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. 17-0032-EL-AIR
In the Matter of the application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 17-0033-EL-ATA
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 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 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 Administrative Code.	)))))	Case No. 16-1602-EL-ESS

REPLY BRIEF
BY
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I. INTRODUCTION

Duke's Settlement has once again confirmed that the electric security plans allowed by Ohio's 2008 energy law are bad for consumers and the State of Ohio. In this latest bad deal for Cincinnati-area consumers, the Settlement (if approved by the PUCO) will consign 700,000 consumers to paying above-market prices to subsidize two 1950's coal plants. These outmoded power plants cannot compete effectively in the competitive market envisioned by the Ohio General Assembly in 1999 for bringing consumers the benefits of lower prices and higher innovation.[1] These old coal plants are being propped up at consumer expense to maintain utility finances while the power is not even used by Ohio consumers. Only at the intersection of utility advocacy and government regulation does this happen to consumers.

Also bad is that the Settlement was the product of a settlement process where the utility enjoys an unfair bargaining advantage given its veto power (under the 2008 law)

[1] *See* Ohio Senate Bill 3, as passed by the 123rd General Assembly, 1999.

over any Public Utilities Commission of Ohio ("PUCO") settlement modifications.[2] The Settlement's bad outcomes for consumers are significant. In addition to tapping consumers to subsidize old, uneconomic coal plants, Duke looks to charge over 700,000 of its customers for a "smart grid" system that does not work, that it plans to scrap, and for a new metering system that is *supposed* to work. More bad news is that Duke has failed, with money collected from consumers to date, to provide consumers the reliability of service required in the PUCO's reliability standards. And Duke has somehow avoided in the Settlement a requirement that it share with its consumers all its tax savings from the federal Tax Cuts and Jobs Act, which should be resulting now in lower electric bills for consumers.

The PUCO should reject the Settlement as being a great deal for Duke at the expense of a bad deal for Ohioans and their electric bills. The Consumers' Counsel's recommendations for consumer protection are in our initial brief and in this reply brief below.

[2] *See In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2.

II. RECOMMENDATIONS

A. The Settlement was not the product of serious bargaining among knowledgeable parties and therefore violates the settlement test.

1. The Settlement cannot be considered a product of serious bargaining where Duke holds substantially unequal bargaining power.

The Office of the Ohio Consumers' Counsel ("OCC"), and former PUCO Commissioners, have long suggested that settlements involving ESPs (such as the one here) need to be viewed with a great deal of skepticism due to utilities' unequal bargaining power. Testimony from Duke confirms that such skepticism is warranted in this case. Contrary to some parties' assertions, the Settlement was not the product of serious bargaining among knowledgeable parties and should be rejected.[3]

In evaluating the Settlement, Duke urges the PUCO to consider the importance of the fact that it is a "global" settlement.[4] This notwithstanding, Duke Witness Wathen admitted that Duke under the ESP statute has the unilateral statutory right to blow up the Settlement if the PUCO modifies the ESP.[5] Although Duke Witness Wathen asserted that the modification would have to be "material,"[6] he acknowledged that Duke, and Duke alone, would be the one to decide what is a "material" modification.[7] And it would

[3] *See* Duke's Initial Brief at 9-11; PUCO Staff's Initial Brief at 8-11; OEG's Initial Brief at 3. Nor is the Settlement supported by diverse interests, as OCC explained in its Initial Brief, a consideration that PUCO Staff Witness Donlon admitted has "been something we always state the Staff does look at." *See* Hearing Transcript at Vol. XII, p. 2037:4-10.

[4] *See, e.g.,* Hearing Transcript at Vol. V, p. 1048:20-24.

[5] *See id.* at 1048:20-1049:1.

[6] *See id.* at 1049:13-20.

[7] *See id.* at 1050:8-15.

not matter what other parties think of Duke's decision (which confirms Duke's unequal bargaining power): "I wouldn't expect that every party would agree with what we deemed to be material."[8]

PUCO Staff Witness Donlon's testimony that the settlement test's first part is met is not credible. He left the PUCO Staff on January 2, 2018.[9] The Settlement was not filed until mid-April.[10] As Duke acknowledged in its Initial Brief, there were "numerous negotiation sessions" held, including after PUCO Staff Witness Donlon left.[11] PUCO Staff Witness Lipthratt admitted that the PUCO Staff had not completed its negotiation of the Settlement before PUCO Staff Witness Donlon left. There were, in fact, "substantial" settlement discussions that occurred thereafter.[12] PUCO Staff Witness Donlon did not participate in any of the all-party settlement meetings after he left Staff.[13] He does not know how many all-party settlement meetings occurred while he was a Staff member or how many such meetings occurred after he left Staff.[14]

PUCO Witness Donlon does not know how many individual parties met with Staff to negotiate settlement while he was part of Staff.[15] He does not know how many parties appeared at the all-party settlement meetings either before or after he left Staff.[16]

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[8] *See id.* at 1050:13-15.

[9] *See id.* at Vol. XII, p. 2017:21.

[10] *See* Docket.

[11] *See* Duke's Initial Brief at 10.

[12] *See* Hearing Transcript at Vol. XI, p. 1869:16-25.

[13] *See* Hearing Transcript at Vol. XII, p. 2022:23-2023:3.

[14] *See id.* at 2021:22-2022:4.

[15] *See id.* at 2022:5-8.

[16] *See id.* at 2022:9-22.

Although he asserts that the Settlement is the product of concessions made by parties, he has no first-hand knowledge of that.[17] PUCO Staff Witness Donlon cannot even say what concessions were made, or at what settlement meetings concessions were made.[18]

The Settlement was not the product of serious bargaining among knowledgeable parties representing diverse interests. It should therefore be rejected.

2. The Settlement was not the product of serious bargaining among knowledgeable and diverse parties because OCC was explicitly prevented from participating in negotiations.

Duke's reliability proceeding (Case No. 16-1602-EL-ESS) was consolidated and incorporated into the Settlement. The only parties to the reliability proceeding were Duke, the PUCO Staff, and OCC. Only two of those parties signed the Settlement, Duke and Staff. The record indicates that Duke and Staff did not (and still don't) agree if Duke had enforceable reliability standards in 2016, 2017, or even now. And unfortunately for consumers, the only other party with knowledge of the reliability issues involved in this case, OCC, was excluded from settlement negotiations.[19] Contrary to parties' assertions, the Settlement was not the product of serious bargaining among knowledgeable parties.[20]

Duke's expert witness for reliability Richard Brown asserted that he is "very familiar with Duke Energy Ohio's existing electric distribution system as it relates to historical reliability performance, historical reliability programs, proposed continuations of reliability programs, new proposed reliability programs, and the setting of SAIFI and

[17] *See id.* at 2038:10-22.

[18] *See id.* at 2038:23-2039:12.

[19] *See Time Warner Axs v. PUCO*, 75 Ohio St. 3d 229 (1996).

[20] *See* Duke's Initial Brief at 9-11; PUCO Staff's Initial Brief at 8-11; OEG's Initial Brief at 3.

CAIDI targets."[21] Yet Duke Witness Brown has not reviewed the PUCO rules proceeding in establishing reliability standards.[22] Duke Witness Brown, when addressing CAIDI, treats it "with kid gloves" even though it is a required standard that Duke must meet.[23] Additionally, Duke Witness Brown testified that it is unclear if Duke had reliability standards in 2016 or 2017.[24] In fact, Duke Witness Brown didn't address these years when analyzing Duke's performance targets because he wasn't clear on if there were standards in place.[25] At the same time, Duke Witness Brown asserted that his recommendations to Duke may or may not have had a bearing on the proposed reliability standards.[26]The record is unclear of what, if anything, Duke relied on in negotiating new reliability standards. Duke has failed to show that it did anything more than pick random numbers.

Contrarily, PUCO Staff Witness Jacob Nicodemus testified that Duke did have standards for 2016 and 2017.[27] Not only did Duke have standards, but it missed CAIDI two years in a row and missed SAIFI in 2017.[28] Additionally, Duke is not likely to meet its 2018 standards, current or proposed.[29] But neither PUCO Staff Witness Nicodemus, nor any other Staff witness, explains how Staff and Duke reached the proposed reliability

[21] *See* Direct Testimony of Richard E. Brown (Duke Ex. 12) filed June 6, 2018 at 3:11-14.

[22] *See* Hearing Transcript at Vol. II, p. 418:23-419:5.

[23] *See id.* at 446:22-25; 447:7-10.

[24] *See id.* at 424:22-23.

[25] *See id.* at 424:4-9.

[26] *See id.* at 422:7-20.

[27] *See id.* at Vol. VII, p. 1304:14-17.

[28] *See id.* at 1204:23-1035:3.

[29] *See id.* at Vol. II, p. 439:19-440:5.

standards. The record is not clear if parties even followed the Staff guidelines in setting reliability standards.[30]

As explained at length in OCC's Initial Brief, and reflected above, no signatory party, outside of Duke and Staff, to the Settlement could have been knowledgeable of the reliability issues to seriously bargain any outcome.[31] But testimony from their witnesses was inconsistent, so it is far from clear that either Duke or Staff was knowledgeable. And sadly for customers, OCC, a party to the original proceeding who was also knowledgeable about the reliability issues, was excluded from the settlement meetings.[32]

The Supreme Court of Ohio ("Court") expressed "grave concern" about the PUCO adopting a stipulation that was a result of "exclusionary settlement meetings."[33] OCC was the only party that exclusively represented residential customers in the reliability proceeding. Yet OCC was excluded from participating and denied discovery on the issue in these consolidated cases. Approving the proposed Settlement under such circumstances would set an unfortunate precedent for not just residential customers, but all parties before the PUCO.

[30] *See* Direct Testimony of Peter J. Lanzalotta file June 25, 2018 at 9:4-15.

[31] *See* OCC Initial Brief at 20-23.

[32] *See id.*

[33] *See Time Warner Axs v. Pub. Util. Comm.,* 75 Ohio St. 3d 229, fn. 2 (1996).

B. The Settlement, as a package, does not benefit customers or the public interest and therefore violates the settlement test.

1. Rider PSR will result in out-of-control costs with very little, if any, PUCO oversight.

Under Duke's Rider PSR proposal, the sale from Duke of Ohio Valley Electric Company's ("OVEC") output into the PJM markets is a wholesale transaction.[34] That transaction would be revenue neutral to Duke.[35] This results from how Rider PSR will function. If the revenues accruing to Duke from the sale of OVEC entitlements into the PJM markets exceed all costs associated with the entitlements, Duke will credit customers the difference through Rider PSR.[36] When the revenues accruing to Duke resulting from the sale of OVEC entitlements into the PJM markets are less than all costs associated with the entitlements, Duke will charge customers the difference through Rider PSR.[37]

Duke's entitlement to OVEC's output is the subject of a FERC-jurisdictional contract.[38] Though costs under the contract will be charged to consumers under Rider PSR,[39] Duke does not intend to seek preapproval from the PUCO of capital spending on

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[34] *See* Hearing Transcript at Vol. V, p. 1023:14-1024:16; *see also id.* at 105:8-13 (Duke itself will be the wholesale market participant); *id.* at 121:7-13 (same).

[35] *See id.* at Vol. III, p. 532:4-9, 21-25.

[36] *See id.* Vol. V, p. 1023:10-1024:16.

[37] *See id.* Duke and Staff rely on the PUCO's previous approvals of AEP's and DP&L's OVEC riders as further justification for approving Rider PSR. *See, e.g.,* Duke's Initial Brief at 44; Staff's Initial Brief at 12. OCC emphasizes that Staff itself, however, concedes that Rider PSR specifically, and OVEC riders generally, "should be evaluated on their own merits." *See* Staff's Initial Brief at 12. The PUCO should look at the record in *this* case when determining if Duke's approximately 700,000 customers should be put at risk for paying hundreds of millions of dollars to subsidize Duke's interest in OVEC.

[38] *See* Hearing Transcript at Vol I, p. 39:22-23.

[39] *See id.* at 102:5-7.

OVEC.[40] The PUCO "prudency review," according to Duke, will extend only to Duke's "handling of its entitlement in the competitive markets."[41] Duke's input into OVEC investment decisions would not be subject to PUCO "prudency review."[42] The PUCO cannot "tell OVEC what to do . . . OVEC is a FERC jurisdictional company."[43] So, for example, OVEC could make a substantial investment in, say, environmental infrastructure (such as an SCR), Duke would pass its share of the cost of that investment on to consumers through Rider PSR, and the PUCO would have no authority to review the prudency of the investment or charging consumers for it.[44] The cost of transmission (potentially a huge cost to consumers) would be passed on to consumers, too, with no PUCO oversight.[45]

Further, the costs charged consumers will include a return on and of investment.[46] So in addition to charging consumers for OVEC's costs, Duke will charge consumers for profit on investment. There will clearly be, therefore, an incentive for capital spending – spending over which the PUCO will have little to no oversight because the OVEC agreement is FERC-jurisdictional. "Duke Energy Ohio is asking that all of the costs allocated to it pursuant to this FERC-approved rate be included in Rider PSR."[47] This is all the more problematic for Ohio's consumers because one of the OVEC plants is not

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[40] *See id.* at 45:24-46:2.

[41] *See id.* at 116:15-18.

[42] *See id.* at 117:20-24.

[43] *See id.* at Vol. V, p. 1029:24-25.

[44] *See id.* at 1030:6-19.

[45] *See id.* at 1064:11-15.

[46] *See id.* at Vol. I, p. 101:1-9.

[47] *See id.* at 103:7-9.

even in Ohio, but Indiana, and none of OVEC's power will be used to directly serve Duke's customers.[48] The PUCO should not approve the OVEC blank check.

2. Contrary to Duke's assertions, Rider PSR will not act as a hedge and is not necessary to support its financial condition and, therefore, has no benefit to consumers or the public interest.

Duke asserts that Rider PSR will act as a hedge against wholesale market prices.[49] But if wholesale revenue from OVEC is less than OVEC's cost – as every witness to testify in the case has projected[50] – then Rider PSR is going to be a charge on consumers.[51] Duke's President admitted that Duke is losing money on its OVEC entitlement right now, as Rider PSR if implemented today would be a charge.[52] And the PUCO Staff admitted in its initial brief that Rider PSR will be a net negative to consumers over the life of the ESP.[53] As a result, Rider PSR will just be an additional charge on consumers above and beyond whatever the price in the wholesale market is.[54] Duke can hypothesize,[55] without any supporting evidence, that Rider PSR will act

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[48] *See id.* at 104:16-24.

[49] *See, e.g.,* Duke's Initial Brief at 39-41; PUCO Staff's Initial Brief at 12; 74; *see also* Hearing Transcript at Vol. I, p. 49:7-14.

[50] *See* Rose Testimony; Wilson Testimony; *see also* Hearing Transcript at Vol. V, p. 1079:2-10 (the only record evidence regarding Rider PSR is that it will be a cost for its duration).

[51] *See* Hearing Transcript at Vol. I, p. 79:8-13.

[52] *See id.* at 107:1-6; *see also id.* at Vol. V, p. 1064:20-22 (Rider PSR would initially be a charge).

[53] PUCO Staff Initial Brief at 37-38.

[54] *See* Hearing Transcript at Vol. I, p. 79:14-18.

[55] And in fact, that is exactly what Duke does. Duke concedes that its "current projections of OVEC's inclusion in the Rider PSR result in a net cost . . . ." *See* Duke's Initial Brief at 34. But that, according to Duke, does not "undermine its *potential*" to act as a hedge. *See id.* It is well-settled that the PUCO must base its decisions on record evidence. *See Tongren v. PUCO*, 85 Ohio St. 3d 87 (1999). As explained throughout herein and in OCC's Initial Brief, there is simply no record evidence that Rider PSR will be anything but a charge. The PUCO should not, and cannot, base its decision on Duke's unsubstantiated assertions of Rider PSR's "potential" to act as a hedge.

countercyclically to the wholesale market. But the record evidence, which Duke itself admits must control the PUCO's decision,[56] shows that it will not. Rider PSR has no hedge value because it will not hedge anything. It will simply increase customers' bills.[57]

Further, although Duke claims that Rider PSR is necessary to support its financial condition, it is not.[58] Duke is not in poor financial condition, and its credit ratings are stable.[59] In fact, in Duke's President's words, "I would say that the company presently . . . is financially healthy[.]"[60] Duke's credit witness John L. Sullivan testified that Duke's current investment grade is three above the lowest S&P investment grades and two above Moody's lowest investment grade.[61] Duke Energy Ohio's credit rating accounts for Ohio gas, electric, transmission, and distribution, as well as Kentucky operations.[62] Duke should not be permitted to charge Ohioans to prop-up credit ratings that do not need it, nor for operations that are not even within the PUCO's jurisdiction.

Additionally, Rider PSR is not necessary to help Duke access capital because, as PUCO Staff Witness Buckley admitted, the return on equity established in the rate case is already set in such a way to assist Duke in accessing capital.[63] There simply is no

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[56] *See* Hearing Transcript at Vol. I, p. 73:3-6.

[57] This makes Duke's assertion that parties opposing Rider PSR "incorrectly interpret[] the nature and purpose of a hedge, which is to reduce volatility and increase price certainty," beside the point. *See* Duke's Initial Brief at 39. Rider PSR, a charge in all cases based on the record evidence, will simply add cost to consumers' bills. Adding cost to consumers' bills does not reduce volatility. And to the degree it increases price certainty, it only increases the certainty that prices will be higher.

[58] *See* Duke's Initial Brief at 41-44.

[59] *See* Hearing Transcript at Vol. I, p. 89:18-20.

[60] *See id.* at 90:7-8. To the degree Rider PSR allegedly relieves any "uncertainty" about Duke's credit rating, it does so by charging customers more money. *See id.* at 111:1-10.

[61] *See id.* at Vol. IV, p. 729:6-21.

[62] *See id.* at 730:21-731:22.

[63] *See id.* at Vol. VII, p. 1334:17-23.

justification for piling additional charges onto consumers, in the form of Rider PSR, to assist in accessing capital when Duke's return on equity already serves that purpose.

3. OVEC's "unique history" has nothing to do with this case. The PUCO should give it no weight when evaluating Duke's proposal to charge customers under Rider PSR.

In support of its proposal to charge customers millions of dollars per year for Duke's unregulated, bad business decision to invest in two coal-fired power plants, Duke cites the plants' "unique history."[64] It is true that once upon a time, the OVEC plants provided power to the Federal Government. But that role ended 15 years ago in 2003.[65] So as of 2003, the OVEC plants were the same as any other power plants—they were plants operating in a competitive market. OVEC's purported "unique history" simply does not justify charging consumers to subsidize it.[66]

In fact, in 2011—eight years after the OVEC plants stopped providing power to the Federal Government—Duke and the other OVEC owners signed a new OVEC Agreement and extended its term to 2040.[67] This decision was a market-based decision that, unfortunately for Duke, turned out to be a bad one. This decision had nothing to do with OVEC's "unique history" or any altruistic intent. Duke and others made a bet that the OVEC plants would be profitable, and they bet wrong. When companies in free markets bet wrong, they lose money. That's fundamental to free-market economics.

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[64] Duke Initial Brief at 38; *see also* PUCO Staff's Initial Brief at 12.

[65] Kahal Testimony at 33:20.

[66] *See generally* OCC's Initial Brief at 95-98.

[67] *See* Kahal Testimony at 36:5-8.

Government bailouts like Rider PSR distort free markets and harm the captive customers that are required to fund those bailouts.

4. Rider PSR is not necessary for Duke to maintain strong credit ratings.

In the section of its brief relating to Rider PSR, Duke stresses the importance of maintaining strong credit ratings.[68] Duke portrays a doomsday-type scenario, where the rejection of Rider PSR will result in a downward credit rating spiral, to the detriment of Duke and its customers.[69] But as OCC explained in its Initial Brief, to date, Duke has not been receiving a subsidy for its interest in OVEC's unregulated power plants, and its credit ratings remain strong.[70] This alone shows that Duke is massively overstating the impact that Rider PSR's approval or rejection would have on Duke's credit ratings.

Indeed, Duke's own witness Fetter admitted that he had no opinion on whether Rider PSR would have any impact on Duke's credit ratings.[71] The PUCO should not buy in to Duke's fear-mongering regarding its credit ratings. Duke's credit is strong, and if it is not strong in the future, it falls on Duke's management, not on the PUCO, or anyone else.[72]

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[68] Duke Initial Brief at 41-44.

[69] *Id.*

[70] OCC Initial Brief at 101-02.

[71] Hearing Transcript at Vol. IV, p. 794:3-8.

[72] *See* OCC Initial brief at 102-03 (explaining that it is Duke's management's responsibility to maintain Duke's financial integrity).

5. Rider DCI should be rejected because it has not, and will not, promote reliability for customers but will only increase profits for Duke's shareholders.

The reliability of Ohio utilities' systems is measured by two standards – CAIDI[73] and SAIFI.[74] Notwithstanding Duke charging customers over a hundred million dollars under Rider DCI, it missed its CAIDI standards in 2016 and 2017.[75] It also missed its SAIFI standard in 2017.[76] Duke concedes that missing reliability standards is contrary to the public interest.[77] Sadly for customers, Staff asserts that there is a benefit where Duke is not "penalized" for missing reliability standards but, instead, is incentivized to meet them.[78] This assertion ignores the fact that Duke has a statutory duty to provide reliable service.[79] To protect consumers, and contrary to parties' assertions,[80] the PUCO should not ignore the reliability requirements that the General Assembly has imposed on Duke.

Staff Witness Doris McCarter asserts that there is a benefit to the proposed revenue cap adjustments to Rider DCI for missed reliability targets in years 2019 and 2020.[81] This ignores three important considerations. First, Duke is still allowed to spend a certain amount under the DCI that it will earn a return on and of the investments.[82]

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[73] Customer Average Interruption Duration Index.

[74] System Average Interruption Frequency Index.

[75] *See* Hearing Transcript at Vol. I, p. 81:1-6; *see also id.* at 84:22-85:3.

[76] *See id.* at 81:7-9; *see also id.* at 84:22-85:3.

[77] *See id.* at 85:4-14.

[78] *See e.g.* Doris McCarter Testimony in Support of the Stipulation (Staff Ex. 8) filed June 25, 2018.

[79] *See* R.C. 4905.22.

[80] *See, e.g.,* Duke's Initial Brief at 28-32; PUCO Staff's Initial Brief at 20; 74-77.

[81] *See* Prefiled Testimony in Support of the Stipulation by Doris McCarter (Staff Ex. 8) filed June 25, 2018 at 3:17-18.

[82] *See* Hearing Transcript at Vol. XI, p. 1799:14-17.

Second, this disregards the fact that if Duke fails to meet its reliability standards for two years in a row it can be assessed a forfeiture.[83] A forfeiture is money that would be paid by shareholders and not customers. Traditionally, the PUCO has required the utility to use the shareholder-funded money to work with Staff and improve reliability.[84] Third, it ignores the fact that the cap under Rider DCI does *not* change in 2018, 2021, 2022, 2023, 2024, or 2025, regardless of whether Duke meets its reliability metrics.[85] Thus, no matter how bad its reliability in those years, it will still be allowed to charge customers the full amount under Rider DCI. Yet the Settlement does not require Duke to work with Staff to improve reliability. Even worse, Duke is permitted to continue to spend customer money and earn a return on projects that may not have a positive impact on reliability.

Additionally, if Duke complies with its statutory duty and meets reliability standards it can spend *more* money in its distribution capital investment program. Duke earns a return on and of the investments in that program.[86] PUCO Staff Witness McCarter saw the potential of losing additional money to spend under Rider DCI as a "tangible consequence or automatic consequence" if Duke failed to meet its reliability standards.[87] But once more the impact on customers is ignored. Customers will be forced to pay more to Duke for meeting its statutory duty but receive no benefit when Duke fails to meet its standards.

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[83] Ohio Admin. Code 4901:1-10-10(E); Ohio Admin. Code 4901:1-10-30.

[84] *See e.g. In re. AEP Ohio,* Case No. 06-222-EL-SLF.

[85] *See* Settlement at 11-12.

[86] *See* Hearing Transcript at Vol. XI, p. 1798:15-20.

[87] *See id.* at 1804:4-10.

6. Allowing Duke to charge consumers for scrapped smart meters is not in consumers' or the public's interest.

Duke asserts that the Settlement will foster system innovation.[88] Not surprisingly, it does not even attempt to defend its efforts to charge consumers for scrapped smart meters that do not function properly.

Under the Settlement, Duke will replace Echelon meters with Itron meters.[89] Although the old Echelon meters will be scrapped, the charge for the new Itron meters will not be offset by the remaining value of the Echelon meters.[90] Instead, Duke will charge consumers for the old, scraped Echelon meters *and* the new Itron meters.[91] Duke Witness Wathen made it clear. When asked, "So as a result of that, customers will be paying for the scrapped meters, correct?", he responded "[t]hat is correct."[92]

So here is how it will work. Duke will identify who has the old Echelon meters.[93] Duke will send out field personnel to remove the Echelon meters.[94] Field personnel will unbolt the Echelon meters and replace them with Itron meters.[95] Duke's field personnel will put the old Echelon meters in a truck and take them somewhere.[96] Although it is uncertain if the old Echelon meters will be taken first to some central location, and then

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[88] *See* Duke's Initial Brief at 13-15; *see also* PUCO Staff's Initial Brief at 20-24.

[89] *See id.* at Vol. V, p. 1042:21-24.

[90] *See id.* at 1044:6-14.

[91] *See id.*

[92] *See id.* at 1044:23-25.

[93] *See id.* at 1045:5-11.

[94] *See id.* at 1045:12-16.

[95] *See id.* at 1045:23-1046:3.

[96] *See id.* at 1046:4-9.

to the scrap yard, or directly to the scrap yard, is unclear.[97] But one thing is clear: Consumers will be charged by Duke hundreds of millions of dollars for both the old, scrapped Echelon meters and the new Itron meters.

7. The PUCO Staff's and Duke's results-oriented, faulty methods for calculating rate of return and return on equity should be rejected, and OCC's recommendations for rate of return and return on equity should be adopted, in consumers' and the public's interest.

Parties' efforts to defend the Settlement's proposed rate of return and return on equity should be rejected.[98] The PUCO Staff employed a results-oriented approach to calculating return on equity and rate of return.[99] It admitted as much in its Initial Brief, stating that as long as the result seemed reasonable, the PUCO Staff would not make any further adjustments, even if there were errors in the inputs.[100] The PUCO Staff's methodology is faulty. Duke likewise relies on Witness Morin's rate of return analysis.[101] But Dr. Morin's analysis suffers from many of the same defects as the PUCO Staff's.

Although the PUCO Staff asserts that an adjustment for stock issuance cost is necessary, it does not know when the stock for which it made an adjustment was issued or what the price of the stock was at issuance.[102] The PUCO Staff asserts that the ROE

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[97] *See id.* at 1046:15-19.

[98] *See* Duke's Initial Brief at 15-23; PUCO Staff's Initial Brief at 68-69.

[99] *See id.* at Vol. VII, p. 1335:22-24.

[100] PUCO Staff Initial Brief at 66 (arguing that because it believes the proposed rate of return was "reasonable," then any objections to the calculations leading to that rate of return should simply be ignored as "immaterial").

[101] Duke Witness Moring's testimony should be rejected in its entirety. The resolution of Duke's rate case is part of the Settlement. But Duke Witness Morin was not familiar with the PUCO's settlement test and offered no opinion regarding its components. *See* Hearing Transcript at Vol. IV, p. 778:21-23; *id.* at 779:7-10; *id.* at 779:14-22; *id.* at 779:23-780:4.

[102] *See* Hearing Transcript at Vol. IV, p. 1338:2-8.

range in the Staff Report was reasonable because the average ROE nationwide over five years was 9.79%, but admitted that that number includes vertically-integrated companies, which Duke is not.[103] The PUCO Staff could not explain why it cited to the nationwide average to support the reasonableness of the Staff Report's range, but did not use the average (instead, a higher ROE of 9.84% was used) in the Settlement.[104]

The PUCO Staff also asserted that the rate of return range proposed in the Staff Report was reasonable because the average rate of return nationwide was 7.39%, but could not explain why it did not use the average in the Settlement (instead a higher rate, 7.54%, was used).[105] In fact, when preparing the Staff Report, the PUCO Staff did not compare its recommended ROE and ROR ranges to national averages for electric utilities.[106]

Additionally, the PUCO Staff dismissed OCC's objections to its ROE analysis as "immaterial."[107] By "immaterial," PUCO Staff means that it did not take OCC's objections into consideration.[108] PUCO Staff concluded that so long as the result – the approved ROE and ROR – are reasonable, the "pieces and parts" in the calculation for reaching the ROE and ROR (the bases for OCC's objections) are immaterial.[109]

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[103] *See id.* at 1338:14-17.

[104] *See id.* at 1338:19-24.

[105] *See id.* at 1340:2-6.

[106] *See id.* at 1340:24-1341:17.

[107] *See id.* at 1346:14-18.

[108] *See id.* at 1346:19-22.

[109] *See id.* at 1345:20-25; 1347:5-12; 1349:19-21; 1350:9-10.

But the PUCO Staff nonetheless admitted (as they had to) that ROE and ROR calculations are only as good as their components.[110] That is, although the PUCO Staff asserted that "the result of the [ROE and ROR] calculation is more important than the individual components of what the formula are[,]" the "results are a function of the individual components . . . ."[111] The bottom-line is this: PUCO Staff admits that ROE and ROR calculations are only as good as the components in those calculations, but it ignored the components of the calculations to reach a desired result. Accordingly, the PUCO Staff's ROE and ROR calculations – the basis for the ROE and ROR in the Settlement – are not reliable, defensible, or justified. The ROE and ROR in the Settlement should therefore be rejected in favor of OCC's recommendations.

The problems with PUCO Staff's methodologies do not stop there. As mentioned, PUCO Staff defends the rate of return in the Staff Report, and reflected in the Settlement, based on a comparison to the average rate of return over a five-year period.[112] According to the PUCO Staff, a "five-year average is more representative of a long-term rate of return, . . ."[113] But PUCO Staff admitted that no single rate of return can be considered fair and reasonable at all times.[114] It admitted that what is a reasonable rate of return changes over time, given changes in the financial markets and economic conditions.[115] So relying on a five-year average, which reflects rates of return from two

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[110] *See, e.g.,* 1347:13-17.

[111] *See id.* at 1349:19-24.

[112] *See* PUCO Staff Initial Brief at 68-69.

[113] *See* Buckley Testimony at 6:11-14.

[114] *See* Hearing Transcript at 1350:24-1351:2.

[115] *See id.* at 1351:3-6.

years ago and five years ago, would not necessarily be a reasonable rate of return today.[116] And the concept of a "long-term rate of return," relied on by PUCO Staff, has no foundation.[117] It was not used in the Staff Report, Duke Witness Morin's testimony, or OCC Witness Duann's testimony.[118] Accordingly, PUCO Staff's defense of the Settlement's ROR based on a comparison to some "representative long-term rate of return" has absolutely no foundation and should be rejected. OCC's recommendation regarding ROE and ROR should be adopted.

8. The PUCO should disregard PUCO Staff Witness Donlon's testimony that the Settlement is in customers' and the public's interest.

PUCO Staff Witness Donlon asserted that the Settlement provides long-term certainty and predictability for all parties, including customers.[119] But he acknowledged that Rider PSR will be adjusted quarterly and be subject to an annual prudency review where the PUCO can disallow cost-recovery.[120] Quarterly adjustments and the possibility of disallowance promote neither certainty nor predictability. Neither does Rider Power Forward ("Rider PF"). Under the Settlement, it has no impact on long-term certainty and predictability, according to PUCO Staff Witness Donlon.[121]

Further, although PUCO Staff Witness Donlon asserted that the Settlement properly accounts for the reliability and safety of Duke's system, he acknowledged that

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[116] *See id.* at 1351:7-14.

[117] *See id.* at 1353:24-1354:6.

[118] *See id.* at 1354:7-15.

[119] *See* Donlon Testimony; *see also* PUCO Staff's Initial Brief at 10.

[120] *See* Hearing Transcript at Vol. XII, p. 2043-2044:12.

[121] *See id.* at 2044:22-25.

the Settlement relieves Duke of responsibility for its past reliability violations.[122] The PUCO should reject PUCO Staff Witness Donlon's testimony that not enforcing violations of reliability standards is good for consumers and the public interest – he could not identify a single case wherein the PUCO has waived a utility's failure to meet reliability standards.[123] The PUCO should not start here.

The PUCO should look at all of PUCO Witness Donlon's testimony, whether regarding the settlement test or the ESP vs. MRO test, with a great deal of skepticism.[124] He provides an overview and description of key components of the Settlement.[125] But he knew very little about what he described. He did not know what PUCO Staff's range for a base rate reduction was.[126] He did not know PUCO Staff's range for ROE.[127] He did not know what the caps were on Rider DCI.[128] He did not know the amount of costs that will be charged as a result of PowerForward directives,[129] communications infrastructure needed to support advanced metering infrastructure and data access enhancement,[130] an infrastructure modernization plan,[131] or reduction in capital bonus and incentive pays.[132]

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[122] *See id.* at 2048:19-25; *see also* PUCO Staff's Initial Brief at 10.

[123] *See* Hearing Transcript at Vol. XII, p. 2049:1-2050:8.

[124] This applies to PUCO Staff Witness Donlon's testimony regarding the settlement test and the MRO v. ESP test.

[125] *See* Donlon Testimony at Question and Answer 10.

[126] *See* Hearing Transcript at Vol. XII, p. 2024:12-2025:22.

[127] *See id.* at 2026:20-23.

[128] *See id.* at 2027:3-9.

[129] *See id.* at 2028:21-25.

[130] *See id.* at 2029:1-7.

[131] *See id.* at 2029:8-12.

[132] *See id.* at 2029:13-2030:6.

PUCO Staff Witness Donlon asserted that the Settlement modifies Rider DSR, but did not know how.[133] He asserted that the Settlement allows for net metering credits to conform with Case No. 12-2050, but did not know how.[134] With such large gaps in PUCO Staff Witness Donlon's knowledge about his own overview and description of key components of the Settlement, it is hard to see how the PUCO should give any weight to his testimony regarding any component of the settlement test or the MRO v. ESP test.

9. Rider ESRR is not in consumers' or the public's interest.

PUCO Witness Lipthratt supported the creation of Rider ESRR, regarding vegetation management.[135] He said that "[u]pon review of recent contractor (or third party) invoices, Staff recognizes that the cost of tree trimming by third-party has spiked recently."[136] But he did not know what Staff did to review those invoices, how many invoices were reviewed, if Staff reviewed the propriety of the work reflected in the invoices, or how much the invoice spiked.[137] Although PUCO Witness Lipthratt testified that Rider ESRR will enable Duke to meet its vegetation management requirements, he did not know what those requirements are.[138]

Once again, this is an instance of PUCO Staff witnesses making assertions in prefiled testimony but, when questioned, having very little, if any, actual knowledge about what they said. The PUCO should give little weight to such testimony.

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[133] *See id.* at 2030:18-2031:9.

[134] *See id.* at 2031:22-2032:7.

[135] *See also* PUCO Staff's Initial Brief at 20-21.

[136] *See* Lipthratt Testimony at Question and Answer 8.

[137] *See* Hearing Transcript at Vol. XI, p. 1871:1-12; 1872:13-23.

[138] *See id.* at 1872:24-1873:9.

Additionally, Duke should not be permitted to increase rates for vegetation management when it fails to meet its required vegetation management program. Duke Witness Karen Hayden testified that Duke failed to meet its tree-trimming goals in 2016 and 2017.[139] Duke is not on track to meet its tree trimming goal in 2018.[140] Yet Duke requests authority to charge customers even though it is already failing to meet its goals. Additionally, Duke is requesting to change from a 4-year tree-trimming cycle to a 5-year tree trimming cycle.[141] But it is unclear if Duke is currently following its approved tree-trimming plan. Between missing tree trimming goals and increasing the use of herbicides[142] without approval from the PUCO, it is unclear what Duke's vegetation management program actually is.[143] It appears that Duke is simply conducting vegetation management to the extent it pleases.

To the detriment of customers, neither Duke nor Staff have relied on any information to determine that the proposed changes in the vegetation management program align with customers' expectations.[144] Parties simply do not know because there is no information in the record. There is no benefit to customers or the public in allowing Duke to charge consumers enormous amounts of money for tree-trimming while it is failing to meet existing standards and isn't forthcoming with its current vegetation management program.

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[139] *See* Hearing Transcript at Vol. III, p. 476:6-8.

[140] *See id.*

[141] *See* Stipulation and Recommendation (Joint Ex. 1) filed April 13, 2018 at 14-15.

[142] *See* Hearing Transcript at Vol. III, p. 472:21-24.

[143] It should be noted that this issue has resulted in a complaint from numerous customers as it relates to Duke's transmission vegetation management program. *See e.g.* Case No. 17-2344-EL-CSS.

[144] *See id.* at 473:15-19; 480:5-9.

10. The Settlement's failure to provide customers with all the benefits of the federal tax cuts is not in consumers' or the public's interest.

PUCO Staff Witness Lipthratt asserted that the federal income tax cut is captured in Rider DCI.[145] But he admits that not all of the tax cut is captured in Rider DCI.[146] He also admits that Staff used the lower federal tax rate in preliminary runs of its schedules and could have captured *all* of the tax cut in Duke's rates.[147] PUCO Staff knew what 100% of the savings from the tax cut would be and, thus, should have advocated that Duke's rate reflect 100% of the savings for consumers' benefit.[148] Waiting until the resolution of Case No. 18-0047, as suggested by PUCO Staff Witness Lipthratt, is unfair to consumers because no one knows when that case will end.[149] Waiting also violates the law, which requires the PUCO to adopt the current tax rates when setting new utility rates.[150]

11. Duke making concessions regarding its litigation positions and its acceptance of a rate reduction should not be considered benefits to customers or the public interest.

On various occasions, Duke asserts that concessions regarding its litigation positions, and its acceptance of a rate reduction, should be considered benefits of the

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[145] *See* Lipthratt Testimony at Question and Answer 9; *see also* PUCO Staff's Brief at 78-79.

[146] *See* Hearing Transcript at Vol. XI, p. 1875:16-18. In its Initial Brief, the PUCO Staff says that "[b]ased on Staff's calculations, accounting for the tax reduction in the DCI captures 75% of the value of what the reduction to the revenue requirement would have been had it instead been captured in base rates." *See* Staff's Initial Brief at 78. Given the PUCO's Staff's ability to perform this calculation, there is absolutely no reason why consumers should not benefit from Duke's rates capturing 100% of the value of the tax cut.

[147] *See id.* at 1876:11-23.

[148] *See id.* at 1878:6-9.

[149] *See id.* at 1878:10-18.

[150] *See* OCC Initial Brief at 107-110.

Settlement.[151] Regarding purported concessions made by Duke, the PUCO should take heed of what Ohio Energy Group (a signatory party) said in its Initial Brief: "fully litigating these issues may have led to similar results, . . ."[152] The PUCO should simply not accept utilities' assertions that a settlement is beneficial for customers and the public interest because they have given up litigation positions without a showing that the positions had some likelihood of success had they been litigated. Otherwise, utilities will (unrealistically) shoot for the stars, accept (realistically) the moon, and claim that benefits consumers and the public interest. Duke made no showing here that its litigation positions had any likelihood of success had they been litigated.

Further, Duke's touting of the $19 million rate reduction is disingenuous. Although there may be a $19 million base rate reduction (which, as OCC Witness Duann testified, is too small),[153] consumers would not really benefit from that reduction were the Settlement approved. They would be charged no less than $18 million per year under Rider PSR, as Duke admits.[154] When the costs of all of the other riders (many of them with unknown costs, or costs that will only be determined later) are added to Rider PSR, it is abundantly clear that the $19 million base rate reduction will be more than made up elsewhere.

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[151] *See, e.g.,* Duke's Initial Brief at 3, 6-7; 16.

[152] *See* OEG's Initial Brief at 3; *see also* OCC's Initial Brief at 140-41.

[153] *See generally* OCC's Initial Brief at 36-41.

[154] *See, e.g.,* Duke's Initial Brief at 34.

C. The Settlement violates important regulatory principles and practices and therefore violates the PUCO's settlement test.

1. Rider PSR should be rejected here, just as it was in Case No. 14-841-EL-SSO, and it is not lawful under R.C. 4928.143(B)(2)(d) as a purported limitation on customer shopping.

As OCC explained in its Initial Brief, we've been here before.[155] Duke proposed charging customers under Rider PSR, and the PUCO rejected it.[156] The same result should occur here. As the Conservation Groups explain in their Initial Brief: "Neither Duke nor other signatories to the Stipulation have offered any evidence suggesting the current OVEC proposal offers any real improvement over the 2015 proposal that the Commission judged would not be in the public interest."[157]

The rider that Duke is seeking to charge customers here is the same rider as in Case No. 14-841.[158] The proposed rider here functions the same as the rider in Case No. 14-841.[159] Rider PSR was approved as part of an ESP in Case. No. 14-841 under R.C. 4928.143(B)(2)(d) as a purported limitation on customer shopping,[160] and Duke is not asserting any new statutory basis for Rider PSR here.[161] And crucially, both Duke and PUCO Staff admit in this case that Rider PSR will *not* act as a limitation on customer shopping. It is non-bypassable, so *all* customers, shopping and non-shopping alike, will

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[155] *See id.* OCC's Initial Brief at section IIIB.

[156] *See id.*

[157] *See* Conservation Group's Initial Brief at 17.

[158] *See* Hearing Transcript at Vol. I, p. 68:19-22.

[159] *See id.* at 1026:20-1027:7. Although Duke Witness Spiller asserted that there were certain terms and conditions put on Rider PSR as part of the Settlement, Duke Witness Wathen confirmed that none of those conditions affect the functionality of Rider PSR. *See id.* at 1027:19-1029:12.

[160] *See id.* at 97:19-23; *id.* at 100:4-8.

[161] *See id.* at 99:22-25; *see also* Duke's Initial Brief at 52.

pay it.[162] Its effect on shopping will be "neutral," and "neither advantage or disadvantage" shopping.[163]

The best that Duke can come up with to shoehorn Rider PSR into R.C. 4928.143(B)(2)(d) is that it will function "as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service – for both shopping and non-shopping customers."[164] This does not save Rider PSR. First, the statute permits "limitations on customer shopping," not purported financial restraints on complete reliance on the retail market.[165] Second, simply adding a charge (Rider PSR) onto customers' bills, whether shopping on non-shopping, serves as neither a financial limitation nor a financial restraint on shopping – both types of customers will pay it.

2. Rider PSR should be rejected as an unlawful transition charge so that Consumers would be protected from paying subsidies foe uneconomic power plants.

R.C. 4928.38 provides that once a utility's market development period ends, "the utility shall be fully on its own in the competitive market" and that the PUCO "shall not authorize the receipt of transition revenues or any equivalent revenues" after the termination of the market development period.[166] Prices are supposed to be determined

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[162] *See id.* at 106:7-9.

[163] *See id.* at 106:7-15; *id.* at Vol. XII, p. 2055:5-8; *see also* Duke's Initial Brief at 33 ("Because Rider PSR is a nonbypassable charge or credit, there can be no adverse impact on the competitiveness of existing or future SSO auctions or the competitiveness of generation supply offers made by CRES providers competing for load, as both are on a level playing field."); *id.* at 52 ("Rider PSR would have no impact on customers' physical generation supply").

[164] *See id.* at 52.

[165] R.C. 4928.143(B)(2)(d).

[166] *See* R.C. 4928.38 (requiring that after the market development period is over, the utility is to no longer receive transition revenues and "shall be fully on its own in the competitive market.").

based on market forces.[167] That is, Duke cannot charge captive customers of regulated services for revenues to support deregulated power plants.[168] Duke and OVEC, individually and respectively, are "wholly responsible" for whether they are in a competitive position in the generation market.[169] Captive customers should not be asked to guarantee Duke's profitability on its ownership in OVEC.[170]

Here, that is precisely what Duke is proposing with Rider PSR. As Duke Witness Wathen admitted, if Rider PSR is a charge, that means there are costs associated with OVEC that are not being recovered in the competitive PJM market – "[t]hat's the nature of the rider, yes."[171] PUCO Staff Witness Donlon admitted the same thing, testifying that if Rider PSR is a charge on consumers, then that charge would reflect OVEC costs that were unrecoverable in the competitive market.[172] That strikes at the very heart of what is prohibited under R.C. 4928.38.[173] This is confirmed by PUCO Staff Witness Donlon's admission that Rider PSR is not even a distribution-related rider.[174] Clearly, Rider PSR is a generation rider prohibited by R.C. 4928.38.

Duke makes a half-hearted effort to say that Rider PSR is not a transition charge by asserting that it does not fit the definition of transition charge in R.C. 4928.39 because

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[167] *See id.*

[168] *See id.*

[169] *See id.*

[170] *See id.*

[171] *See* Hearing Transcript at Vol. V, p. 1058:22-1059:1.

[172] *See id.* at Vol. XII, p. 2053:3-8.

[173] The fundamental aspect of what is transition or equivalent revenue is whether the revenue reflects costs that are unrecoverable in a competitive market. *See* R.C. 4928.39.

[174] *See* Hearing Transcript at Vol. 2055:22-24.

"the OVEC entitlement has never been used to provide retail electric generation service to Duke Energy Ohio customers."[175] The PUCO should first note that Duke cites no record evidence in support of the assertion that the OVEC entitlement has never been used to serve its customers. More importantly, if OVEC has never been used to serve Duke's customers that would not matter. under R.C. 4928.38. R.C. 4928.39's definition of transition charge applies to defining those transition charges that a utility could recover through a transition plan filed under R.C. 4928.31.[176] It does not define the transition charges that are prohibited under R.C. 4928.38.

Further, R.C. 4928.38's prohibitions are broader than R.C. 4928.39's definition of recoverable transition charges. R.C. 4928.38 prohibits charging consumers not only for transition revenue, but for "any equivalent revenue" as well.[177] Such "equivalent revenue" at the very least includes recovery of power plant costs that are unrecoverable in a competitive market.[178] As detailed earlier, those are exactly the costs that Duke Witness Wathen and PUCO Staff Witness Donlon testified that Duke would recover under Rider PSR.

Indeed, were Duke's position that only charges for power plants that were used to serve customers can be "transition charges" adopted, R.C. 4928.38 would effectively be read out of the statute books. The Ohio General assembly's vision of deregulation under S.B. 3 and S.B. 221 would be thwarted. R.C. 4928.38 requires that after the market

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[175] *See* Duke's Initial Brief at 57.

[176] *See* R.C. 4928.39.

[177] *See* R.C. 4928.38; *see also In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d 439 (2016); *In re Dayton Power & Light Co.*, 147 Ohio St.3d 166 (2016).

[178] *See, e.g., In re Application of Columbus Southern Power Co.; In re Dayton Power & Light Co.*

development period, a "utility shall be fully on its own in the competitive market."[179] Duke's position would mean that utilities would not be fully on their own in the competitive market because utilities could still charge consumers to subsidize old, uneconomic power plants.

3. Contrary to Duke's and the PUCO Staff's assertions, the Settlement does not advance state policy or comply with principles of cost causation.

Duke and the PUCO Staff claim in their initial briefs that the Settlement is consistent with State policies under R.C. 4928.02. This is false.

The PUCO Staff and Duke cite R.C. 4928.02(A), which requires the PUCO to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service."[180] The Settlement violates this policy. Under the Settlement, electric service will not be reasonably priced because, among other things, (i) customers will be charged millions of dollars per year to subsidize Duke's unregulated interest in the OVEC power plants, (ii) customers will be denied millions of dollars in base rate reductions to which they are entitled, (iii) customers will pay nearly half a billion dollars for a new smart grid system so that Duke can replace the smart grid system that it just finished installing in 2015, and (iv) customers will not receive the benefits of the Tax Cuts and Jobs Act as the law requires.[181] And it gives

[179] R.C. 4928.38.

[180] PUCO Staff Initial Brief at 13; Duke Initial Brief at 24.

[181] *See* OCC Initial Brief at 26-36, 75-105, 107-114, 122-137.

Duke a free pass on poor reliability for consumers in 2017 and 2018, and it allows Duke's reliability as measured by CAIDI to get worse over the next six years.[182]

The PUCO Staff and Duke cite R.C. 4928.02(B), which requires the PUCO to "ensure the availability of unbundled and comparable retail electric service ...."[183] According to the PUCO Staff, the Settlement is consistent with this because it "enables market forces to set the price for generation service for all customers, whether they take SSO service from the Company or take service from a CRES provider."[184] But nothing could be further from the truth. Rider PSR explicitly requires Duke's captive distribution customers to pay subsidies to Duke for unregulated power plants. This is precisely the opposite of allowing "market forces to set the price for generation."

The PUCO Staff and Duke cite R.C. 4928.02(D), which requires the PUCO to "encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure."[185] According to Duke and the PUCO Staff, the Settlement is consistent with this because it allows Duke to charge customers for new smart meters and smart grid initiatives.[186] But the PUCO Staff simply ignores the plain language of the statute, which requires these investments to be cost-

[182] *See* OCC Initial Brief at 41-51, 114-122.

[183] PUCO Staff Initial Brief at 13; Duke Initial Brief at 24.

[184] PUCO Staff Initial Brief at 14.

[185] PUCO Staff Initial Brief at 15, 23; Duke Initial Brief at 25.

[186] PUCO Staff Initial Brief at 23; Duke Initial Brief at 25.

effective.[187] Duke made no attempt to show that its proposed smart grid investments will be cost-effective. To the contrary, OCC Witness Alvarez demonstrated that the costs of Duke's proposal are likely to massively outweigh the benefits.[188]

Duke also claims that the Settlement is consistent with this state policy because it will "continue to explore all cost-effective energy efficiency offerings while continuing to meet the current statutory thresholds. But Duke concedes that the Settlement *could not* exempt Duke from meeting its statutory energy efficiency standards.[189] And although Duke points to the purported benefits of decoupling,[190] it concedes that the most vulnerable among us (low-usage customers, predominantly residential customers) will possibly pay *more* as a result of decoupling.[191]

The PUCO Staff and Duke cite R.C. 4928.02(H), which requires the PUCO to avoid "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."[192] But Rider PSR is precisely what R.C. 4928.02(H) proscribes: an anticompetitive subsidy flowing from Duke's retail customers to Duke's unregulated interest in power plants.

Duke asserts that the Settlement advances state policy to ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies,

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[187] R.C. 4928.02(D).

[188] *See* OCC Initial Brief at 133.

[189] *See* Hearing Transcript at Vol. I, p. 124:18-125:3.

[190] Duke Initial Brief at 24.

[191] *See id.* at 125:23-126:1.

[192] PUCO Staff Initial Brief at 17; Duke Initial Brief at 26.

and market power because it will continue to comply with governing rules on the matters and be subject to PUCO jurisdiction.[193] But Duke concedes that the Settlement *could not* exempt Duke from complying with the governing rules or from PUCO jurisdiction.[194] Duke also asserts that the PUCO will still have oversight over its competitive procurements.[195] But Duke concedes that the Settlement *could not* remove the PUCO's oversight of Duke's competitive procurements.[196]

Duke asserts that the Settlement, through its adoption of Duke's corporate separation plan, ensures effective competition by avoiding anticompetitive subsidies from its regulated distribution business.[197] By subsidy, Duke means "any kind of assistance or use – use from the company's distribution business."[198] The "Corporate Separation Plan is, and that's to prevent Duke Energy Ohio, the utility, from providing an unfair advantage to any of its affiliates."[199] That would include using revenue from Duke's distribution customers for unregulated affiliates.[200] But that is exactly what Rider PSR does – it uses revenue from Duke's distribution customers for Duke's unregulated

[193] *See* Duke Initial Brief at 26; Spiller Testimony at 20:8-20; 21:1-6.

[194] *See* Hearing Transcript at Vol. I, p. 126:16-23; *id.* at 127:12-17.

[195] *See* Spiller Testimony at 21:7-13.

[196] *See* Hearing Transcript at Vol. I, p. 128:21-129:2.

[197] *See* Whicker Testimony at 7:6-7.

[198] *See* Hearing Transcript at Vol. III, p. 516:22-23.

[199] *See id.* at 517:6-8.

[200] *See id.* at 517:9-14.

affiliate, as Duke concedes.[201] That is a clear violation of R.C. 4928.02(H)'s prohibition against subsidies

Duke asserts that the Settlement does not violate any important regulatory principles or practices. But it admits that cost causation is an important regulatory principle and practice.[202] The Settlement's most egregious provision, Rider PSR, does not comply with the principle of cost causation. Duke's customers did not cause any of the costs associated with OVEC because they will not be served,[203] and have never been served,[204] with power from OVEC.

4. The Settlement violates numerous of the regulatory policies set forth in the PUCO's recently released *PowerForward: A Roadmap to Ohio's Electricity Future.*

The PUCO recently completed its PowerForward initiative with the publication of a report entitled *PowerForward: A Roadmap to Ohio's Electricity Future* (the "PowerForward Report").[205] In their initial briefs, several parties cite this report in support of their positions.[206] According to the report, it is designed to "set forth certain policy positions, outline principles and objectives, and express a vision to allow the state

[201] *See id.* at 517:19-520:5. Although Duke Witness Whicker responded "if that's a benefit[]" in response to a question regarding whether charging consumers for the difference between OVEC's revenue and costs, it simply defies credulity to question whether that would be a benefit. Of course it would. Duke wouldn't do it otherwise.

[202] *See, e.g.,* Hearing Transcript at Vol. I, 139:7-10.

[203] *See id.* at 104:22-24.

[204] *See id.* at 140:11-13.

[205] The PowerForward Report is available at https://www.puco.ohio.gov/industry-information/industry-topics/powerforward/powerforward-a-roadmap-to-ohios-electricity-future/.

[206] *See, e.g.,* Duke Initial Brief at 13; Initial Post-Hearing Brief of the Ohio Environmental Council and Environmental Defense Fund Regarding Data Access and Net Metering at 4 (Sept. 11, 2018).

to pursue grid modernization responsibly."[207] The Settlement's smart grid proposals violate fundamental policy positions and principles found in the PowerForward Report. And if approved, they would result in Duke pursuing grid modernization irresponsibly. The Settlement is therefore inconsistent with the regulatory principles and practices set forth in the PowerForward Report. It fails the PUCO's test for settlements.

a. The Settlement violates the regulatory principle that grid modernization investments must be cost-effective.

As discussed in OCC's Initial Brief, it is fundamental that the benefits of grid modernization outweigh the costs.[208] The PUCO agreed with this policy position in a recent case involving DP&L, stating: "OCC witness Williams contends that ... all smart grid programs should be evaluated to determine if they are cost effective and provide sufficient benefits to customers. We agree."[209] The PowerForward Report reaffirms that it is PUCO policy that customers should receive more benefits from smart grid than the costs of the smart grid investments:

> [I]n requests for grid modernization investment, it only makes sense that an EDU include a cost/benefit analysis with the application. This way, the Commission and stakeholders can transparently evaluate whether a grid modernization investment should be made in the first place. Applications for investment should demonstrate that benefits generated by the project will exceed costs on a net present value basis.[210]

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[207] PowerForward Report at 4.

[208] OCC Initial Brief at 127-29.

[209] *In re Application of the Dayton Power & Light Co.*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 59 (Oct. 20, 2017).

[210] PowerForward Report at 27 (emphasis added). *See also* PowerForward Report at 8 (describing one of the "foundational tenets" of grid modernization as: "Insist that EDUs spend ratepayer dollars wisely and in a manner that delivers eventual net value to the customer").

The Settlement violates this most fundamental principle. Neither Duke nor any of the other settling parties even attempted to show whether the benefits of Duke's smart grid investment will exceed the costs. Duke admitted that it did only a "cost analysis" and made no attempt at all to quantify the benefits to customers of its smart grid proposals.[211] Because the record lacks any evidence of the projected benefits to customers from Duke's smart grid proposals, it is impossible for the PUCO to conclude that the benefits generated by the project will exceed costs on a net present value basis. The Settlement therefore violates this regulatory principle.

b. The Settlement violates the regulatory principles that charges to customers for grid modernization should have limits.

The PowerForward Report states that customers should protected from excessive charges for grid modernization. According to the report, to avoid giving utilities a "blank check," it will "encourage the implementation of cost caps for each EDU grid modernization plan."[212] Likewise, the PUCO concluded that "there will need to be an absolute ceiling that each class of retail customer can be charged on a month to month basis" for grid modernization.[213] The Settlement violates these regulatory principles by failing to adequately protect consumers from unjust and unreasonable grid modernization charges.

Although the Settlement does include caps on spending in certain categories, other categories of smart grid spending could be unlimited. For example, component

[211] Schneider Testimony at Attachment DLS-1.

[212] PowerForward Report at 27.

[213] *Id.* at 27-28.

three of the proposed PowerForward Rider is for an "infrastructure modernization plan" that will include, but not be limited to, an upgrade to Duke's customer information system.[214] Duke witness Schneider admitted that the Settlement does not propose any limitations whatsoever on the amount that customers might be charged under component three of the PowerForward Rider.[215] Nor does the Settlement impose any cap on charges to customers under PowerForward Rider component one.[216]

Further, the Settlement could result in excessive monthly charges to customers for grid modernization because there is no cap on monthly charges.[217] Indeed, customers likely will not know what they are paying for grid modernization because Duke intends to charge them for grid modernization through (i) three separate components of a PowerForward Rider,[218] (ii) Rider DCI,[219] and (iii) base rates, not to mention natural gas smart grid, which customers continue to pay through Rider AU. The Settlement does not propose any cap on monthly charges for smart grid, and it would result in a haphazard web of smart grid charges through a variety of rates that no customer (or regulatory agency) could possibly keep track of. This violates regulatory principles and practices and should not be approved.

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[214] Settlement at 17.

[215] *See* Hearing Transcript at Vol. II, p. 357:2-5 ("Q. But Duke is not committing, through the stipulation, to any particular limit on the amount that it might seek under Component three, correct? A. I am not aware of any, no.").

[216] Settlement at 16.

[217] *See* generally Settlement.

[218] Settlement at 16-18.

[219] Alexander Testimony at 30; Settlement at 13 (describing a battery storage project to be charged to customers through Rider DCI).

c. The Settlement violates the regulatory principle that grid modernization should "do no harm" to customers.

The PowerForward Report identifies "foundational tenets" of grid modernization, the first of which is that grid modernization should "do no harm."[220] The do no harm principle is described as: "Maintain the delivery of safe, reliable electric service at fair prices while the industry advances in grid modernization."[221] The Settlement violates this regulatory principle because it will allow Duke to charge customers hundreds of millions of dollars for a new smart grid system, just three years after Duke finished installing its previous multi-hundred-million-dollar smart grid system.[222] This will not result in fair prices, and thus, it violates this regulatory principle.

5. Consistent with important regulatory principles and practices, PUCO Staff should have annualized residential customer bills using the last month of the test year, which would result in a substantial benefit to consumers.

OCC explained in its objections to the PUCO Staff Report in the rate case that growth in Duke's residential rate class should have been recognized by annualizing residential customer bills using the last month of the test year.[223] PUCO Staff Witness

[220] PowerForward Report at 8.

[221] *Id.*

[222] *See* OCC Initial Brief at 54-72, 127-138.

[223] *See In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-0032-EL-AIR, OCC Objection 3 to Staff Report (Oct. 26, 2017).

Snider was familiar with annualizations and recognized that they would be made if known and measurable.[224]

PUCO Witness Snider was then walked through the total residential bill count from 2014 through March 2017, the last actual month of the test year.[225] PUCO Witness Snider identified the year-over-year increase in residential bill count for each time-period.[226] PUCO Witness Snider identified what the total residential bill count at the end of 2017 would be were the March 2017 bill count annualized.[227] PUCO Witness Snider acknowledged that comparing the 2016 residential bill count to the 2017 year-end bill count (annualized based on the March 2017 bill count) resulted in an increase "more in line" with residential bill count growth since 2014.[228]

Annualization, when what is being annualized is known and measurable, is an important regulatory practice and principle. As the exercise with PUCO Witness Snider confirms, Duke's residential bill count is known and measurable when annualized based on the March 2017 bill count. In consumers' interest, annualization should be done here.

[224] *See* Hearing Transcript at Vol. VII, p. 1370:16-1371:5. Although PUCO Staff Witness Snider referenced "expense" adjustments, he offered no rationale for distinguishing other adjustments if the subject matter of the adjustment is known and measurable. *See id.*

[225] *See id.* at 1375:9-1379:20.

[226] *See id.*

[227] *See id.*

[228] *See id.* at 1380:6-17.

6. Duke and Staff have failed to show that under Rider DCI, customers' and Duke's expectations are aligned and that Duke is dedicating sufficient emphasis on resources to its distribution system.

R.C. 4928.143(B)(2)(h) requires that before approving Rider DCI, the PUCO must examine the reliability of Duke's distribution system and ensure that customers' and Duke's expectations are aligned. Additionally, the PUCO must find that Duke is placing sufficient emphasis on, and dedicating sufficient resources to, the reliability of its distribution system.[229] The record is saturated with evidence that neither requirement is met here. Rider DCI should be rejected.

As previously explained, the record clearly shows that Duke failed to meet its CAIDI standards for both 2016 and 2017, SAIFI standards for 2017, and is not going to meet its reliability standards in 2018.[230] Further, Duke Witness Brown testified that Duke will meet few, if any, of its reliability standards moving forward.[231] The Settlement has increasing CAIDI standards each year, but an initial increase and then a gradual decrease in SAIFI standards.[232] Duke has failed to meet its reliability standards and is proposing much less stringent reliability standards moving forward. This will result in worse reliability for customers at a much higher cost.

Staff relies upon a customer service study, conducted by Duke, to determine that customers' and Duke's expectations are aligned.[233] But the study shows that customers'

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[229] *See id.*

[230] *See* Hearing Transcript at Vol. II, p. 425:21-426:18; Vol. III, p. 468:18-469:1; 619:9-20; Vol. VII, p. 1304:23-1305:3; Vol. XI, p. 1797:23-17989:3.

[231] *See id.* at Vol. II, p. 438:21-440:2.

[232] *See* Joint Ex. 1 at 13.

[233] *See* Hearing Transcript at Vol. VII, p. 1304:5-10.

and Duke's expectations are not aligned. According to the survey, 58.8% of customers view an outage of thirty minutes or less as acceptable.[234] Additionally, 20% of customers view an outage of more than thirty minutes but less than an hour acceptable.[235] Yet the shortest CAIDI standard proposed in the Settlement is 134.34 minutes. This is almost twice the duration of outages customers expect. As it relates to SAIFI, more than half of customers find one or more interruptions (lasting more than five minutes) a year acceptable.[236] But the proposed Settlement would have less than one interruption a year. Thus, the study indicates that residential customers are seeking a reasonable balance between the number of outages and the duration of those outages. Under the Settlement, customers who experience an outage can expect the power to be out much longer.

Duke, however, would like to see the opposite. Duke Witness Brown focused on lowering SAIFI and SAIDI.[237] He conceded that Duke is required to meet CAIDI standards and says he has "to do a pretty convoluted analysis to address CAIDI."[238] Duke Witness Brown explained that to improve CAIDI Duke would need to identify, locate, and respond to the fault quicker.[239] He testified that to do so would require higher staffing or more dispatch locations closer to the events.[240] To improve CAIDI would require more operation and management expenses (that Duke will not earn a return on

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[234] *See* Pre-filed Testimony in Support of the Stipulation of Jacob J. Nicodemus (Staff Ex. 3) filed June 25, 2018 at attachment JN-2 at 9.

[235] *See id.*

[236] *See id.* JN-2 at 6.

[237] *See e.g.* Direct Brown.

[238] *See* Hearing Transcript at Vol. II, p. 447:2-10.

[239] *See id.* at 432:11-16.

[240] *See id.* at 432:8-11.

and of), but Duke will earn a return on and of capital improvements to improve SAIFI. It appears Duke is unwilling to reach a balance between investments that are meant to reduce outages while also spending sufficient money on personnel and equipment to respond quickly to outages when they occur. Thus, the proposed standards are not an alignment of customers' and Duke's expectations.

Further, Duke has not shown that Rider DCI has improved reliability. To the contrary, reliability continues to worsen. Duke concedes that CAIDI performance has declined since the beginning of Rider DCI.[241] Additionally, Duke concedes that it does not track the impact that the programs included in Rider DCI have on reliability metrics.[242] Similarly, Staff did not quantify the impact of Rider DCI on reliability.[243]Staff speculates that reliability could have been worse without Rider DCI -- but conceded that reliability could have improved *without* Rider DCI.[244]

Simply put, parties have failed to show that customers' and Duke's expectations are aligned. They have not shown that Rider DCI will assist Duke in improving reliability. Based on the record presented, the PUCO should not approve Rider DCI.

7. Rider DCI is not commensurate with "good utility practice," as Duke asserts.

The proposed Settlement will allow Duke to continue Rider DCI until at least June 1, 2024.[245] Duke Witness Cicely M. Hart asserts that Rider DCI is necessary for

[241] *See id.* at Vol. III, p. 620:24-621:5.

[242] *See id.* at 621:21-622:4.

[243] *See id.* at Vol. VII, p. 1325:20-23.

[244] *See id.* at 1325:24-13.

[245] *See* Joint Exhibit 1 at 13.

Duke to operate the distribution facilities in accordance with "good utility practice."[246] Duke Witness Hart describes "good utility practice" as being "adhering to inspection, adhering to national electric code, national electric safety code, monitoring, testing and periodic maintenance programs in general."[247] She added that "good utility practice would also encompass what's good for customers and the environment."[248]

But Rider DCI is not good for customers. As previously discussed, Duke is not meeting its reliability standards, will likely not meet its reliability standards moving forward, is not meeting its vegetation management goals,[249] and has failed to meet its inspection, maintenance, repair and replacement standards for distribution facilities.[250] Yet Duke wants customers to pay more through riders that will not ensure Duke is operating in accordance with "good utility practice."

The problems do not stop there. Duke Witness Hart testified that it is Duke's mission to provide safe, reliable, and affordable service.[251] But Duke's service is neither reliable nor affordable when customers are paying for programs that do not improve reliability or improve Duke's services. Duke Witness Brown acknowledged that the programs under Rider DCI are not focused on maximizing reliability index improvement.[252] In fact, Duke is proposing new programs under Rider DCI that will

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[246] *See e.g.* Direct Testimony of Cicely M. Hart (Duke Ex. 17) filed June 6, 2016.

[247] *See* Hearing Transcript at Vol. III, p. 613:14-21.

[248] *See id.* at 614:1-5.

[249] *See id.* at 476:6-9; 477:3-6.

[250] *See e.g.* Case No. 17-999-EL-ESS Application (Mar. 31, 2017); Case No. 16-999-EL-ESS, Application (March 31, 2016).

[251] *See* Hearing Transcript at Vol. III, p. 623:15-19.

[252] *See* Brown Direct at 10:5-6.

worsen its reliability. Duke is proposing installing more self-optimizing grid infrastructure, which is similar to Duke's self-healing teams.[253] But Duke's self-healing teams have failed to operate.[254] Additionally, Duke is proposing to implement "targeted undergrounding" through Rider DCI.[255] Targeted undergrounding costs more to install, costs more to repair, and takes longer to repair than overhead wiring.[256] Yet Staff has not been able to determine that Rider DCI is helping Duke improve reliability.[257]

Importantly, Duke and Staff both concede that there is nothing preventing Duke from spending on reliability projects similar to those under Rider DCI but collecting for those projects through a base rates case.[258] Duke is required to file for such a case by May 31, 2024.[259] Duke would be able to make the reliability investments now and recover at that time. Instead, Duke is seeking permission to charge customers now while failing to meet its basic statutory duties governing reliability.[260]

8. Contrary to Ohio policy, the Settlement, if adopted, will prevent the PUCO from holding Duke accountable to its customers for missed reliability standards.

Duke has a legal duty to "furnish necessary and adequate service" as a public utility in Ohio.[261] It is a policy of Ohio to "ensure the availability to consumers of

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[253] *See* Direct Testimony of Cicely M. Hart (Duke Ex. 17) filed on June 1, 2017 at 11:3-20.

[254] *See* Hearing Transcript at Vol. III, p. 636:10-13.

[255] *See id.* at 636:14-18.

[256] *See id.* at 636:19-367:5.

[257] *See id.* at Vol. VII, p. 1326:7-13.

[258] *See id.* at Vol. II, p. 427:19-24; Vol. III, p. 623:15-19; Vol. XI, p. 1806:12-17.

[259] *See* Joint Exhibit 1 at 13.

[260] *See e.g.* R.C. 4905.22.

[261] R.C. 4905.22.

adequate, ***reliable***, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[262] Consistent with Ohio policy, the PUCO established Ohio Admin. Code 4901:1-10-10 to facilitate how distribution reliability is measured and established. But the Settlement seeks to abandon this process and ignore Ohio law and policy. Parties' assertions that this is an acceptable result should be rejected.[263]

The Settlement proposes that Duke's failure to meet reliability standards in 2016 and 2017 cannot be used to determine a penalty for non-compliance.[264] Additionally, Duke is not attempting to meet its standards in 2018.[265] By PUCO Entry, Duke's 2016 reliability standards are in effect until "such time as the Commission orders otherwise."[266] As of today, the PUCO has not ordered otherwise, so the 2016 reliability standards govern. But Duke is attempting to meet the reliability standards proposed in the Settlement, *not* the required 2016 standards.[267] This has grave ramifications, as Duke is likely to miss its *required* standard given that the *proposed* standard is less stringent.[268]

The Settlement would have the PUCO ignore three years of Duke's declining reliability to the detriment of customers. If approved, the Settlement would set an unwelcomed precedent of allowing utilities to ignore their duty to provide reliable service and side step the PUCO's enforcement power through a settlement.

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[262] R.C. 4928.02(A) (emphasis added).

[263] *See, e.g.,* PUCO Staff's Initial Brief at 74-77.

[264] *See* Joint Ex. 1 at 13.

[265] *See* Hearing Transcript at Vol. III, p. 642:6-17.

[266] *See* Case No. 16-1602-EL-ESS, Entry (Sep. 18, 2018) ¶6.

[267] *See* Hearing Transcript at Vol. II, p. 438:5-9; Vol. III, p. 642:11-17.

[268] *See id.* at Vol. II, p. 438:5-17; Joint Ex. 1 at 13.

9. The PUCO should reject the PUCO Staff's and Duke's reliance on SAIDI, which is not a recognized reliability metric under the PUCO's rules.

The PUCO's rules use CAIDI and SAIFI to measure electric distribution utility reliability performance.[269] Failure to meet CAIDI for two consecutive years constitutes a violation of the PUCO's rules.[270] Failure to meet SAIFI for two consecutive years constitutes a violation of the PUCO's rules.[271] As OCC explained in detail in its Initial Brief, the Settlement would allow Duke's CAIDI performance to get worse and worse over the term of the ESP.[272] The PUCO Staff and Duke attempt to get around this by directing the PUCO's attention to Duke's purported SAIDI (System Average Interruption Duration Index) standard.[273]

According to the PUCO Staff, the PUCO should effectively ignore Duke's worsening CAIDI performance under the Settlement because its SAIDI will purportedly improve.[274] But this is irrelevant. The PUCO has already decided that it measures reliability using CAIDI, and separately using SAIFI.[275] It does not use SAIDI in isolation. The PUCO should ignore the PUCO Staff's and Duke's red herring argument that Duke's SAIDI might improve. This is a distraction from the relevant fact that Duke is proposing

[269] Ohio Adm. Code 4901:1-10-10(B).

[270] Ohio Adm. Code 4901:1-10-10(E).

[271] *Id.*

[272] OCC Initial Brief at 116.

[273] PUCO Staff Initial Brief at 75-76; Duke Initial Brief at 29.

[274] *Id.*

[275] Ohio Adm. Code 4901:1-10-10(E).

a Settlement that allows Duke to charge customers hundreds of millions of dollars for worse reliability (outages of longer duration).

10. Rider DCI violates regulatory principles and practices where Duke believes it can pick and choose what it spends customer dollars on without PUCO approval.

Rider DCI, if approved, will give Duke a blank check to spend on anything it wants so long as the costs are recorded in FERC Accounts 360 through 374. This differs from the previously approved Rider DCI. Previously, Rider DCI was limited to spending on 19 approved programs.[276] The proposed Settlement includes the original 19 programs and two additional programs.[277] But Duke also proposes the ability "to adapt and revise or modify programs intended for inclusion, or incorporate new programs, under Rider DCI."[278] Duke Witness Hart testified, "This flexibility in respect of the distribution capital investment program, which may include shifting of dollars, will enable the Company to efficiently incorporate new or refined technologies. . . ."[279] Thus, what Duke is asking for is the permission to freely "incorporate new or refined technologies" without oversight from the PUCO.[280]

The PUCO should not grant Duke such broad authority, especially when Duke and Staff have different beliefs about what can and cannot be included in Rider DCI. For example, Duke Witness Hart believes that vegetation management of hazardous tress

[276] *See* Case No. 14-841-EL-SSO Opinion and Order (Apr. 2, 2015) at 10.

[277] *See* Hart Direct at 14:8-20.

[278] *See id.*

[279] *See id.*

[280] *See* Hearing Transcript at Vol. III, p. 639:7-10.

outside of Duke's right of ways should be included in Rider DCI.[281] Contrarily, PUCO Staff Witness McCarter testified that it would be inappropriate to include in Rider DCI hazardous trees not associated with right-of-way clearing.[282] Further, including vegetation management in Rider DCI poses additional issues of double recovery and a distribution capital program that includes non-capital expenditures.[283] There is no guarantee that Duke will not be recovering, for example, removal of a hazardous tree in both Rider DCI and Rider ESRR.

D. The ESP in the proposed Settlement fails the ESP vs. MRO test, and thus harms consumers.

There is no credible evidence that Duke's proposed ESP is more favorable in the aggregate than the expected results under an MRO. Thus, contrary to parties' assertions, the ESP cannot be approved under R.C. 4928.143(C).[284] Duke Witness Wathen's testimony regarding the ESP vs. MRO test filed in Case No. 17-1263 (the ESP case) was stricken.[285] Duke Witness Wathen's Second Supplemental Testimony (supporting the Settlement) regarding the MRO v. ESP test asks the PUCO to consider purported benefits outside of the ESP, such as purported benefits from Case No. 17-0032 (the rate case), in

[281] *See id.* at 629:21-630:15.

[282] *See* Hearing Transcript at Vol. XI, p. 1792:7-11.

[283] *See e.g. id.* at 1792:17-1793:25.

[284] *See, e.g.,* Duke's Initial Brief at 53-57; PUCO Staff's Initial Brief at 35-45.

[285] *See* Hearing Transcript at Vol. V, p.909:13-14 (identifying Duke Exhibit 28 as Duke Witness Wathen's testimony in the ESP case); *id.* at 931:22-934:6 (argument regarding striking Duke Witness Wathen's MRO v. ESP testimony in Duke Exhibit 28 and Attorney Examiner's ruling granting OCC's motion to strike).

its MRO v. ESP analysis.[286] But doing so is impermissible, as even PUCO Staff Witness Donlon admitted. Regarding the MRO v. ESP analysis, PUCO Witness Donlon was asked: "You look at everything within the bounds of the ESP, but you don't look beyond the bounds of the ESP, correct?"[287] His response: "Correct."[288] Indeed, in its Initial Brief, the PUCO Staff analyzes the ESP vs. MRO test without accounting for any benefits from Duke's rate case.[289]

Of course, PUCO Staff Witness Donlon could not have responded any other way. R.C. 4928.143(C) is crystal clear: "the commission by order shall approve or modify and approve an *application filed under division (A)*[, the application for an electric security plan,] of this section if it finds that *the electric security plan* so approved" is more favorable in the aggregate than the expected results under an MRO.[290] So as PUCO Staff Witness Donlon testified, and the plain language of the statute makes clear, the PUCO may consider in its MRO v. ESP analysis only the purported benefits of Duke's proposed ESP and *not*, as Duke Witness Wathen would have it do,[291] purported benefits *outside* the ESP (such as the rate case). Because Duke Witness Wathen's MRO v. ESP testimony from Case No. 17-1263 (the ESP case) was stricken, and the PUCO cannot as a matter of law consider his MRO v. ESP testimony in his Second Supplemental Testimony, Duke

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[286] *See* Wathen Second Supplemental Testimony at 31:6-21; *see also* Duke's Initial Brief at 53-55. Duke Witness Wathen peppers his Second Supplemental Testimony regarding the ESP v. MRO test with references to his testimony in Case No. 17-1263. But as mentioned, that testimony was stricken. Accordingly, it cannot be considered in the PUCO's MRO v. ESP analysis.

[287] *See* Hearing Transcript at Vol. XII, p. 2018:19-21.

[288] *See id.* at 2018:22.

[289] PUCO Staff Initial Brief at 38-45.

[290] R.C. 4928.143(C) (italics added).

[291] *See* Wathen Second Supplemental Testimony at 31:6-21.

has provided no evidence that the ESP proposed in the Settlement passes the MRO v. ESP test in R.C. 4928.143(C). The PUCO should not approve the proposed ESP.

The only other witness to testify that the proposed ESP in the Settlement passes the ESP vs. MRO test, PUCO Staff Witness Donlon, cannot save the proposed ESP. His testimony that the test is passed is not credible. He works for a firm that lobbies the General Assembly on utilities' behalf.[292] He "pitches" clients with that lobbying firm, including utilities.[293] Although PUCO Staff Witness Donlon asserted that he was testifying in a different capacity than that of being associated with the lobbying firm, the only purported safeguard against conflicts is he keeps public utility matters "separate." But there is no written document reflecting the processes and procedures by which PUCO Staff Witness Donlon separates utility matters from the lobbying firm business.[294] Further, PUCO Staff Witness Donlon was asked to support the Settlement, calling into question the independence and objectivity of his testimony.[295] He said: "If I could not have supported the stipulation, I probably wouldn't have been employed[]" by the PUCO to testify.[296] So rather than being engaged and then independently and objectively analyzing the Settlement, PUCO Witness Donlon, according to his own testimony, was engaged because he *already supported the Settlement.*

[292] *See* Hearing Transcript at Vol. XII, p. 2008:13-21.

[293] *See id.* at 2010:9-14.

[294] *See id.* at 2012:11-2013:21.

[295] *See id.* at 2016:2-16.

[296] *See id.* at 2016:14-16.

PUCO Witness Donlon concedes that Rider PSR causes the proposed ESP to fail the quantitative analysis of the ESP vs. MRO test.[297] The PUCO Staff likewise concedes this in its initial brief.[298] But he thinks the ESP's purported qualitative benefits outweigh the quantitative costs.[299] He refers to alleged retail market enhancements.[300] Yet he concedes that none of the retail intervenors support the Settlement and that they actually filed testimony *opposing* the Settlement.[301] PUCO Staff Witness Donlon points to battery storage options, but concedes that customers will be charged for those options and thus there are no qualitative benefits – customers are paying for any benefits.[302] He points to the Settlement's alleged "promotion of innovative measures" in response to directives from the PUCO's PowerForward initiatives, yet admitted that there were no such directives and no information about how much those directives will cost.[303] PUCO Staff Witness Donlon points to vegetation management flexibility, but concedes that customers will be charged for that flexibility and thus there are no qualitative benefits – customers are paying for any benefits.[304] He says that Rider DCI will improve both

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[297] *See* Donlon Testimony at Question 21, lines 11-16.

[298] PUCO Staff Initial Brief at 37-38 ("Since Rider PSR is the lone rider which would not be allowable under an MRO, it would result in a negative outcome for the quantitative analysis of the ESP versus MRO test.").

[299] *See* Hearing Transcript at Vol. XII, p. 2059:17-22.

[300] *See id.* at 2060:1-3.

[301] *See id.* at 2060:4-18.

[302] *See id.* at 2061:1-11.

[303] *See id.* at 2061:17-2062:6; *id.* at 2067:8-11; *see also id.* at 2067:23-2068:3 (PUCO Witness Donlon admits that although a White Paper is supposed to issue as a result of PowerForward, no one knows what it will say, and he does not know what any directives out of PowerForward will say).

[304] *See id.* at 2062:7-16. In his filed testimony, PUCO Staff Witness Donlon also pointed to provision of equitable treatment among the EDUs in Ohio as another alleged qualitative benefit. But that testimony was stricken. *See id.* at 2062:17-2063:2.

safety and reliability, but admits that Duke had Rider DCI in 2016 and 2017 and *missed* its reliability standards.[305]

The PUCO Staff and Duke make similar arguments in their Initial Brief. There, the PUCO Staff argues that many of the Settlement provisions provide qualitative benefits, including Rider DCI, Rider PF, the battery storage proposal, the hospital working group, and other miscellaneous provisions.[306] Duke similarly cites the PUCO Staff's analysis regarding qualitative factors.

But these parties miss the point. The PUCO must evaluate whether the proposed ESP is more favorable in the aggregate than an MRO. Thus, to show that the qualitative benefits of the ESP make it better than an MRO, the parties would have to show that these qualitative benefits would be unavailable in an MRO. Indeed, the PUCO Staff recognized this earlier in its brief. Earlier, the PUCO Staff asserted that consideration of riders in the ESP, with the exception of Rider PSR, would be considered a wash when comparing the ESP to an MRO because those riders would be available under an MRO as well.[307]The same logic must apply to qualitative benefits. If the qualitative benefits would be available in an MRO, then their presence in an ESP says nothing about whether the ESP is qualitatively better than an MRO.

Ultimately, this leaves us as follows: all of the purported quantitative and qualitative benefits found in the Settlement could also be provided without the ESP, *except* for Rider PSR, which the PUCO Staff admits is a net negative under the test. The

[305] *See id.* at 2064:6-19; 2023:22-2024:3.

[306] PUCO Staff Brief at 38-45.

[307] PUCO Staff Brief at 35-36.

PUCO Staff's flawed analysis of qualitative factors cannot save the ESP vs. MRO's undisputed failure of the quantitative test.

Further, many programs in the Settlement have unknown costs. In fact, although Duke asserts that the Settlement will result in an approximately two to three percent increase in rates, it admits that that forecast does not include the cost of all of the Settlement's proposals.[308] The cost of Rider PF is unknown.[309] The cost of Rider PSR is unknown.[310] The cost of Rider ESRR is unknown.[311] The cost of Rider DSR is unknown.[312] With so many unknown costs, the PUCO cannot possibly properly evaluate if the ESP proposed in the Settlement is more favorable in the aggregate than the expected results under an MRO.

E. The PUCO should protect consumers by rejecting the Marketers' proposal to unjustly and unreasonably increase the cost that standard service offer customers pay for distribution service.

Marketer Witness Edward Hess proposes a multi-step reallocation process designed to increase the cost of the standard service offer and thus make shopping more appealing to customers (to the benefit of the Marketers who sponsor his testimony). But the PUCO need not delve into the details of his assumptions and calculations (which as discussed below, are flawed). Instead, the PUCO should reject the very premise of the Marketers' proposal because it ignores the fundamental fact that *all* customers benefit

[308] *See* Hearing Transcript at Vol. I, p. 140:23-141:9.

[309] *See* Hearing Transcript at Vol. I, p. 126:10-15; 132:17-22; *id.* at Vol. V, p. 1054:1-10.

[310] *See id.* at Vol. I, p. 141:11-13; 142:3-6.("Rider PF")

[311] *See id.* at Vol. V, p. 1055:25-1056:25.

[312] *See id.* at 1057:1-15.

from the standard service offer and thus *all* customers should pay for the distribution costs associated with the SSO.

1. The standard service offer benefits all customers. All customers should pay the distribution costs associated with it.

The Marketers propose that distribution costs be shifted from shopping customers to SSO customers based on the theory that certain distribution costs are related exclusively to the SSO.[313] This proposal fails for a fundamental reason: as OCC Witness Willis explained, all customers benefit from the SSO, so it is just and reasonable for all SSO-related distribution costs to be allocated to the distribution function and paid by all customers.[314]

Duke is required by law to provide a standard service offer: "[A]n electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services to maintain essential electric service to customers, including a firm supply of electric generation service."[315] This statute is unambiguous: the SSO must be available to all customers, all the time. It serves as the default service for those customers who do not want to shop, and it provides a safety net for customers when their supplier fails to provide service for any reason, including the supplier's bankruptcy.[316] This undeniably

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[313] IGS Initial Brief at 16-24; RESA Initial Brief at 3-4; *See also* RESA/IGS Ex. 1 (the "Hess Testimony") at 4:7-5:3, Exhibit JEH-1. .

[314] OCC Ex. 22 (the "Willis Testimony") at 6:17-7:4.

[315] R.C. 4928.141(A).

[316] R.C. 4928.14 ("The failure of a supplier to provide retail generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer...").

benefits even those customers who shop, because they could, at any moment, need or want to revert to the SSO.

OCC Witness Willis described various ways in which the standard service offer benefits both shopping and non-shopping customers (many of which were also identified in the PUCO Staff's Initial Brief[317]):

- Non-shopping customers receive electric service that is competitively bid.[318]
- Customers have an option to receive generation service without engaging in the "time-consuming and sometimes confusing process of selecting an alternative supplier."[319]
- The standard service offer is a safety net for all customers, including shopping customers, who need a generation option when their supplier defaults.[320]
- The standard service offer provides the benefit of a "competitive price-to-compare that customers can use to evaluate marketer offers when deciding whether to shop for their generation."[321]

As OCC Witness Willis succinctly concluded "all customers (shoppers and non-shoppers) benefit from the standard service offer. As such, all customers should share in the costs of providing and administering the standard service offer."[322]

This should be both the beginning and the end of the PUCO's analysis of this issue. All customers benefit from the statutorily-required SSO, so distribution costs that

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[317] PUCO Staff Initial Brief at 59-60.

[318] Willis Testimony at 7:16-17.

[319] *Id.* at 7:16-19.

[320] *Id.* at 6:19, 7:20-22.

[321] *Id.* at 7:22-8:2.

[322] *Id.* at 8:2-5. *See also* Duke Initial Brief at 59 (stating that it would be inappropriate to adopt the Marketers' recommendation because the SSO is available to all customers).

Duke incurs to provide a standard service offer should be paid by all customers. This alone should convince the PUCO to deny the Marketers' unfair plan to artificially increase the costs that SSO customers pay for distribution service.

2. The Marketers' proposal would unreasonably cause residential customers to pay cross subsidies.

Not only does the Marketers' proposal unreasonably shift costs from shopping customers to SSO customers, but it results in unreasonable interclass subsidies paid by residential consumers. Under the Marketers' proposal, residential SSO customers would pay an additional $21.3 million in distribution costs.[323] Under the Marketers' proposed credit rider, however, residential customers would receive a total credit of only $20.6 million.[324] Thus, as OCC Witness Willis testified, about $700,000 in costs would be shifted from commercial and industrial customers to residential customers, which is an unreasonable cross-subsidy in violation of the regulatory principle of cost causation.[325]

3. Marketers' Witness Hess unreasonably assumed that some distribution costs should be borne exclusively by SSO customers but that zero distribution costs should be borne exclusively by shopping customers.

Marketers' Witness Hess's testimony relies on the flawed belief that some distribution costs pertain exclusively to the SSO and thus should be paid exclusively by SSO customers. But even if one were to adopt this erroneous view, the flip side would be that some distribution costs pertain exclusively to shopping and thus should be paid exclusively by shopping customers. Mr. Hess calculates $23.1 million in SSO-related

[323] Hess Testimony at Exhibit JEH-1.

[324] *Id.*

[325] Willis Testimony at 3:13-16, 5:4-8. Tr. Vol. XIII at 2087:5-10.

distribution costs to be assigned exclusively to SSO customers, but he claims that there are $0 in shopping-related costs that should be assigned exclusively to shopping customers.[326] This makes no sense.

For example, one of Mr. Hess's prime examples of an alleged cost that should be allocated exclusively to SSO customers is call center costs.[327] According to Mr. Hess, when a customer calls DP&L to complain about the SSO, the costs that DP&L incurs responding to that call should be paid only by SSO customers.[328] But on the flip side, Mr. Hess did not testify that shopping customers should pay call center costs related to shopping, and he did not propose reallocating any such costs to shopping customers.[329] This inconsistency highlights an approach that provides an unfair result that benefits Marketers at the expense of SSO customers.

Further, Mr. Hess demonstrated that he knows very little about these costs in the first place and is unqualified to opine on them. For example, despite making claims about how Duke handles calls, he did not even speak to Duke about its call-center policies, so his claims are pure speculation.[330] Nor did he have personal knowledge about Marketers' corresponding call center policies, as he relied entirely on hearsay from IGS without verifying whether IGS's policy is the same as other Marketers.[331] He knew nothing about

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[326] Hess Testimony at Exhibits JEH-1, JEH-2.

[327] Hess Testimony at 7:1-18, 12:3-8.

[328] Tr. Vol. VI at 1158:1-5 ("Q. And your testimony is that when a customer calls Duke to complain about the SSO, the costs involved in responding to that complaint should be paid only by SSO customers, is that right? A. Yes.").

[329] Hess Testimony at Exhibit JEH-2.

[330] *See* Hearing Transcript at Vol. VI, p. 1131:14-16.

[331] *Id.* at p. 1161:8-21.

how many calls Duke gets about the SSO or shopping, how much time Duke spends responding to calls about the SSO or shopping, how many calls Marketers get about distribution service or shopping.[332] In short, Mr. Hess speculated as to certain costs, used that speculation to justify $23 million in additional charges to SSO customers, but made no effort to substantiate the underlying basis for his proposal.

The Marketers' proposal would have the dubious achievement of artificially inflating consumers' cost of the SSO, inflating the SSO as a reference point for shopping customers trying to save money, and enabling higher prices for marketers competing against the SSO. The PUCO should reject this approach that harms, not helps customers.

4. Failure to adopt the Marketers' "unbundling" proposal would not result in Duke charging customers for competitive services through non-competitive distribution rates.

IGS states that the PUCO "has no authority to regulate or provide compensation to support competitive retail electric service through base distribution rates."[333] This is true. But it is also irrelevant as to the Marketers' proposed "unbundling." By declining to adopt the Marketers' proposal, the PUCO would in no way be regulating or providing compensation for competitive services through distribution rates.

Duke's base distribution charges relate exclusively to non-competitive services. Mr. Hess's own analysis demonstrates this. In calculating the amount that he proposes to shift to SSO customers, he bases his analysis on various distribution-related FERC

[332] *Id.* at 1131:18-1132:3, 1160:6-11.

[333] IGS Initial Brief at 19.

accounts.[334] Notably, he does not claim that the expenses in these accounts should be included in Duke's ESP.

If Mr. Hess believed that the costs in question were costs for competitive services, then he would have testified that it was wholly improper to include them in distribution-related FERC accounts in the first place. But he does not challenge Duke's inclusion of these costs in distribution accounts. This fatally undermines IGS's argument on brief that the Settlement would result in competitive costs being included in non-competitive distribution rates.[335]

IGS is right that the PUCO should not charge customers for competitive services through monopoly distribution rates. But in this case, the distribution rates in the Settlement do not include charges for competitive services.[336] Under the Settlement, customers would not be paying for non-distribution-related services through base distribution rates.

5. R.C. 4928.143(B)(2)(g) does not require the PUCO to adopt the Marketers' proposal to increase costs to SSO customers.

IGS cites R.C. 4928.143(B)(2)(g) and suggests that it requires the PUCO to adopt the Marketers' unbundling proposal.[337] But IGS misreads this statute. It says nothing at all about how a utility may charge SSO or shopping customers for distribution service.

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[334] Hess Testimony at Exhibit JEH-2.

[335] IGS Brief at 19-22.

[336] Of course, as OCC has demonstrated repeatedly here and in its initial brief, the Settlement would result in unlawful charges to distribution customers for Duke's interest in OVEC, which is a competitive service. But those charges would be through a rider in Duke's ESP, not through base distribution charges.

[337] IGS Initial Brief at 21.

R.C. 4928.143(B)(2) is a list of the types of items that may be included in an electric security plan. Notably, subsection (B)(2) is discretionary; it provides that an electric security plan "may provide" the enumerated provisions "without limitation."[338] In contrast, the immediately preceding subsection (B)(1) includes mandatory requirements for what must be included in an electric security plan.[339]

One of the things that an ESP *may* provide is a provision "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."[340] This is the statute that IGS cites, purportedly for the proposition that the law *requires* all SSO costs to be included in an ESP.[341] But this is not what the statute says. The statute merely says that a utility may, at its discretion, include in its electric security plan a request to recover SSO costs through the plan.

Indeed, Duke does in fact currently charge customers a substantial amount for SSO service under its electric security plan. SSO customers are charged for their SSO generation costs through two bypassable generation riders called the Retail Capacity

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[338] R.C. 4928.143(B)(2) ("The plan may provide for or include, without limitation, any of the following:..."). The Supreme Court of Ohio has ruled that the provision limits the types of items that may be included in an ESP to those enumerated in (B)(2), but not the amount that can be collected for each item. *In re Application of Columbus S. Power Co.,*128 Ohio St. 3d 512, ¶¶ 31-35 (2011).

[339] R.C. 4928.143(B)(1) ("An electric security plan shall include provisions relating to the supply and pricing of electric generation service.").

[340] R.C. 4928.143(B)(2)(g).

[341] IGS Brief at 21-22.

Rider and Retail Energy Rider, not through base rates.[342] A typical residential SSO customer using 1,000 kWh per month would be charged $60.54 per month under these riders for its SSO generation charges.[343] These generation charges are paid exclusively by SSO customers, so there is no subsidy.

The PUCO should reject IGS's erroneous interpretation of R.C. 4928.143(B)(2)(g). This statute does not prohibit a utility from recovering distribution costs from customers simply because they are SSO customers.

F. The PUCO should clarify in its order (if the Settlement is approved) that by accounting for the Federal tax cuts under Rider DCI, the annual DCI Revenue Cap is not *de facto* increased. Otherwise, customers are not actually receiving the savings from the Federal tax cuts.

Under the Settlement, customers' base rates will not be reduced to account for Duke's reduced tax liability under the Tax Cuts and Jobs Act of 2017 ("TCJA").[344] Instead, some of the tax savings will purportedly be addressed under Rider DCI instead. According to PUCO Staff Witness Lipthratt, Rider DCI "captures 75% of the value of what the reduction to the revenue requirement would have been had it instead been captured in base rates."[345] But customers will not actually see *any* of these savings unless the PUCO clarifies in any order approving the Settlement that Duke cannot exceed the annual cap on Rider DCI charges as a result of the Federal tax savings.

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[342] *See* Duke Tariffs, *available at* https://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Duke%20Energy%20Ohio/PUCO%2019%20Retail%20Electric%20Service.pdf.

[343] *Id.* at Sheet 11 ($0.020768 per kWh for Rate RS), Sheet 12 ($0.039769 per kWh for Rate RS). 1,000 kwh * ($0.020768 + $0.039769) = $60.537.

[344] *See generally* Effron Testimony.

[345] Lipthratt Testimony at Q&A 9.

An illustrative example helps explain the concern for consumers. Under the Settlement, Duke can charge customers a maximum of $32 million in 2018.[346] Suppose, for illustrative purposes only, the tax savings captured by Rider DCI under the Settlement are $5 million for 2018. Without clarification from the PUCO, Duke could conceivably spend $36 million in DCI-eligible charges—which would be above the $32 million cap—but then use the $5 million tax savings to lower the Rider DCI revenue requirement to $31 million and thus under the $32 million cap. In effect, consumers would not actually see reduced bills as a result of the Federal tax cuts. Instead, Duke would simply be using those tax savings to increase capital spending, which customers pay.

The PUCO should therefore clarify that any tax savings to customers under Rider DCI be addressed as follows. First, the amount of Rider DCI-eligible spending shall be determined and shall be subject to the annual DCI Revenue Caps found in the Settlement (or other lower caps that the PUCO may order if it amends the Settlement). Then, *after* the cap is applied, the PUCO should reduce the Rider DCI revenue requirement by the amount of the tax savings.

Coming back to example above regarding Duke's $32 million cap for 2018, suppose that Duke spends $36 million in 2018 on distribution investment. The revenue requirement under Rider DCI would first be reduced to $32 million to account for the cap. Then, the tax savings would be applied on top of that. Assuming again for illustrative purposes $5 million in tax savings, the Rider DCI revenue requirement would

[346] Settlement at 11. Duke is also subject to annual Rider DCI caps in 2019 and beyond. *Id.*

be reduced by another $5 million to $27 million. That would be the maximum that Duke could charge customers under Rider DCI for 2018.

The PUCO has repeatedly assured consumers that they would receive the benefits of the Federal tax cuts.[347] In its most recent Entry in its tax investigation, the PUCO reaffirmed that "all impacts resulting from The Tax Cuts and Jobs Act of 2017 *will be returned to customers*."[348] Following the process outlined above is the only way ensure that customers actually benefit from that TCJA under Duke's proposal to include tax savings in Rider DCI.

III. CONCLUSION

Public utilities such as Duke are charged with fulfilling a vital public purpose. They provide consumers with an essential service. For doing so, they get various benefits from regulation. But such regulation cannot be warped and twisted so as to unfairly benefit shareholders at consumers' expense.

Unfortunately for consumers, that is what the Settlement does. It warps and twists the regulatory construct to benefit Duke shareholders. It will increase the cost of consumers' electric service without providing consumers any additional services, increasing reliability, or safety benefits. As a package, the Settlement will not benefit customers and it is not in the public interest. It violates important regulatory principles and practice. The ESP embodied in the Settlement fails the MRO v. ESP test.

The Settlement should be rejected to protect consumers.

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[347] *See In re the Commission's Investigation of the Financial Impact of the Tax Cuts & Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Entry ¶ 1 (Jan. 10, 2018); Entry on Rehearing ¶ 3 (Mar. 8, 2018).

[348] *Id.*, Second Entry on Rehearing ¶ 1 (Apr. 25, 2018) (emphasis added).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief has been served upon the below-named persons via electronic transmission this 2nd day of October 2018.

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