR,⁴⁴ but joint ownership of generation units is common in Ohio and elsewhere, and this factor alone should have no bearing on the Commission's decision.⁴⁵ Just because a corporate contract is multi-party does not somehow make it incumbent on customers to relieve a corporate entity of the burdens of that contract. There is nothing especially unique about the OVEC plants. They are money-losing coal-burning power plants in a region with many other such plants.

VII. Conclusion

For the foregoing reasons and those offered in our Initial Brief, the Conservation Groups ask that the Commission reject Rider PSR.

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Respectfully submitted,

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⁴⁴ Duke Brief at 36.

⁴⁵ Fisher Direct Testimony at 30.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Conservation Groups' Reply Brief has been served upon the following parties via electronic mail on October 2, 2018.

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Summary: Reply Brief Regarding Rider PSR electronically filed by Mr. Tony G. Mendoza on behalf of Environmental Law & Policy Center and Natural Resources Defense Council and Environmental Defense Fund and Ohio Environmental Council and Sierra Club