BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	)))	Case No. 17-32-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 17-33-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 17-34-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	)))	Case No. 17-872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	)))	Case No. 17-873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 17-874-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)))))))	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)))	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Vegetation Management Costs.	)))	Case No. 17-1265-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards Pursuant to Chapter 4901:1-10, Ohio Administrative Code.	)))))	Case No. 16-1602-EL-ESS

POST-HEARING REPLY BRIEF OF DUKE ENERGY OHIO, INC.

October 2, 2018

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I. Introduction

Approval of the Stipulation and Recommendation (Stipulation) filed on April 13, 2018, in these consolidated proceedings will provide seven years of rate stability and certainty for customers and Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company). No party to these proceedings can dispute or should ignore that fact. The pending Stipulation offers the Public Utilities Commission of Ohio (Commission) a comprehensive, well-conceived, and thoughtful regulatory approach to resolve complex matters raised by Duke Energy Ohio in four cases (ten total proceedings) that will provide numerous benefits to customers, such as stable prices, innovation, and certainty through mid-2025. As discussed in the Post Hearing Brief of Duke Energy Ohio, Inc. (Company's Brief),[1] the Stipulation resolves Duke Energy Ohio's electric distribution base rate case (Distribution Case),[2] establishes a standard service offer (SSO) through an electric security plan (ESP Case),[3] determines the outcome in its application to modify its previously approved price stabilization rider (Rider PSR Case),[4] and decides its two-year-old application to establish ongoing reliability metrics (Reliability Case)[5] (collectively, the Consolidated Cases).[6]

Achieving the resulting Stipulation was not an easy task. Indeed, as the record in these Consolidated Cases demonstrates, nearly six months of negotiations, multiple meetings at the Commission's offices, and numerous unopposed continuances requested by the Staff of the

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[1] Post Hearing Brief of Duke Energy Ohio, Inc., filed September 11, 2018.

[2] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et seq*.

[3] *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, *et seq*.

[4] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR*, Case No. 17-872-EL-RDR, *et seq*.

[5] *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.

[6] Consolidated Cases, Entry, ¶¶ 8, 14 (May 9, 2018).

Commission (Staff) were necessary to accomplish this monumental task.[7] The result is a fair, reasonable, and justifiable balance of competing interests of a diverse cross-section of stakeholders. The Signatory Parties supporting the Stipulation include the Staff, the city of Cincinnati (City), the Ohio Energy Group (OEG) (representing large industrial customer), the Ohio Hospital Association (OHA), as well as two low-income customer representatives: Ohio Partners for Affordable Energy (OPAE) and People Working Cooperatively (PWC).[8] Additionally, numerous parties have agreed not to oppose the Stipulation. These stakeholders include both individual sophisticated customers and trade organizations that represent countless other customers of Duke Energy Ohio. The non-opposing parties include: the Kroger Company; Ohio Manufacturers' Association Energy Group (OMAEG); Industrial Energy Users-Ohio (IEU-Ohio); and Wal-Mart Stores East LP and Sam's East, Inc.[9] Each of these parties regularly participates in proceedings before the Commission, has significant experience in regulatory matters, and was represented by experienced, competent counsel.[10] The resulting negotiations present, on balance, a reasonable compromise that offers an appropriate resolution of competing interests of all stakeholders (including both customers and the Company), provides numerous benefits to customers, and is consistent with Ohio law.

Nevertheless, the few opposing parties demand more. The Office of the Ohio Consumers' Counsel (OCC), conservation groups (comprising Sierra Club, Ohio Environmental Council (OEC), Environmental Law & Policy Center (ELPC), Environmental Defense Fund (EDF), and the Natural Resources Defense Council (NRDC), collectively the "Conservation

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[7] *See, e.g.,* Case No. 17-1263-EL-SSO, *et seq.*, Unopposed Motions for Extension of the Procedural Schedule and Requests for Expedited Treatment filed by Staff on October 26, 2017; November 3, 2017; November 9, 2017; November 27, 2017; December 18, 2017; January 3, 2018; January 29, 2018; and February 14, 2018.
[8] Stipulation (Joint Ex. 1), pg. 30.
[9] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pg. 2; Spiller Test. (Duke Energy Ohio Ex. 5), pg. 26.
[10] Donlon Test. (Staff Ex. 17), pg. 11; Spiller Test. (Duke Energy Ohio Ex. 5), pg. 26.

Group"),[11] and competitive marketers (IGS Energy (IGS) and Retail Energy Supply Association (RESA)) oppose the Stipulation, seeking attention to their own parochial interests. As more fully described below, the Commission should approve the Stipulation without modification and should ignore the opposing parties' demands that, among other things: deny the Company reasonable opportunities for timely recovery of its costs; restrict its ability to invest in its distribution system; hinder its ability meet reliability targets; create unreasonable subsidies or changes to the competitive markets that will unfairly penalize customers that do not or cannot shop; increase the risk of customer slamming; or otherwise deny the Company an opportunity to earn a reasonable return on its investment for providing electric distribution service to its 700,000 customers. For the reasons set forth in the record of these proceedings, and as described in the Company's Brief and more fully set forth herein, the Commission should approve the Stipulation without modification.

II. Argument

A. The Stipulation Meets the Commission's Three-Part Test.

1. The Stipulation was the result of serious bargaining among capable and knowledgeable parties.

a. Serious bargaining occurred.

OCC's claim that the Stipulation lacked serious bargaining is not only unfounded, but directly conflicts with the overwhelming record evidence.[12] Rather, as explained in the Company's Brief, the Stipulation, in fact, represents an agreement of settlement among a diverse group of capable and knowledgeable parties across several complex regulatory proceedings before the Commission.[13] Company witnesses Amy Spiller and William Don Wathen Jr.

[11] Not all members of the Conservation Group agree with each other on all issues. Their separate approaches are not so noted in this Reply Brief, although Duke Energy Ohio is aware of those differences.
[12] OCC Brief, pp. 19-20.
[13] Company's Brief, pg. 9.

explained the months of lengthy negotiations leading to the settlement.[14] Staff witness Patrick Donlon also described the lengthy negotiation process in his direct testimony.[15] As Staff describes in its initial post-hearing brief, the diverse interests represented by the five Signatory Parties include "the major users of power in the Duke Energy Ohio service territory and the Staff."[16] As previously described, this diversity of interests includes the Staff, whose broad interests include those of all stakeholders. The Signatory Parties include two organizations, PWC and OPAE, who represent the interests of low-income residential customers in the Company's service territory. The Stipulation was also signed by the City (of Cincinnati), which is the third largest city in the state of Ohio and represents not only itself as a significant user of electricity for providing necessary public services to its citizens but also the direct interests of its residents.[17] Finally, the Signatory Parties include both OEG and OHA, representing dozens of large industrial energy users and hospitals in the Company's service territory, respectively. Each of the Signatory Parties individually and through its counsel has an extensive history of participation and experience in matters before the Commission and, collectively, they encompass a wide cross-section of customers.

The Non-Opposing Parties include three of the largest supermarket chains in the country (Kroger, Wal-Mart, and Sam's Club), as well as OMAEG and IEU, which represent other groups of medium to large commercial customers.[18] Again, each of these parties regularly participates in proceedings before the Commission, has significant experience in regulatory matters, and was

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[14] Spiller Test. (Duke Energy Ohio Ex. 5), pp. 4, 26-27; Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pp. 2-3.
[15] Donlon Test. (Staff Ex. 17), pg. 11.
[16] Staff's Brief, pg. 8.
[17] *See Motion to Intervene of the City of Cincinnati*, Case No. 17-1263-EL-SSO, *et al.* (August 4, 2017)(justification to intervene was to protect City's interests, economic development within its borders, and the interests of its residents).
[18] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pg. 2; Spiller Test. (Duke Energy Ohio Ex. 5), pg. 26.

represented by experienced, competent counsel.[19] The diversity of interests represented in the Stipulation is indisputable. Any claim otherwise is false.

Likewise, the fact that serious bargaining occurred is incontrovertible. Between November 2017 and April 2018, there were numerous negotiation sessions held at the Commission's offices, to which Duke Energy Ohio invited all parties that had timely intervened.[20] Issues raised by all parties (signatory, non-opposing, and opposing) "were thoroughly reviewed, discussed, and, to the extent agreement could be reached, were resolved during negotiations."[21] In fact, these meetings resulted in a number of compromises that provided benefits not only to the Signatory and Non-Opposing Parties but to several Opposing Parties as well.[22] Under cross-examination, OCC's own witness conceded that there was serious bargaining among the parties and that the parties were capable and knowledgeable.[23] The result of these negotiations is embodied in the Stipulation and is remarkably different from what the Company had filed in its initial underlying applications in these Consolidated Cases.[24] Concessions were made by all stipulating parties, including the Signatory and Non-Opposing Parties, and especially Duke Energy Ohio. Serious bargaining occurred over nearly six months, resulting in resolution of multiple complex cases pending before this Commission. Any claim to the contrary is factually wrong.

b. The Stipulation is a compromise representing diverse interests among the settling parties.

OCC argues that the support for the Stipulation lacks diversity of interests and is limited in scope.[25] Although diversity of interests is not a prerequisite for validation of a settlement,

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[19] Donlon Test. (Staff Ex. 17), pg. 11; Spiller Test. (Duke Energy Ohio Ex. 5), pg. 26.
[20] Donlon Test. (Staff Ex. 17), pg. 11; Spiller Test. (Duke Energy Ohio Ex.5), pg. 27.
[21] Spiller Test. (Duke Energy Ohio Ex. 5), pg. 26. *See also* Donlon Test. (Staff Ex. 17), pg. 11.
[22] Spiller Test. (Duke Energy Ohio Ex. 5), pp 7-8.
[23] Trans. Vol. XI, pp. 1733-1736.
[24] Company's Brief, pp. 3-9.
[25] OCC's Brief, pg. 19.

OCC's allegation is nonetheless wrong. As discussed above, there was a great diversity in interests among the settling parties, that included Staff (representing all stakeholders), low-income residential advocates, the City (representing itself as a consumer of electricity and as a water utility providing utility service, and as a representative of the residents within its municipal boundaries), and multiple associations representing various sizes and categories of non-residential/commercial customers. Each of these parties, as well as the parties opposing the Stipulation, participated in the numerous settlement negotiations. Each party had the opportunity to, and in fact did, raise issues that were of importance to it. To the extent compromises were possible, those compromises became terms of the Stipulation, either by explicit inclusion or by exclusion. To the extent the parties did not agree with an issue in the Company's applications and the Company conceded or withdrew its pursuit of the issue, that too was part of the bargaining.[26] The end result is a Stipulation negotiated by numerous diverse interests that includes benefits for all parties.

c. All parties were fully aware and completely informed during negotiations.

OCC's allegation that the Signatory Parties were unaware of, or misinformed regarding the Company's Reliability Case is untrue and insulting to the counsel that represent those parties.[27] Simply because Parties did not intervene in a given proceeding does not mean that those issues were excluded from settlement negotiations. In fact, they were not. All parties participated in the negotiations, including OCC, and the Company's proposed reliability performance standards in the Stipulation were extensively and fully discussed and negotiated.[28] The Stipulation's terms and conditions were thoroughly discussed and, indeed, were negotiated down to the last word. The plain language of the Stipulation addresses the reliability standards

[26] *See* Company's Brief, pp. 7-8.
[27] OCC's Brief, pg. 20.
[28] Stipulation (Joint Ex. 1), pg.13.

and specifically references the Reliability Case. The negotiated language is unambiguous and clearly demonstrates the Signatory Parties' intent and knowledge in negotiating resolution of the Reliability Case, providing as follows:

> Duke Energy Ohio's Customer Average Interruption Duration Index (CAIDI) and System Average Interruption Frequency Index (SAIFI) performance for 2016 and 2017, will not be used to determine any penalty for non-compliance with Ohio Admin. Code 4901:1-10-10(E). The Signatory Parties agree that all matters related to Case No. 16-1602-EL-ESS are resolved via the terms of this Stipulation as set forth here and below.[29]

All Signatory Parties (supporting and non-opposing) were represented by capable and knowledgeable counsel. Numerous and lengthy settlement discussions occurred at the Commission's offices where all parties were invited, despite what OCC falsely claims.[30] All parties had an opportunity to raise issues of importance to them. To the extent resolution was possible and agreeable between and among the parties, such terms were included in the Stipulation. OCC's disagreement with a particular term does not equate to OCC being excluded from the discussions. Nor does the fact that a final Stipulation term is different from what OCC demanded equate to OCC being excluded from the negotiations. Rather, it just means that, as part of the give and take in the negotiation process and resulting settlement package, the settling parties were able to come to an agreement that was different from what OCC desired. A settlement package of terms necessarily involves give and take on issues important to the parties. The fact that no supporting party or non-opposing party has withdrawn or changed its position proves that these parties were fully aware of what they were agreeing to and intentional in such agreement. The record in these proceedings is clear that the Stipulation satisfies the first element of the three-pronged test.

[29] Stipulation (Joint Ex. 1), pg. 13.
[30] OCC's Brief, pg. 22.

d. OCC's opposition does not veto a stipulation.

Serious bargaining can occur without unanimous agreement. Nevertheless, OCC argues that its concurrence with an outcome is a necessary element of the Commission's finding that serious bargaining occurred.[31] OCC and its witness Kahal demand the Commission take note of OCC's active opposition to the Stipulation.[32]

The test for reasonableness of a settlement is three parts:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?[33]

OCC would have the Commission add a fourth prong; namely, whether or not OCC "actively opposed" the Stipulation. OCC's acquiescence is neither a prerequisite nor a requirement for validation of the reasonableness of any stipulation. OCC is not the Commission and does not have a veto right to a regulatory settlement. While OCC, by statute, represents residential customers, OCC is not the only residential customer advocate in these proceedings. As previously discussed, PWC, OPAE, Commission Staff, and the City all represent residential customers in the Company's service territory. And PWC, OPAE, Staff, and the City are Signatory Parties to the Stipulation. Residential customers had multiple voices in these proceedings, and they were heard. The Stipulation has numerous benefits for all stakeholders, including residential customers, as was described by Company witnesses Spiller and Wathen and explained in the Company's Brief.[34] Although not an exhaustive list, the most immediate

[31] OCC's Brief, pg. 19.
[32] *Id*.
[33] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.,* 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).
[34] Spiller Test. (Duke Energy Ohio Ex. 5), pp. 8-9; Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30) pp. 32-33.

benefits customers will experience include a significant reduction in base distribution rates, funding for low-income assistance, and no increases to monthly distribution customer charges.[35]

e. Neither the Court nor the Commission has ever concluded that a utility has superior bargaining power.

OCC falsely claims that a utility has superior bargaining power in negotiating a settlement involving an ESP.[36] The Commission should ignore OCC's inflammatory declarations. Neither the Commission nor any court has determined that the utility has superior bargaining power.[37] Such a claim presumes that the only resolution to an ESP proceeding is by settlement. That is clearly not the case. No party is compelled to settle, ever. The fact that parties are capable of achieving any settlement is, in itself, noteworthy and worthy of substantial weight.[38]

While the General Assembly has given utilities the statutory authority to reject an ESP that is modified by the Commission,[39] such ability does not come without significant risk for the utility. The utility's remedy for an unacceptable modification to an ESP is to reject the modified plan and file a new one.[40] However, preparing and filing an ESP is a time-consuming and costly endeavor. Thus, the ability to reject an unacceptably modified ESP does not support the conclusion that a utility has any greater bargaining power *vis-a-vis* any other party during negotiations. Indeed, here, the fact that the settlement negotiations leading to the final filed Stipulation occurred over a six-month period is evidence that the Company did not have any superior position during its negotiations. The risk of litigation is significant to all parties,

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[35] The monthly customer charge for Rate DS was reduced from $229 to $100.
[36] OCC Initial Brief pg. 6-7.
[37] OCC is apparently aware of this fact, as its cited "authorities" for its claim are merely minority opinions. *Id.*
[38] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370, *citing City of Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).
[39] R.C. 4928.143.
[40] *Id.* Note, however, that the opportunity to reject a modified plan has been challenged. *See In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, *et al.*, Application for Rehearing (Jan. 18, 2013).

whether stipulating or not. While settlements are obviously advantageous for all stakeholders in that they can achieve a reasonable and, often, more expeditious resolution, parties are free to litigate issues that they are unable to resolve amicably. OCC clearly knows this fact.

The Commission should disregard OCC's claims that Duke Energy Ohio somehow has greater bargaining power than other intervening parties in these proceedings. It does not. The settlement was the result of serious negotiations among capable and knowledgeable parties. This is indisputable.

2. The Stipulation offers benefits to customers and the public..

a. The evidence clearly demonstrates that the Stipulation provides benefits to customers and the public.

The record demonstrates that the Stipulation provides benefits and long-term certainty to ratepayers across customer groups, other critical stakeholders, and Duke Energy Ohio, while also advancing or remaining consistent with state policy.[41] The Company's testimony in support of the Stipulation and the Company's Brief thoroughly explain and describes these benefits. The significant highlights of these benefits include:

- Long-term rate stability;[42]
- A $19.17 million distribution base rate **<u>decrease</u>**;
- Approval/continuation of several riders for incremental distribution investment, uncollectible expense collection, incremental vegetation management expense above what is included in base rates, as well as termination of other riders;[43]
- Funding for low-income services;[44]
- Continuation of a competitive auction process for procuring generation; and[45]
- Modifications to Duke Energy Ohio's Rider DCI that provide immediate and long-term benefits to customers such as: 1) caps on the annual amount of revenue

[41] Company's Brief, pp. 11-45.
[42] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pp. 3-4.
[43] Many of these components were addressed in both the Company's Distribution Case application and its ESP.
[44] Stipulation (Joint Ex. 1), pg. 26.
[45] *Id.*, pp. 4-5.

> to be collected; 2) reliability targets; 3) revised capitalization policies and earnings-related incentive pay; 4) sunset provisions; 5) provisions for the potential inclusion of battery storage projects that will defer other distribution investments and increase reliability; and 6) provisions for Commission audits and for recovery of associated costs.[46]

The Stipulation also supports the Commission's PowerForward initiative through the creation of rider (Rider PF) to enable the Company to proceed with innovations on its system, thereby offering improved service and new capabilities to control energy to customers. Rider PF will likewise provide a mechanism for recovery of costs associated with related Automated Metering Infrastructure (AMI), which is the metering hardware that gathers the data needed to support the competitive retail electric service (CRES) providers' customer enhancements. The Stipulation further provides for reasonable cost recovery to assist the Company in meeting necessary credit metrics, which benefits customers through lower borrowing costs and improved access to capital in the markets.[47] The record clearly establishes that the terms and conditions of the Stipulation advance the policies outlined in R.C. 4928.02.[48] Yet, OCC and other opposing parties ignore these substantial benefits and falsely claim that the Stipulation does not satisfy the Commission's three-part test. The evidence is clear and the Commission should approve the Stipulation as providing substantial benefits to customers and the public.

b. Language changes are not required for the Company's tariffs.

The Commission has already approved reasonable language proposed by Duke Energy Ohio to address OCC's concerns about tariff language.[49] Many of the Company's electric tariffs already include text acknowledging the Commission's authority to conduct prudency reviews of the riders and to adjust rates for imprudent costs, while affording the Company reasonable due process and without undermining existing law, including, but not limited to, the filed rate

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[46] *Id.*, pp. 6-13.
[47] Sullivan Supp. Test. (Duke Energy Ohio Ex. 9), pp. 9-14.
[48] Spiller Test. (Duke Energy Ohio Ex. 5), pp. 14-22.
[49] OCC's Brief, pg. 23.

doctrine. The Commission should reject OCC's demand that the Commission insert OCC's proposed unreasonable, unlawful, and one-sided tariff language into all of the Company's tariffs. The Commission should recognize OCC's language for what it is: an effort to undermine long-standing Ohio Supreme Court precedent under *Keco Industries v. Cincinnati Suburban Bell Tel. Co.*,[50] statutory procedural protections,[51] and the well-established filed-rate doctrine.[52] OCC's preferred tariff language suggested in brief is overbroad, unreasonable, undermines existing procedural due process protections for appeals, and, if approved, would create uncertainty for utilities. Under OCC's proposal, any prior Commission decision could be undone years after issuance, with significant impact to the financial integrity of the utility. OCC's proposal would encourage litigation and appeal of each and every Commission decision.

Duke Energy Ohio has already and proactively revised language relating to its Rider DCI, as follows:

> This Rider is subject to reconciliation, including, but not limited to, refunds or additional charges to customers, ordered by the Commission as the result of audits by the Commission in accordance with the April 2, 2015, Opinion and Order in Case Nos. 14-841-EL-SSO, *et al*., or based upon the impact to the rates recovered through the rider due to changes in federal corporate income taxes, including the Tax Cuts and Jobs Act of 2017 and pursuant to an order by the Commission directing changes to this rider as a result of the Commission's investigation in Case No. 18-47-AU-COI.[53]

Similar language has also already been added to the following riders: Distribution Reliability – Infrastructure Modernization Rider (Rider DR-IM), Alternative Energy Rider (Rider AER-R), and the Supplier Cost Reconciliation Rider (Rider SCR). The language Duke has included in these riders is reasonable and strikes the appropriate balance between acknowledging the need for the Commission to conduct prudency audits and the finality of Commission decisions

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[50] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254. 257, 141 N.E.2d 465 (1957).
[51] R.C. 4903.16.
[52] R.C. 4905.32
[53] P.U.C.O. Electric No. 19, Sheet No. 103.11 (Effective June 28, 2018).

regarding such rates. OCC's proposed language, on the other hand, is unreasonable. It provides that a Commission order approving a rate that is taken up on appeal is no longer final, intentionally turning the filed rate doctrine on its head.

The Commission should not allow the filed rate doctrine to be undermined by OCC's unreasonable and one-sided language changes. Ohio's long-standing filed rate doctrine provides that a utility may only charge the rates fixed in its current, commission-approved tariff.[54] While this Commission has the power to invalidate a rate schedule and fix a new rate, it may only do so prospectively.[55] This rule against retroactive ratemaking works both ways; it prohibits the Commission from adjusting currently approved utility rates to make up for either over-charges (refunds) or under-charges (collection deficiencies) under previously recovered rates.[56]

Ohio's General Assembly has already provided a remedy for a party, on appeal, to seek a stay of collection of any rate that is believed to be unlawful. R.C. 4903.16 provides as follows:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.[57]

The bond requirement is an important tool used by the Court to ensure that frivolous claims and claims with little chance of success do not create unnecessary backlogs. It is also a

[54] *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229.*; citing Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254. 257, 141 N.E.2d 465 (1957).
[55] *Id.*
[56] *Id.*
[57] R.C. 4903.16.

requirement that has been upheld numerous times by the Ohio Supreme Court.[58] It provides a balanced approach that appropriately weighs the interests of parties (utilities and others) expecting to rely upon final Commission decisions with the ability of a disagreeing party to seek redress. And yet, OCC believes it should be above the law and that this bonding requirement should be bypassable by Commission order and utility tariff.

OCC points to the Ohio Supreme Court's decision regarding FirstEnergy's Alternative Energy Rider (FE AER Case) case as justification for its overly broad tariff language proposal.[59] OCC misconstrues the facts underlying the Court's ruling and ignores that those due process procedural protections were followed by First Energy. In the FE AER Case, FirstEnergy made quarterly filings under an agreed-upon procedural process where the rate would go into effect one month after filing unless otherwise ordered by the Commission. The Court found that, when First Energy implemented its charges and recovered its renewable energy credit costs "under a filed rate schedule," without objection from the Commission, the Commission could not later order a disallowance or refund.[60] Here, however, the Company has agreed to a process and incorporated reasonable language in its applicable tariffs that already acknowledges the potential for adjustments as a result of prudency audits.

Indeed Attachment C to the Stipulation sets forth the procedural processes for each of the Company's riders, the type of audit that will occur, and whether a Commission order is necessary to implement a change in the rate. This protection makes it clear for all stakeholders

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[58] *See, e.g., Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465, 468 (1957); *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 112, 163 N.E.2d 167, 172 (1959); *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 510 N.E.2d 806 (1987); *Office of Consumers' Counsel v. Public Util. Comm.*, 61 Ohio St.3d 396, 403, 575 N.E.2d 157, 162 (1991); *Ameritech Ohio v. Pub. Util. Comm.*, 79 Ohio St.3d 1473, 682 N.E.2d 1002 (1997); *Consumers' Counsel v. Pub. Util. Comm.*, 107 Ohio St.3d 1679, 2005-Ohio-6480, 839 N.E.2d 401; *Reading v. Pub. Util. Comm.*, 105 Ohio St.3d 1496, 2005-Ohio-1666, 825 N.E.2d 612; *Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 1492, 2006-Ohio-2762, 848 N.E.2d 856; and *In re Complaint of Corrigan v. Clev. Elec. Illum. Co.*, 2014-0799, June 25, 2014.

[59] OCC's Brief, pg. 24.

[60] *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, pg. 7.

when a change in the rider is made and under what conditions it becomes a "filed rate."[61] Agreeing to OCC's tariff changes would initiate a sea change in the law that would cause intervening parties to appeal every adverse rate decision that the Commission issues and make the likelihood of regulatory settlements extremely remote. Intervenors would routinely seek to delay rate changes and utilities would have no recourse for the harm caused by the delay while the case is on appeal, creating a significant, unjustified incentive for intervenors to prolong litigation – regardless of whether an appeal has any merit. Simply put, the benefit an intervenor would derive from a delay in rate changes would always outweigh the cost of losing an appeal, which would have been all but eliminated. Such regulatory uncertainty would create additional risks for utilities in Ohio because a Commission-approved tariff would no longer be considered to be a "filed rate" that can be relied upon and would be tantamount to retroactive rate making, in direct violation of the long-standing *Keco* jurisprudence. For these reasons, OCC's proposed tariff language change is unnecessary and should be rejected.

c. The Stipulation must be considered as a package, not as individual elements.

Parties opposing the Stipulation seek to misapply the Commission's three-part test and ignore the requirement that the Stipulation must be viewed as a total package. Instead, the opposing parties focus on individual terms and conditions, such as Rider PSR, to argue, inaccurately, why they believe the Stipulation fails the Commission's three-part test. These opposing parties cherry-pick these terms and argue that such individual terms provide no benefit and are not in the public interest. While Duke Energy Ohio disagrees and submits that the evidence in the record is clearly to the contrary, particularly with regard to Rider PSR, dissection and examination of the individual terms of a stipulation is not the test to be applied by the Commission. The Ohio Supreme Court has endorsed the Commission's three-part test and

[61] Stipulation, (Joint Ex. 1), Attachment C.

confirmed that a Stipulation, **as a package**, must provide benefits to ratepayers and be in the public interest.[62] As recently as April 25, 2018, the Commission reinforced this position in its approval of a stipulation involving AEP Ohio. In its Opinion and Order, the Commission stated:

> The Commission emphasizes, as the language of the criterion clearly states, that the benefits of the Stipulation are evaluated as a package. Not all ratepayers will benefit from each and every provision of the Stipulation; some provisions may impose costs on certain ratepayers. Nor are benefits accorded equally to all rate payers and, therefore, the Commission considers the public interest benefits of the whole Stipulation. The Commission has previously determined that, while many signatory parties receive benefits under a stipulation, the Commission will not conclude that such benefits are the sole motivation of any party supporting the stipulation.[63]

As Mr. Wathen testified, the Stipulation, "as a package, was negotiated in a comprehensive fashion with each of the referenced cases listed in Stipulation in mind."[64] Duke Energy Ohio's willingness to agree to one provision is inextricably tied to the balance achieved in the settlement package as a whole.[65] That spirit of compromise can be seen in all stipulating parties.

As the Commission has stated before, there is no requirement that each and every term, individually, must meet a threshold of being beneficial to rate payers on its own. Indeed, if such were the case, no regulatory settlement that included any rate increase could ever meet such an onerous standard. Compromise necessarily means that parties to a settlement do not get everything they want. Rather, the totality of the settlement, meaning all of its terms and conditions, as a package, must meet the second criterion. And the broader public interest must also be considered in weighing the reasonableness of any settlement, such as the financial

[62] *See, e.g., Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).
[63] *In the Matter of the Application of the Ohio Power 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. 16-1852-EL-SSO, *et al*., Opinion and Order (April 25, 2018), *citing In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Opinion and Order, pg. 44 (Mar. 31, 2016), and Fifth Entry on Rehearing, pg. 104 (October 12, 2016).
[64] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pg. 34.
[65] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pg. 34.

integrity of a utility providing electric distribution services to its customers. Without question, the Commission must view a settlement through the lens of customers; however, the Commission has the Solomonic role of weighing the interests of all stakeholders.

Importantly, the Stipulation at issue, as a package, does include terms that provide numerous benefits to all customers, as detailed in the Company's testimony and as further explained in the Company's Brief.[66] Furthermore, the Stipulation also provides benefits to the Company and the overall public interest. Company witnesses Wathen, Spiller, Fetter, and Sullivan describe the direct benefits to customers and the Company, as well as the broader public interest. This explanation includes, among other things, how the Stipulation terms and conditions satisfy Ohio's policy goals, provide stability for customers for many years, reduce base distribution rates, provide numerous procedural safeguards and reliability thresholds, and assist the Company in maintaining its credit quality through its cash-from-operations-to-debt ratio, which has been identified as a risk for downgrade by rating agencies.[67] Moreover, Duke Energy Ohio witness Rose described the customer benefits of having a physical hedge against unanticipated market volatility.[68] As a package, the Stipulation satisfies the Commission's three-part test and should be approved without modification.

d. Rider PSR offers benefits to customers.

The record in these consolidated proceedings is replete with evidence establishing that Rider PSR offers benefits to customers, such as: (a) serving as a hedge to volatile wholesale market rates; (b) providing support not only for Duke Energy Ohio's credit quality but also for the credit quality of all Ohio utilities; and (c) including numerous conditions specifically

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[66] Company's Brief, pp. 3-8; 11-45.

[67] Spiller Test. (Duke Energy Ohio Ex. 5), pp. 5, 27-28; Wathen 2nd Supp. Test. (Duke Energy Ohio Ex.30), pp. 1-30; Fetter Test. (Duke Energy Ohio Ex. 22), pp. 5-13; and Sullivan Supp. Test. (Duke Energy Ohio Ex. 20), pp. 5-14.

[68] Trans. Vol. II, pp. 269-270.

designed to protect the public interest.[69] However, despite the weight of this evidence, various opposing parties continue to argue to the contrary. These arguments are addressed individually below.

i. Future market forecasts are snapshots in time.

OCC and several of the Conservation Group members argue that, because Duke Energy Ohio's current forecasts (factoring in sunk costs) show losses for the period covered by the term of Rider PSR, there can be no benefit to customers. This argument fails to take into account both the notional nature of energy market forecasts and, just as importantly, the other benefits provided to customers by Rider PSR.

Market forecasts must be understood as snapshots in time that provide a future view of market prices. Experts such as Duke Energy Ohio witness Judah Rose use the best information available at a particular point in time to predict future market outcomes. However, even the best forecasts are subject to the unpredictability of future market volatility and, as noted by Staff witness Donlon, the PJM wholesale market is currently, and is likely to continue, experiencing significant market volatility.[70] As Mr. Rose explained, the OVEC costs are significantly less volatile than the wholesale markets.[71] In times of such market volatility, the largely fixed and relatively stable nature of OVEC's costs of operations provides the additional distinct benefit of offering rate stability during times of uncertainty.

ii. The Company's assumptions regarding reserve margins and penalty rates are supported by the record and the facts.

OCC argues that Mr. Rose's forecasted future PJM capacity and energy prices are based on incorrect assumptions regarding reserve margins and penalty rates.[72] OCC witness James

[69] *See* Company's Brief, pp. 32-45.
[70] Donlon Test. (Staff Ex. 17), pp. 15-16.
[71] Trans. Vol. II, pp. 253-255.
[72] OCC's Brief, pp. 27-30.

Wilson reaches the blanket conclusion that "[t]he market is comfortable with the capacity prices provided by recent RPM results that show excess cleared capacity."[73] This assertion has little support in the record and, more importantly, is completely unsupported by recent facts. First, as noted by Mr. Rose, capacity prices for the majority of the Rider PSR term (through May 31, 2022) have already been determined by the PJM auction process and are therefore not subject to forecast variability.[74] Additionally, as evidenced in the Supplemental Testimony of Mr. Rose, PJM firm retirements for the period of 2018 to 2021 increased by approximately 11 gigawatts (GW) (relative to his initial Direct Testimony) while firm new combined cycle unit additions for the same period increased by only 2 GW.[75] And since Mr. Rose provided his testimony, FirstEnergy Corp. has announced an additional 4 GW of coal-fired generation retirements in PJM, including assets located in Ohio and Pennsylvania.[76] This increase in retirements without a proportional increase in new builds serves as evidence that PJM market participants are far from "satisfied" with the PJM market. Witness Rose goes on to note that PJM itself is working on "capacity and energy market reforms that would increase prices."[77] In its recent decision rejecting PJM's proposed market reforms, FERC also noted its concern over the suppressive pricing within the PJM market.[78] The evidence in the record clearly contradicts the assertions by OCC witness Wilson that either market participants or PJM itself is comfortable with current capacity pricing and that the reserve margin forecasts used by Mr. Rose are, in fact, logical assumptions based on actual market conditions. Not only is FERC examining the pricing structure in PJM, but asset retirements are increasing, making price escalation in the wholesale

[73] Wilson Test. (OCC Ex. 11), pg. 22.
[74] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pg. 62.
[75] *Id*., pg. 7.
[76] https://www.pjm.com/planning/services-requests/gen-deactivations.aspx
[77] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pg. 22.
[78] *Order Rejecting Proposed Tariff Revisions, Granting in Part and Denying in Part Complaint, and Instituting Proceedings Under Section 206 of the Federal Power Act*, 163 FERC ¶ 61,236 (June 29, 2018).

markets all the more likely. The OVEC assets provide stability from this volatility in wholesale markets through its relatively fixed costs.[79]

With regard to penalty rates, there is also ample evidence in the record to support the penalty rate conclusions used by Mr. Rose. As outlined in Mr. Rose's testimony, the penalty rate should be designed so that there is:

> an opportunity cost to providing capacity. However, PJM has not properly set the penalty rate – it is too low because the expected hours of penalty are too high. When this happens the penalty is too low because the penalty is the ratio of the net CONE times balancing ratio divided by the hours. A recent Market Monitoring report discusses what the hours of expected penalty should be as FERC concluded there is not an adequate basis for the estimate used (the current estimate for the RTO of 30 hours is based on a single year), and PJM itself has released historical data showing the hour estimate is too high.[80]

As indicated above, Mr. Rose's conclusion that the penalty rate is too low is based directly on information from the market and from actual historic data released by PJM relating to actual penalty hours. Finally, OCC witness Wilson himself acknowledges that PJM is undertaking a stakeholder process that may result in changes to the penalty rate.[81]

iii. Duke Energy Ohio is also correct regarding the potential price impacts of PJM's buy-side market power mitigation efforts, OVEC utilization rates, dispatch and margins.

In its Brief, OCC also makes poorly supported assertions that Duke Energy Ohio's conclusions regarding PJM's buy-side mitigation efforts and OVEC utilization rates, dispatch, and margins are incorrect.[82] However, Duke Energy Ohio witness Rose's testimony clearly points to several PJM and FERC initiatives that support his conclusions.[83] In the time since the hearing on this matter, FERC has rejected PJM's efforts to mitigate buy-side power's impacts as not being sufficient to adequately address the issue and has ordered continuing proceedings in an

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[79] Trans. Vol. II, pp. 253-255.
[80] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pg. 65.
[81] Wilson Test. (OCC Ex. 11), pg. 23.
[82] OCC's Brief, pg. 31.
[83] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pg. 12.

attempt to deal with the issue.[84] Additionally, as noted by Mr. Rose, both FERC and PJM are concerned about resiliency within the market and their efforts to that end could further increase capacity pricing.[85] With regard to OVEC utilization, dispatch, and margins, Mr. Rose's conclusions regarding these items was based on, among other things, increasing natural gas and electrical energy prices.[86] Additionally, Mr. Rose testified during cross-examination that these items are co-determined factors that are tied to prices.[87] The above-referenced actions by FERC and PJM clearly serve to further support Mr. Rose's conclusions regarding the future state and pricing of the PJM market.

iv. Rider PSR will serve to stabilize rates and provide a hedge value to customers.

Both the Conservation Group and OCC summarily conclude that Rider PSR cannot serve as a hedge because current pricing forecasts do not show it making positive returns. As noted in the Company's Brief, the current pricing projections for Rider PSR are just that: projections. On the other hand, hedges are designed to project against unanticipated price or market changes, which, by their very nature, are impossible to forecast. The argument set forth by the Conservation Group and OCC fails to adequately factor in the impact of the current extreme price volatility in the PJM market, or the likely increases in prices due to FERC's efforts to mitigate price suppression, contrasted against the relative stability of OVEC operating costs and the inherent value that such contrast creates.[88] Witness Rose's testimony demonstrates that historical OVEC costs are largely fixed and relatively stable.[89] OVEC's cost stability gives it a distinct advantage over other generators in the market, such as natural gas or renewables, that lack such cost certainty. Both Mr. Rose and Mr. Donlon also testify that the PJM market is

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[84] PJM Interconnection, L.L.C., 163 FERC ¶ 61,236 (2018).
[85] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pg. 66.
[86] *Id*., pp. 14-16.
[87] Trans. Vol. II, pp. 247-248.
[88] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pg. 21.
[89] *Id*., pg. 14.

experiencing significant price volatility and Mr. Rose's testimony further notes that the PJM market is, in fact, five times more volatile than anticipated OVEC costs.[90] Additionally, Duke Energy Ohio witness Spiller testified on cross-examination that using Rider PSR as a hedge protects both Duke Energy Ohio's non-shopping and shopping customers from that market volatility. The opposing parties' argument fails to take into account this important aspect of the value of Rider PSR as a hedging instrument.

However, the value of Rider PSR as a hedge is not limited to just its protections against market volatility. Witness Rose also notes that Rider PSR provides a physical hedge in that "a physical hedge and the physicality of it as opposed to a financial hedge is differentiable in a sense of were there to be changes in the revenues available by virtue of the particular physicality of the plant, that is the fuel secure resources, the plant would receive those revenues and that would affect the calculus of the hedge in a way in which a financial transaction which is denominated purely in a dollar basis wouldn't."[91]

v. Rider PSR, as now structured, is an improvement over the proposal made in a previous case.

The Conservation Group contends that the Commission should not approve Rider PSR in the present case on the ground that it previously chose not to approve a separate Duke Energy Ohio proposal for Rider PSR contained in a previous ESP case.[92] This argument fails to recognize the significant improvements from the Company's previous proposal. As a result of the negotiation process that led to the current Stipulation, Rider PSR now contains several conditions that are designed to protect ratepayers from excessive costs. These include:

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[90] *Id.*; Donlon Test. (Staff Ex. 17), pg. 15.
[91] Trans. Vol. II, pg. 270. *See also Id.*, pg. 276.
[92] *In the Matter of the Application of Duke Energy Ohio 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. 14-841-EL-SSO, *et al.* (ESP III), Opinion and Order (April 2, 2015).

- Limitations related to periods of forced outages at OVEC's generating plants;
- Limitations related to capacity performance assessments from PJM;
- Provisions for Staff audits to review the Company's practices for liquidating the capacity, energy, and any other product it acquires from OVEC in the wholesale markets;
- A requirement to continue pursuing a transfer of the Company's entitlement under the Inter-Company Power Agreement (ICPA), along with a requirement to provide an annual update on the Company's progress toward that end; and
- The condition that there will be no carrying costs included in Rider PSR.[93]

These conditions represent material improvements to the terms of Rider PSR, which improvements resulted from the negotiation process and were not included in Duke Energy Ohio's previous request. The Conservation Group's failure to acknowledge the differences between the treatment of the ICPA costs in the Stipulation and what was initially proposed in the PSR Case (or what was proposed in the Company's previous ESP III case), is telling. Their concerns do not consider the significant and unmitigated risks in the wholesale markets that exist today, or that, under the stipulated Rider PSR construct, there will be a valuable hedge to customers with fair and adequate protections.

e. Rider DCI offers benefits to customers and is supported by the record.

As recent extreme weather has demonstrated, Duke Energy Ohio and other electric distribution utilities must be constantly vigilant and work continuously to maintain and harden distribution services. As Duke Energy Ohio witness Cicely M. Hart testified, the programs included for cost recovery under Rider DCI are designed to manage costs and allow the company to proactively address the aging infrastructure issues through a targeted and coordinated approach.[94] In its ESP III proceeding, the Commission recognized that the Company "is correct

[93] Wathen 2nd Supp Test. (Duke Energy Ohio Ex. 30), pg. 18.
[94] Hart Test. (Duke Energy Ohio Ex. 17), pg. 6.

to aspire to move from a reactive to a more proactive maintenance program."[95] The Commission further recognized that "it is detrimental to the state's economy to require the utility to be reactionary or allow the performance standards to take a negative turn before we encourage the EDU to proactively and efficiently replace and modernize infrastructure . . ..."[96]

OCC argues that Rider DCI should not be approved. With no evident understanding of Duke Energy Ohio's distribution system, and after offering no credible expert testimony regarding reliability standards and practices, OCC persists in arguing that the Company is not making necessary improvements. OCC points to reliability indices for CAIDI and SAIFI and argues that results in the past two years demonstrate that reliability is not improving.[97] But OCC witness James Williams has no experience in managing or working with a utility distribution system.[98] Nor did he do any research with regard to CAIDI and SAIFI standards as applied to utilities in other states.[99] It should be noted that OCC complains that the Company has not met reliability standards at the same time that it argues that the Company should not be permitted to make investments in its distribution system to improve reliability. While the Commission has recognized, in its PowerForward initiative, that ongoing investment to create a better electricity experience for the customer is needed, OCC's position would do just the opposite. OCC's position is backward and ill-advised.

Moreover, instead of focusing on facts related to distribution system planning and operations, Mr. Williams instead chose to focus upon the conduct of settlement negotiations and a claim that other parties may not understand all the implications of the Stipulation.[100] Additionally, again with no actual understanding of Duke Energy Ohio's system, despite ample

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[95] ESP III, Opinion and Order, pp. 71-72 (April 2, 2015).
[96] *Id*. (EDU is the acronym for electric distribution utility).
[97] OCC's Brief, pg. 43.
[98] Trans. Vol. VI, pg. 1249.
[99] *Id*., pg. 1259.
[100] Williams Test. (OCC Ex. 8), pg.12.

opportunity for discovery, Mr. Williams claims that Duke Energy Ohio's performance over the past three years has been inadequate.[101]

OCC witness Lanzalotta likewise opposed the settlement saying that the indices set forth in the Stipulation would be "less reliable."[102] But Mr. Lanzalotta readily admitted that the SAIFI standards set forth in the Stipulation provide that reliability will improve, and yet he did not mention this in his testimony.[103] Mr. Lanzalotta further admitted, with reference to Table 4 of his testimony setting forth the dramatic increase of planned outages, that such work could have an impact on CAIDI.[104] Nevertheless, Mr. Lanzalotta did not account for this is his analysis. He also failed to account for the effects of emerald ash borer infestation of ash trees.[105] And with regard to the Company's proposal to change its vegetation management trim cycle from four years to five, Mr. Lanzalotta performed no review and did not seek discovery with respect to the Company's specifications or guidelines.[106] Consequently, he is not qualified to discuss any potential impact such a change in cycles may have on reliability.

The Company supported the provisions of the Stipulation that set forth reliability targets with experienced and knowledgeable witnesses. In addition to the testimony of Duke Energy Ohio witness Cicely Hart explaining the work that Duke Energy Ohio performs to maintain and harden its distribution system, the Company also provided the testimony of Dr. Richard E. Brown. Dr. Brown holds a Ph.D. in Electrical Engineering and has extensive experience in the utility engineering and distribution systems reliability.[107]

Dr. Brown explained that other reliability improvement programs can improve reliability, but many of these have already been included in Duke Energy Ohio's program. Thus, the

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[101] *Id*., pg. 7.
[102] Lanzalotta Test. (OCC Ex. 19), pg.18;Trans. Vol. X, pg. 1629.
[103] Trans. Vol. X, pg. 1637.
[104] *Id*., pg. 1646.
[105] *Id*., pg. 1647.
[106] *Id*., pg. 1648.
[107] Brown Test. (Duke Energy Ohio Ex. 12), pp. 1-2.

Company has already "picked all the low hanging reliability fruit."[108] And, therefore, the new program proposed by Ms. Hart and supported by Dr. Brown related to a self-optimizing grid (SOG) will provide some improvements in the indices.

Dr. Brown described the terms of the Stipulation with respect to the CAIDI and SAIFI standards and provided a very detailed and comprehensive study that explains the value therein. Dr. Brown explained that decreases in SAIFI actually mean that reliability will improve.[109] Dr. Brown further illustrated that the reliability targets set forth in the Stipulation reflect a significant improvement in reliability. Indeed, the SAIFI targets reflect a reduction of 33 percent.[110]

Dr. Brown also explained that many of the programs included for cost recovery under Rider DCI are not necessarily focused on maximizing performance indices, but these programs nonetheless constitute reasonable and prudent investment. Dr. Brown explained, "[a]s distribution equipment ages, failure rates tend to increase. This causes reactive maintenance costs to increase, but also results in customer reliability getting worse. In this sense, aging infrastructure projects are keeping reliability indices from getting worse, but may not result in them getting better."[111]

Dr. Brown also pointed out that the work undertaken to increase reliability can cause an increase in the number of customer interruptions and, therefore, an increase in SAIFI.[112] Duke Energy Ohio does not remove the impact of these planned outages from its SAIFI reporting. If one performs the calculation to remove the impact of such work, SAIFI improves.[113] Indeed, as shown by Dr. Brown, historical baseline SAIFI has improved markedly since 2012.[114] Using Dr. Brown's analysis, and accounting for ongoing, planned outages and other work underway, for

[108] *Id*., pg. 11.
[109] *Id*., pg. 7
[110] *Id*., pg. 9.
[111] *Id*., pg. 10.
[112] *Id*., pg.12.
[113] *Id*., pg.15.
[114] *Id*.

both SAIFI and CAIDI, the reliability indices agreed to in the Stipulation are reasonable and achievable and, more importantly, represent a significant improvement over current levels.

i. Pursuant to R.C.4928.143(B)(2)(h), the Company's interests and customer interests are aligned.

Ms. Hart provided results of surveys taken by J.D. Power that demonstrate that both residential and commercial customers highly value power quality and reliability.[115] OCC argues that failure to meet reliability targets demonstrates the opposite.[116] But OCC's conclusion is illogical; reliability metrics are unrelated to the alignment of interests. As explained above, the Company is working toward hardening and maintaining its distribution system in order to keep existing reliability from deteriorating and, in some instances, to cause improvements. This ongoing work, although perhaps detrimental to reliability indices in the short run, will provide improved reliability in the long run. Staff witness Jacob Nicodemus pointed out that customers' expectations include an acceptance of less than 1.2 interruptions per customer served in a year.[117] Duke Energy Ohio's current SAIFI performance exceeded that standard in each of the last five years. Likewise, Mr. Nicodemus testified that, on average, customers state that restoration time of less than approximately four hours is acceptable.[118] Duke Energy Ohio exceeded this standard also, in each of the last five years. Duke Energy Ohio has established that its reliability programs are aligned with and indeed exceed customer expectations.

ii. The evidence supports continuation of Rider DCI and the new programs proposed for inclusion in the Rider.

Ms. Hart provided detailed testimony concerning two new proposed programs Self-Optimizing Grid (SOG) and Targeted Undergrounding.[119] Ms. Hart explained that the SOG proposal bears a relationship to and complements the Company's earlier investment in self-

[115] Hart Test. (Duke Energy Ohio Ex. 17), pg. 16 and Attachment CMH-2.
[116] OCC's Brief, pg. 44.
[117] Nicodemus Test. (Staff Ex. 3), pg. 10.
[118] *Id.*
[119] Hart Test. (Duke Energy Ohio Ex. 17), pg. 11.

healing teams, although in an even more integrated and real-time approach. Targeted Undergrounding entails moving overhead lines to underground in specific problem areas, in order to harden the distribution system.[120] Such programs allow for continuing improvement and maintain the existing integrity of the overall distribution system. Updating and automating the Company's aging distribution system enable greater resiliency and customers will benefit from the holistic and coordinated approach to addressing these areas of concern.[121]

OCC argues that such programs are not justified and claims that Staff has not adequately explained why Rider DCI should continue.[122] OCC fails to recognize Staff's ongoing supervision and understanding of the Company's programs or the Company's ongoing efforts to improve its distribution system. Staff witness Nicodemus correctly recognized that the terms of the Stipulation that include the Company's commitment to decrease SAIFI provide the assurance that the programs included for recovery under Rider DCI are well-justified. As Mr. Nicodemus noted, "The combination of Duke's CAIDI and SAIFI commitments results in SAIDI that improves each of the next four years, and in 2022 through 2025 will be the lowest it has been since the electric distribution utilities (EDUs) began to report reliability performance in 2010."[123] Indeed, the SAIFI and CAIDI levels agreed to in the Stipulation are aggressive. The value of these commitments is that they align contemporarily with spending on distribution capital investment. This highlights the purpose of resolving the reliability standards issues along with the other provisions of the rate proceedings. Customers of Duke Energy Ohio will receive measurable – and immeasurable – value from their investment.

[120] *Id*., pg. 12
[121] *Id*., pg. 15.
[122] OCC's Brief pg. 44.
[123] Nicodemus Test. (Staff Ex. 3), pg. 12.

iii. There is no need for stakeholder input with respect to Rider DCI as it is governed by commitments to show actual results.

As set forth in the Stipulation and as further explained above, Rider DCI was designed to permit recovery of distribution investment, with specific caps on spending and with provisions that require that the Company demonstrate value. OCC incorrectly argues that there is no requirement to quantify or verify reliability impacts. OCC is wrong. The Stipulation plainly requires that the Company meet reliability standards in order to be entitled to receive full compensation for its investment.

OCC also argues that the annual plan the Company has agreed to develop with Staff will not be submitted to Staff until December 2019. However, OCC is aware that it recently negotiated terms of a Stipulation providing that the Company must file an annual report with the Commission detailing each of the programs approved in ESP III and that this report must be filed in December of 2018.[124] OCC intentionally overlooks this report and argues that it has no ability to participate in oversight of Duke Energy Ohio's distribution programs. This is simply incorrect.

Likewise, OCC repeats its argument claiming that the Company's distribution programs are not aligned with customer interests. OCC points to the testimony of Mr. Williams related to customer expectations. But Mr. Williams is quite mistaken. Indeed, as Staff witness Nicodemus pointed out, on average, customers state that restoration times of less than approximately four hours is acceptable.[125] Duke Energy Ohio's CAIDI performance has been better than that during each of the last five years.[126] And also, with respect to SAIFI, customers state that less than 1.2

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[124] *In the Matter of the Review of Duke Energy Ohio, Inc.'s Distribution Capital Investment Rider*, Case No.17-1118-EL-RDR, Stipulation and Recommendation, pp. 5-6 (June 22, 2018).
[125] Nicodemus Test. (Staff Ex. 3), pg. 10.
[126] *Id*.

interruptions per customer served is acceptable in a year. This is exceeded by Duke Energy Ohio's SAIFI performance in each of the last five years.[127]

iv. The cost of meter replacements is properly included in Rider DCI.

Rider DCI was approved in ESP III to recover all costs included in specified FERC accounts. Specific details of how such costs would be determined and accounted for were explained in testimony by Duke Energy Ohio witness Peggy A. Laub in ESP III and summarized in the Commission's Order in ESP III.[128] The Commission addressed and approved Rider DCI in ESP III. Rider DCI allows only recovery of costs related to capital investment but does not include recovery of operation and maintenance costs. Further, it includes the capital-related costs that are incremental to capital-related costs being recovered in base rates.[129] Meter replacement is an ordinary and necessary requirement of an electric utility. The current need to replace meters is driven by technological realities that are unavoidable. Duke Energy Ohio witness Donald L. Schneider, Jr., explained the Company's experience with smart meter deployment and the reasons why it is now necessary to replace Echelon meters with Itron meters.[130] Most importantly, in addition to solving for the need to upgrade from 3G to 4G technology, the switch to Itron meters will enable to flow of customer energy usage data (CEUD) to competitive retail energy service providers. These are current exigencies of the distribution system that are inexorably tied to technological developments outside the control of Duke Energy Ohio. OCC objects to inclusion of meter replacement costs in Rider DCI but offers no constructive alternative.

[127] *Id.*
[128] ESP III, Opinion and Order, pg. 67 (April 2, 2015).
[129] *Id.*
[130] Schneider Test. (Duke Energy Ohio Ex. 11), pg. 13.

f. The proposed battery storage project will benefit customers and provide valuable insights for future development.

Duke Energy Ohio witness Zachary Kuznar discussed a proposed 10-megawatt (MW) battery energy storage system that will employ lithium ion batteries.[131] Such energy storage systems provide distribution system operational flexibility and efficiencies.[132] OCC's principal opposition rests upon the perceived lack of support for the investment. Thereafter, OCC argues that the Commission should maintain approval authority over battery storage projects.[133] In the end, OCC's arguments seem to focus on form over substance. OCC provided no testimony or expertise with respect to such projects. OCC has no insight into Duke Energy Ohio's distribution system needs or potential projects that may be beneficial. In order to demonstrate the value of such projects, they will need to be built and tested. OCC misses the point. As Mr. Kuznar explained, energy storage will be used primarily to provide system benefits. It may also be used during grid outages in the form of backup power.[134] This effort is consistent with state policy in that it encourages innovation and will facilitate the state's effectiveness in the global economy.[135] Moreover, this is a project that demands a flexible regulatory approach and is consistent with the Commission's goals in its PowerForward initiative.[136]

In contrast to OCC's argument, IGS simply opposes the battery storage proposal because it believes that the plan represents a "subsidy" in the wholesale service market.[137] But as Duke Energy Ohio provides no competitive retail energy service, it is not a competitor of IGS. The costs of the battery storage project may be recovered through Rider DCI, but the Company has committed that any revenue obtained from PJM related to the battery project would offset costs

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[131] Kuznar Test. (Duke Energy Ohio Ex. 16), pp. 2-3.
[132] *Id*.
[133] OCC's Brief, pg. 51.
[134] Kuznar Test. (Duke Energy Ohio Ex. 16), pg. 4.
[135] *Id*., pg. 5.
[136] "PowerForward – A Roadmap to Ohio's Electricity Future," p.21; available at https://www.puco.ohio.gov/industry-information/industry-topics/powerforward/
[137] IGS's Brief, pg. 4.

to customers. The concept is very common in the utility industry. For example, for an integrated utility that owns generation, it is common that, because retail ratepayers are charged the full revenue requirement on a generating asset, any margin the utility can derive by selling excess generation into the wholesale market is shared up to 100 percent with the ratepayer. IGS would apparently have Duke Energy Ohio deprive all of its customers of this potential benefit. And although IGS is correct that Rider DCI was designed to allow for potential recovery of costs that fall within specific accounting codes, there is no reason why the Commission may not explicitly approve a project that varies from that requirement, where it sees benefit in doing so, regardless of accounting treatment. Thus, IGS's argument that the project does not fall within specified accounting codes for recovery under Rider DCI is of no consequence.

Finally, although IGS may itself be investing in resources that it feels might compete with this project, the Company's project would enable the Commission to obtain information that it cannot obtain from an unregulated business like IGS. As an unregulated entity, IGS would likely balk at any request to provide detailed financial information and performance data related to its own projects. Instead, the Commission will gain valuable insight and knowledge from this limited regulated project that can inform its policy decisions in the future. As Mr. Kuznar explained, the project will allow Duke Energy Ohio and the Commission to gain operational knowledge for this type of system and this knowledge will be invaluable for future energy storage deployments and economic modeling.[138]

The primary purpose of any battery project initiated by Duke Energy Ohio would be to benefit the distribution grid. It is highly unlikely that IGS, or any competitive supplier, would be seeking to invest in battery projects to benefit the distribution grid. Consequently, whatever dark motive IGS sees in EDUs investing in projects to benefit the distribution grid is more imagined

[138] Kuznar Test. (Duke Energy Ohio Ex. 16), pp. 4-5.

than real. The battery storage project, as recommended by Duke Energy Ohio and as defined in the Stipulation, should be approved by the Commission.

The Conservation Group argues that the Company's proposal to pilot a battery storage project should be modified. They assert that a proposal for a non-wires alternative should be constrained by a pre-approval process that includes a number of specific hurdles prior to implementation. The Conservation Group suggests that Duke Energy Ohio will look at the most cost-effective solutions and that a cost-benefit analysis will be a key factor in selecting the location.[139] But Duke Energy Ohio has put forth a specific proposal and the Stipulation is designed to include this proposal for a 10 MW battery storage facility. Mr. Wathen explained that the Company would submit a report to the Commission documenting the results of the pilot after the project is in service.[140] Curiously, however, despite such assurances, the Conservation Group still opposes allowing the Company to move forward with this project because they would prefer that the Company follow a framework designed by the Conservation Group member ELPC, as described by their witness, Mark Higgins.[141]

The Conservation Group's regulatory recommendations would amount to an over-burdensome process that would entail both a pre-deployment and a post-deployment collaborative approach that would take multiple years of work and slow down initiatives to the maximum extent possible.

g. Changes to Riders NM and SCRR offer benefits to customers and are supported in the record.

In testimony filed in these proceedings, Duke Energy Ohio witnesses Wathen and James E. Ziolkowski explained that the Company's net metering tariff would be modified so that

[139] Initial Brief Regarding Battery Storage Proposal of the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council and Ohio Environmental Counsel (Conservation Group Battery Brief) pg. 5 (the Conservation Group filed three separate briefs on specific topics).
[140] Trans. Vol. V, pg. 952.
[141] Higgins Test. (ELPC Ex. 3), pp. 22-23; Conservation Group Battery Brief, pg. 11.

customers with excess generation during a billing period are credited with the value of the energy at the then-current rate for Rider RE.[142] The Company proposed to eliminate the credit for capacity when a customer's generation exceeds its usage in a billing period.[143] And Mr. Ziolkowski explained that the Company would then include payments made for excess generation in its Rider SCR; otherwise, the Company would have no means of recovering the cost of such payments.[144]

The Stipulation provides that the Company will modify its Rider NM (Net Metering) and Rider NM-H (Net-Metering – Hospitals) consistent with the Commission's regulations as such regulations have been, or may be, amended in Case No.12-2050-EL-ORD.[145]

OCC witness Wilson Gonzalez and the Conservation Group both argue their opposition to this tariff change because both believe customers should be compensated in a manner that includes recognition for capacity.[146] Both OCC and the Conservation Group members have argued their respective positions before the Commission in the rule review case referenced above, which is not yet final. The Stipulation provides that the Company will comply with the Commission's policy.[147] Thus, addressing this issue in these proceedings beyond the commitment to comply with the Commission's policy is of no value. The Commission must affirm this provision.

[142] Ziolkowski Test. (Duke Energy Ohio Ex. 18), pg. 8; Wathen Test. (Duke Energy Ohio Ex. 28) pp. 7-8.
[143] Wathen Test. (Duke Energy Ohio Ex. 28), pp. 6-7; Ziolkowski Test. (Duke Energy Ohio Ex. 18), pp. 7-8.
[144] Ziolkowski Test. (Duke Energy Ohio Ex. 18), pg. 8.
[145] Stipulation (Joint Ex. 1), pp.21-22.
[146] Gonzalez Test. (OCC Ex. 6), pg. 9; OCC's Brief, pg. 51; Conservation Group Net Metering and Data Access Brief, pg. 18.
[147] Stipulation (Joint Ex. 1), pp. 21-22.

h. The Company's AMI transition will result in a new system that will provide benefits to customers.

i. OCC's attempts at revisionist history are unfounded and should be ignored.

It is troubling that OCC now wishes to rewrite history with respect to Duke Energy Ohio's SmartGrid deployment. The Company received approval to begin deployment of its SmartGrid in its first ESP case.[148] That case was fully stipulated by all parties, including OCC.[149] As part of the agreement to implement SmartGrid, the parties agreed to a mid-deployment review. Specifically, the agreement stated that the "review shall address deployment lessons learned, an updated allocation of the annual distribution revenue requirement, and the desirability of continuing the program beyond 2012.[150] Indeed, OCC's witness, Paul Alvarez was then employed by the firm (MetaVu, Inc.) that was ultimately selected by the Commission as the consultant to undertake this mid-deployment review of the Company's plan.[151] Mr. Alvarez admitted that his work for the MetaVu audit was thorough and was designed to verify and quantify the value of the SmartGrid deployment and to identify any changes or revisions needed to the plan.[152] In his work, as part of the review, Mr. Alvarez reviewed 23 discrete operational benefits that were identified by Duke Energy Ohio in its original application seeking approval.[153] Indeed, Mr. Alvarez verified, among other things, that the Company's system was using two different data processing systems and he had found that to be acceptable.[154]

Mr. Alvarez was subsequently employed by Duke Energy Corporation (Duke Energy) to prepare reports for the U.S. Department of Energy.[155] After having gained valuable knowledge

[148] ESP III, Stipulation, (Oct. 27, 2008); Opinion and Order, (December 17, 2008).
[149] ESP III., Stipulation (Oct. 27, 2008); Opinion and Order, pg. 16-18 (December 17, 2008).
[150] *Id.*, Stipulation, pg. 15.
[151] Trans. Vol. X, pg. 1576.
[152] *Id.*, pg. 1579.
[153] *Id.*, pg. 1580.
[154] *Id.*, pg. 1580.
[155] *Id.*, pg. 1581.

and insight from his experiences with Duke Energy, Mr. Alvarez, in his own book, credits Duke Energy employees, saying "[m]y teams have worked with many utilities over the years, but the professionalism, focus, and integrity of every Duke Energy employee with whom we've ever worked have been truly exceptional."[156] In his book, Mr. Alvarez further credited Staff with having **maximized** SmartGrid benefits for Ohio citizens.[157] Under cross-examination in the current proceedings, he admitted that the stipulation in the Company's mid-deployment review was the vehicle that provided the maximization of SmartGrid benefits to Ohio citizens and that the proceeding addressed a rate case timing issue such that economic benefits of the deployment available from smart meters would be translated into customer rates.[158] He also admitted that the settlement agreement addressed issues regarding the scalability of the validation, editing, and estimating routines (VEE).[159] Indeed, Mr. Alvarez learned a lot about SmartGrid deployment from Duke Energy Ohio and Duke Energy employees, particularly how to maximize benefits of SmartGrid deployments.[160]

Despite the facts that the Company essentially educated Mr. Alvarez with regard to grid modernization, that Mr. Alvarez previously had nothing but praise for his experience with Duke Energy personnel, and that Mr. Alvarez essentially reviewed every aspect of the Company's deployment in the Commission's mid-deployment review, giving it glowing compliments, he nevertheless returned to Ohio, now on behalf of OCC, and changed his view entirely. Again, OCC and Mr. Alvarez are conspiring in their attempt to rewrite history.

In its Post Hearing Brief, OCC relies on calculations made by Mr. Alvarez intending to imply that the Company misstated its estimates of the cost of the AMI transition. Sadly, Mr.

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[156] *Id.*, pg. 1585.
[157] *Id.*, pg. 1584 (emphasis added).
[158] *Id.*, pg. 1584.
[159] *Id.*, pg. 1584.
[160] *Id.*, pg. 1585; Acknowledgments from "Smart Grid Hype and Reality," by Paul Alvarez, (Duke Energy Ohio Ex. 38).

Alvarez's calculations reveal his apparent lack of understanding of basic financial principles and of utility ratemaking. For example, the figures referenced in OCC's Post-Hearing Brief, on page 132, rely on computations made by Mr. Alvarez in his testimony. Those computations are so fraught with mistakes that they are meaningless. For example, Mr. Alvarez's cost calculations include a calculation of revenue requirement on net plant. One only has to review the Commission's Standard Filing Requirements for establishing new base rates to know that the return allowed on utility investment must be offset with the accumulated deferred income taxes on the plant. Nowhere in Mr. Alvarez's exhibits does he reflect an offset for accumulated deferred income taxes. Missing that valuable rate base offset means that Mr. Alvarez has significantly overstated the revenue requirement on any capital investment for AMI.

Throughout the proceeding, OCC has opposed nearly every aspect of the proposal that would allow Duke Energy Ohio to continue to provide smart energy services to customers and would enable the provision of data to CRES providers such that customers could control their energy usage and save money. Despite the fact that OCC had essentially been a partner with Duke Energy Ohio throughout the initial deployment process since 2008, OCC now wishes to bring all of the previous efforts to a grinding halt. OCC's newfound opposition does a disservice to its constituents and residential customers, and fails to consider the repercussions of its negative views.

Arguing that the settlement does not benefit ratepayers, OCC claims that a regulated entity is ill-suited to deploy SmartGrid.[161] This is a curious position to take before the Commission, particularly in light of the Commission's forward-looking view to grid modernization and infrastructure investments. The logical conclusion would be that the Commission abandon its PowerForward initiative and sit back and hope that unregulated

[161] OCC's Brief, pg. 54.

enterprises bring about needed changes for regulated customers in Ohio. In support of this argument, OCC argues that "Duke's smart grid is virtually useless."[162] It is difficult to know where to begin to respond to such a mendacious statement, particularly given OCC's direct involvement in the Company's deployment efforts over the past nearly ten years.

OCC participated in every rider proceeding that the Company has filed since 2009. In each of these proceedings, the Company explained the status of its deployment and detailed costs incurred in deployment. In almost all of these proceedings, OCC raised relevant concerns and participated as it deemed appropriate. Likewise, for many of those years, OCC participated in the Company's SmartGrid collaborative meetings. At no time, in any of these cases, did OCC argue that the deployment should cease, or that the Company was not providing sufficient information, or that there was no value in continuing the deployment. The Commission should give no credence to OCC's disingenuous new claims.

ii. The AMI transition and upgrade to the Company's SmartGrid system is reasonable, necessary, and in customers' best interests.

Duke Energy Ohio witnesses Donald Schneider, Jr., and Scott Nicholson both explained the current status of the Company's grid modernization and what is currently needed to continue to provide and enhance service to customers. Mr. Schneider explained the history of the Company's deployment of both Echelon and Itron meters, the functionality of these meters, the communication nodes, the back-end data processes, and the reasons for the additional investment needed for new meters and communication systems. Mr. Schneider further explained that various options were considered and ultimately rejected by the Company as less optimal alternatives.[163]

[162] *Id.*, pg. 54.
[163] Schneider Test. (Duke Energy Ohio Ex. 11), *passim*.

Recent developments in the industry caused the Company to modify and adapt as it continues to manage its SmartGrid systems. For example, Ericsson, the Company that originally manufactured the communication nodes used in conjunction with Echelon meters, ceased manufacturing the nodes, an event well outside the control of Duke Energy Ohio.[164] The Company moved quickly to respond to this business issue, but also found a much better long-term solution by moving to the mesh meter environment.[165]

Likewise, Verizon, the Company's cellular provider, alerted the Company that it would no longer support 2G and 3G technology as of 2022. Again, the Company must adapt to market circumstances outside its control in order to keep the current deployment functioning. This effective planning will allow Duke Energy Ohio to avoid approximately $91.2 million in total costs to upgrade its AMI environment to 4G. Having all the meters upgraded to Itron, in the mesh environment, will also facilitate the flow of data through the Company's data management system as needed to provide CEUD to third parties. Failure to act at this juncture, as recommended by the Company, would result in millions of dollars having to be spent on interim or provisional repairs. The Company examined the options and worked to develop the most practical and efficient plan. OCC has not offered any viable alternatives. Nor did OCC perform any analysis of its own to suggest a better plan.

OCC argues now that the Company has made imprudent decisions, but it must be remembered that OCC did not raise any concerns about any of these decisions in earlier cases. Although OCC witness Alexander attempts to find fault with the Company's current proposal and suggests disallowance of costs related to meter changes, etc., Ms. Alexander's overall lack of knowledge and her factually unsupported and combative views do not support OCC's position.

[164] *Id.*, pg. 9.
[165] *Id.*, pg. 12.

As pointed out above, Ms. Alexander had very little knowledge of the facts as related to Duke Energy Ohio's SmartGrid system and deployment:

- She had no technical expertise with respect to AMI or meter data management;[166]
- She has never audited a utility company SmartGrid deployment;[167]
- She was unaware of when the Company completed deployment;[168]
- She was not familiar with all of the Company's previous rider applications;[169]
- She did not know the rider applications entailed a prudency review;[170]
- She did no financial analysis to ensure that savings were netted against costs as provided for in the stipulation after the mid-term review;[171]
- She did not examine operational costs from the last Duke Energy Ohio rate proceeding to compare them with the costs included in this rate application to explore operational savings;[172]
- Although she admitted having no knowledge of when the Company made a decision to use Itron instead of Echelon meters, she alleged that the Company intentionally misrepresented these facts to the Commission and to the U.S. Department of Energy;[173]
- She is unaware of the billing improvements achieved with SmartGrid deployment;[174]
- She is unaware of the fact that the Company can notify customers of outages via text message;[175]
- She has no knowledge of flexible billing options enabled by SmartGrid; and[176]
- She has no knowledge of cybersecurity matters.[177]

With this breath-taking lack of knowledge and preparation for her testimony, Ms. Alexander's testimony offers virtually nothing that can be relied upon. And since OCC's

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166 Trans. Vol. IX, pp. 1496-1497.
167 *Id.*, pg. 1497.
168 *Id.*, pg. 1499.
169 *Id.*, pg. 1500.
170 *Id.*, pg. 1500.
171 *Id.*, pg. 1501.
172 *Id.*, pg. 1503.
173 *Id.*, pg. 1519.
174 *Id.*, pg. 1524.
175 *Id.*, pp. 1524-1525.
176 *Id.*, pg. 1525.
177 *Id.*, pg. 1526.

arguments are reliant upon her testimony and no other support, OCC has no basis to support its claims.

iii. The Company has provided value to customers and delivered on its promises.

This case is not about justifying the Company's prior deployment decisions. Nonetheless, each of those decisions was made in transparent fashion over the years, under the watchful eyes of the Staff and interested stakeholders. The Company filed rider cases each year and, in each of those cases, parties had ample opportunity to consider the process of deployment, the decisions made, and the dollars spent. However, even though OCC was a party to each of those cases, it did not disagree with the Company's deployment decisions. And now, OCC brings in witnesses with no history and no appropriate experience to second-guess all that has occurred. In seeking to find fault after the fact, OCC lays out a flawed timeline and refers to its own witness as a source for that information. And yet, OCC witness Alexander has virtually no knowledge of what has actually transpired with respect to Duke Energy Ohio's deployment.[178] Ms. Alexander attempted to argue, based upon her experience as a consumer advocate, that Duke Energy Ohio's SmartGrid deployment has failed to provide benefits to customers. Ms. Alexander testified that she believes this is true because the Distribution Case application in these proceedings, in her opinion, was required to specifically call out the level of the benefits attributable to SmartGrid but it failed to so.[179]

Ms. Alexander admitted that she had no technical or engineering understanding of the Duke Energy Ohio SmartGrid deployment.[180] She further admitted that she wasn't aware of when the Company completed its deployment other than by relying upon the Staff Report. And Ms. Alexander admitted that she did not do a complete review of the annual applications

[178] *Id.*, pp. 1497-1501.
[179] Alexander Test. (OCC Exhibit 12), pg. 3.
[180] Trans. Vol. IX, pg. 1497.

submitted to the Commission to document deployment and cost recovery.[181] Quite surprisingly, given the context of Ms. Alexander's testimony, she was unaware that each annual filing entailed a prudence review with respect to the costs that had been incurred. And she reviewed only "some" of the testimony filed in those cases.[182] Ms. Alexander was ill-informed to render any reliable opinion with respect to the value of the Duke Energy Ohio SmartGrid deployment.

Ms. Alexander had, after the fact, reviewed the stipulation that was agreed to by all intervenors, including OCC, during the Commission's mid-deployment review.[183] She was not involved in those negotiations. Despite the fact that the stipulation provided an explicit methodology for reducing the annual revenue requirement of SmartGrid deployment to equal the value of the operational benefits, levelized over four years, Ms. Alexander did not review subsequent filings to ensure that such benefits were in fact returned to customers each year.[184] Consequently Ms. Alexander was not aware of the $12.933 million in savings that had been netted against the revenue requirement in the Company's most recent rider application.[185] And although Ms. Alexander stated that she reviewed the Staff Report in the Company's Distribution Case, she did not compare any of it with the Staff Reports or outcome of previous rate cases to determine whether the Company's expenses have had gone up or down.[186]

In its Post-Hearing Brief, OCC argues that, despite the fact that the Company's operation and maintenance (O&M) expenses have decreased by nearly $16 million since 2012, it is unconvinced that those savings are attributable to the SmartGrid deployment. In OCC's view, the penalty for not discretely identifying savings attributable to SmartGrid deployment (even

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[181] *Id.*, pg. 1500.
[182] *Id.*, pg. 1500.
[183] *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its Gas and Electric Recovery Rate for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No.10-2326-GE-RDR, Stipulation and Recommendation (February 24, 2012) (Duke Energy Ohio Ex. 35); Trans. Vol. IX, pg. 1503.
[184] Trans. Vol. IX, pg.1503.
[185] *Id.*, pg. 1506.
[186] *Id.*, pp. 1506-1507.

though Duke Energy Ohio had no requirement to do so) is that the Company's revenue requirement should be reduced by an additional $12.933 million. Rather than praise the Company for significantly reducing its actual O&M by about $16 million since 2012,[187] largely due to the benefits of SmartGrid, OCC dismisses this benefit out of hand because of its inept reading of stipulation it agreed to the mid-deployment review.[188] Notwithstanding OCC's attempt to renege on that stipulation by insisting on provisions that did not exist, Duke Energy Ohio has clearly achieved considerable savings since the inception of its SmartGrid deployment. At a time when inflation has increased costs overall, the Company has managed to decrease its O&M by about 10 percent. It is not necessary, and it was certainly not required, for the Company to itemize each factor contributing to this significant cost reduction but it should be recognized that these cost savings are, in fact, being passed on to customers.

Ms. Alexander expressed her concern that Duke Energy Ohio had not obtained "permission" from the Commission to install the Itron metering system, but she also admitted she was unaware of any legal requirement to do so.[189] She just thought it would be a "standard regulatory policy." And she held this view even though she was unaware that the Company had convened a SmartGrid collaborative group that met monthly at the Commission to discuss the status and issues with deployment as they occurred.[190]

Ms. Alexander demonstrated her ill-informed and biased views through reckless and unfounded allegations that somehow Duke Energy Ohio had intentionally misrepresented its

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[187] This reduction can be seen by comparing Schedule C-2 in the Distribution Case Staff Report to Schedule C-2, attached to the testimony of Staff witness W. Ross Willis, in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Rates*, Case No. 12-1682-EL-AIR.

[188] *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its Gas and Electric Recovery Rate for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Stipulation and Recommendation (February 24, 2012) (Duke Energy Ohio Ex. 35).

[189] Trans. Vol. IX, pg. 1516.

[190] *Id.*, pg. 1518.

SmartGrid deployment strategy to the U.S. Department of Energy.[191] This inflammatory allegation is utterly unsupported in the record. Ms. Alexander had already admitted that she did not participate in the Duke Energy Ohio SmartGrid collaborative and that she had not reviewed all of the Company's rider applications filed during the years of deployment.[192] She then went on to admit that she had not discussed this potential "misrepresentation" with anyone at the U.S. Department of Energy, nor did she review or have knowledge of discussions between the Company and the U.S. Department of Energy.[193] She did understand that the U.S. Department of Energy "doles" out grant funds over a period of time but she readily admitted that she had no insight into how the U.S. Department of Energy was overseeing Duke Energy Ohio's SmartGrid deployment.[194] Ms. Alexander clearly had no factual basis for her claims. There is absolutely no evidence, other than her unfounded allegation, that the Company was anything but forthcoming and cooperative with both state regulators and the U.S. Department of Energy. Such unfounded and biased testimony should be disregarded as of no value at all.

In its brief, OCC lists a series of items that it claims the SmartGrid system is incapable of delivering. OCC is misinformed and incorrect. Indeed, despite OCC's claims, Duke Energy Ohio customers do have access to their daily "real time" usage through the Company's website. A customer need only sign into the account page to see the information.

Additionally, and most importantly, OCC is misinformed about a very important fact: The Echelon meters connected to the Duke Energy Ohio billing system do indeed render billing quality data. During the rider proceeding in 2013, CRES providers raised issues related to access to CEUD.[195] In that case, Duke Energy Ohio witness Schneider explained the details of the

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[191] *Id.*, pp. 1521-1522.
[192] *Id.*, pp. 1517-1518.
[193] *Id.*, pg. 1522.
[194] *Id.*, pg. 1523.
[195] *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2012 SmartGrid Costs,* Case No.13-1141-GE-RDR, Opinion and Order, (April 9, 2014) pg. 11.

various meter data management systems and billing capabilities.[196] The questions in that case related to access to billing quality data for CRES providers. Mr. Schneider explained the need to transfer data from the energy data management system (EDMS) to the second generation meter data management system (MDM) in order to allow for transmitting billing quality data to CRES providers.[197] However, Duke Energy Ohio has been rendering bills to its customers who have SmartGrid meters since the beginning of its deployment. As explained by Mr. Schneider, the EDMS system relies on the Company's customer management system (CMS) to provide scalable validation, estimation, and editing (VEE) functionality for AMI CEUD.[198] Thus, the Echelon meters do indeed provide billing quality data. OCC simply does not understand the system. This type of misunderstanding of the Company's systems and processes, along with not having sufficient knowledge of the SmartGrid deployment history, underpins most of OCC's arguments.

iv. The Commission should not disallow depreciation of existing meters and customers are not "double paying" for two systems.

The Company was the first EDU in Ohio to deploy a SmartGrid system. By doing so, it has created value for customers and improved its reliability significantly. The terms of the Stipulation that provide for updating AMI and engaging in related IT work to provide CEUD to CRES providers is the next logical step in the process. Along with that work, the Company will also update its meters to accommodate an industry shifting from 3G to 4G technology. As all of this comes together, the interrelated projects will create synergies that benefit the overall work to be done. Staff witness Krystina Schaefer explained that the components of Rider PF will further state objectives by supporting development of innovative products and services and giving Ohio customers more control over their energy usage.[199] Ms. Schaefer further explains that the

[196] *Id.*, Supplemental Direct Testimony of Donald L. Schneider, Jr., pg. 5 (Jan. 29, 2014).
[197] *Id.*, pg. 11.
[198] Schneider Test. (Duke Energy Ohio Ex. 11), pg. 7.
[199] Schaefer Test. (Staff Ex. 11), pg. 6.

updating of the Company's SmartGrid and the work included under component two of Stipulation Attachment F will provide the processes and systems to make CEUD available to CRES providers.[200] Absent the updating of the meters to accompany these changes, none of this would be possible.

This updating work will necessarily include changing from Echelon meters to Itron meters, in order to allow data to flow properly and to account for the change from 3G to 4G. OCC argues that the Company should not be permitted to depreciate the Echelon meters that will be replaced. But Staff recommended in its Staff Report that these meters be treated as dying accounts and that the unrecovered investment be amortized over a ten-year period.[201] Staff noted that this treatment was consistent with the treatment of dying accounts authorized in Case No.08-709-EL-AIR and for dying Accounts 370.0 Meters and 370.1 Leased Meters.[202] The Stipulation in this case properly reflects this recommendation. OCC persists in complaining about the fairness of this approach, but OCC has offered no testimony to explain why such accounting treatment is not consistent with regulatory policy or practice.

v. The provisions for updating the SmartGrid deployment and providing CEUD to CRES providers contained in the Stipulation represent the least-cost alternative.

Mr. Schneider's testimony described the Company's deployment and current industry challenges in order to explain the basis for the decisions to be made going forward.[203] He presented two different scenarios for proceeding, each of which was studied by the Company as a realistic alternative. These scenarios were described in his Attachment DLS-1 and were

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[200] *Id*.
[201] Staff Report of Investigation, September 26, 2017, pg. 11, *citing In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR, *et al*., Opinion and Order (June 8, 2009)(adopting the March 31, 2009, Stipulation in its entirety, by which the Company would implement depreciation rates consistent with the January 27, 2009, Staff Report).
[202] *Id*.
[203] Schneider Test. (Duke Energy Ohio Ex. 11), pp. 3-10.

described as the "Continue Node" option or the "Transition to Mesh" option.[204] Some costs would be common to both approaches. Mr. Schneider testified that the economic benefit of transitioning to the mesh environment was the avoidance of approximately $91.2 million dollars.[205] Moreover, if the Company were to simply attempt to maintain the current system, it would still be faced with Verizon's decision to cease support of its 3G systems, as well as the cost to support the node environment going forward.[206]

The Conservation Group opines that the Commission should modify the Stipulation to ensure that all customers receive full benefits from the installation of AMI, including access to CEUD, for any third party.[207] But the Stipulation already provides this assurance. The Conservation Group acknowledges that the Stipulation states: "If a third party other than a CRES expresses an interest in receiving CEUD, the Company shall develop a proposal for providing historical interval CEUD to third parties when authorized by customers."[208] There is no need to modify the Stipulation, as it already makes clear that the Company will provide the necessary data to third parties with appropriate authorization. The Conservation Group's witness Michael Murray attempts to micro-manage the process with his own specific recommendations.[209] Such specific details were not needed in the Stipulation because the plain language contained therein already provides the assurance that CRES providers and third parties will have appropriate access to the data. Indeed, the Stipulation itself already spells out the needed detail in Attachment F. The Conservation Group is pointing out a solution in search of a problem.

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[204] Schneider Test. (Duke Energy Ohio Ex. 11), Attachment DLS-1.
[205] Schneider Test. (Duke Energy Ohio Ex. 11), pg. 13.
[206] *Id*., pg.14.
[207] Conservation Group Data Access and Net Metering Brief, pg. 4.
[208] Stipulation (Joint Exhibit 1), pg. 18.
[209] Michael Murray Test. (OEC/EDF Ex. 3), pg. 11.

It is not necessary to examine every possible alternative to know that the plan agreed upon in the Stipulation is the best and most cost-effective alternative. OCC's suggestion that "all available alternatives" be examined is impractical and unrealistic.[210] To argue for alternatives, OCC refers to the testimony of Mr. Alvarez. But as already explained, Mr. Alvarez had ample opportunity to find fault and identify potential concerns with Duke Energy Ohio's SmartGrid deployment years ago. Not only did he fail to do so; rather, he did just the opposite and even wrote a book about it.

vi. The Company will continue to improve its deployment and provide increasing value to customers.

In a last-ditch effort to support its unfounded objections, OCC argues that Duke Energy Ohio's shareholders should pay for changes to SmartGrid deployment to accommodate industry changes and to enable the flow of CEUD to CRES providers. But OCC makes this argument again through reliance on its witness Mr. Alvarez. Mr. Alvarez had an opportunity to advise the Commission in 2012. According to Mr. Alvarez, his audit of the system at the time was very thorough and was designed to verify and quantify the value of the SmartGrid deployment and to identify any changes or revisions needed to the plan.[211] At no time in 2012 did Mr. Alvarez question the deployment of Echelon meters or discuss future needs to accommodate changing telecommunication technologies. Instead, he wrote glowing accounts of Duke Energy employees. OCC offers no rationale for its argument and there is none.

[210] OCC's Brief, pg. 69.
[211] Trans. Vol. X, pg. 1579.

3. The Stipulation does not violate important regulatory principles or practices.

a. The Stipulation is consistent with all important regulatory principles and practices.

The record supports that the Stipulation, in its entirety, is consistent with all important regulatory principles and practices. Considering the ESP's pricing and all other terms and conditions, as proposed in the Stipulation, the ESP recommended by the Signatory Parties is more favorable in the aggregate than the expected results of a market rate offer (MRO) under R.C. 4928.142.[212] The Stipulation results in an ESP that complies with R.C. 4928.143, is more favorable in the aggregate than the results of an MRO,[213] and is consistent with state policies enumerated in R.C. 4928.02.[214] The Stipulation, factoring in all of its terms and conditions, including the resolution of the Company's Distribution Case with an overall base rate reduction and no increases or decreases to the monthly fixed customer charges, follows principles of cost causation[215] and gradualism,[216] and does not result in unreasonable subsidies.[217] Notwithstanding the baseless claims by OCC, IGS, and others, as the Commission has previously held regarding mechanisms similar to the Rider PSR, the Stipulation does not result in unlawful transition revenues.[218] The Stipulation should be approved without modification as it meets the third part of the Commission's three-part test.

[212] Donlon Test. (Staff Ex. 17), pp. 11-12; Wathen 2nd Supp. Test (Duke Energy Ohio Ex. 30), pp. 30-33.
[213] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pp. 30-33.
[214] R.C. 4928.02; Spiller Test. (Duke Energy Ohio Ex. 5), pp. 14-23.
[215] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pp. 34-35.
[216] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pp. 34-35 (Mr. Wathen describes the significant distribution rate reduction, that customer charges are not being raised, and in some instances being reduced).
[217] Stipulation (Joint Ex. 1), pg. 9.
[218] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, *et al.*, Case No, 14-1693-EL-RDR, *et al.*, Fifth Entry on Rehearing, pg. 37 (April 5, 2017); *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 16-395-EL-SSO, *et al.,* Opinion and Order, pp. 55-56 (Oct. 20, 2017).

b. The stipulated ROE is reasonable and should be approved.

i. The Stipulated ROE is supported by valid independent analysis, while OCC's recommendation is not.

As thoroughly addressed in the Company's Initial Brief, the overwhelming record evidence supports the stipulated return on equity (ROE) of 9.84 percent that contributes to an overall reasonable rate of return (ROR) of 7.54 percent for Duke Energy Ohio.[219] The stipulated ROE and the resulting ROR are reasonable, are supported with thorough and independent analysis using multiple methodologies, are within the ranges offered by Staff's own witness Joseph Buckley and Company witness Dr. Roger Morin, and are consistent with current authorized returns for electric utilities across the country.

Conversely, the shockingly low ROE promoted by OCC's witness, Dr. Daniel Duann, is unreasonable and is not supported by independent analysis or any other standard methodology.[220] Rather, OCC's witness merely made his own self-serving modifications to the Capital Asset Pricing Model (CAPM) analysis performed by Staff.[221] Unlike Company witness Dr. Morin, who performed multiple analyses using different methodologies to support his recommended range, which also overlaps with the range recommended by Staff, Dr. Duann admitted he did not perform a Risk Premium Analysis or even a Discounted Cash Flow Analysis.[222] Instead, he simply and opportunistically modified Staff's CAPM analysis to reach OCC's desired outcome. The result is that OCC is pursuing an unsupportable and unreasonable ROE that is almost 150 basis points below the average ROE approved for all investor-owned electric utilities across the United States in 2017.[223]

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[219] Company's Brief, pp. 16-23.
[220] Trans. Vol. VI, pp. 1215-1216.
[221] *Id.*, pp. 1215-1216.
[222] *Id.*, pp. 1215-1216.
[223] *Id.*, pp.1218-1219.

ii. The stipulated ROE is comparable to authorized ROEs recently granted to electric utilities by other state commissions.

Contrary to OCC's claims,[224] the record clearly demonstrates that the Stipulation's 9.84 percent ROE is consistent with and within the range of ROEs recently authorized by other state commissions for electric utilities.[225] In addition, the Stipulation's ROE of 9.84 percent is much closer to the average ROEs being granted to electric utilities across the country than is OCC's proposed ROE of only 8.28 percent. As OCC witness Duann's own exhibit demonstrates,[226] the range of ROEs authorized for electric utilities in 2017 was between 8.40 percent to 11.95 percent.[227] The Stipulation's 9.84 percent ROE is well within this range, while OCC's proposed 8.28 percent ROE is below even the lowest recently approved ROE.

Additionally, as witness Duann's exhibit establishes, the average ROE for all electric utilities in 2017 was 9.74 percent, which is only 10 basis points lower than the Stipulation's ROE of 9.84 percent. In contrast, OCC's proposed ROE of 8.28 percent is almost 150 basis points below the average 2017 authorized electric utility ROE. OCC's proposal is well below **any** reasonable ROE.[228]

If OCC's proposed ROE were adopted by the Commission, Duke Energy Ohio would have the lowest ROE authorized for an investor-owned electric utility, not only in Ohio, but in the entire United States.[229] Dr. Duann's recommendation is significantly below **any** approved

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[224] OCC's Brief, pp. 40, 83-86.
[225] Company's Brief, pp. 21-23.
[226] Duann Test. (OCC Ex. 7), Attachment DJD-6, pp. 9-13.
[227] Or 9.00 percent to 10.40 percent if the highest and lowest ROEs are removed. As discussed in Duke Energy Ohio's Brief, the two lowest ROEs authorized for electric utilities in 2017 were 8.40 percent, authorized by the Illinois Commerce Commission pursuant to a statutory return-on-equity formula as opposed to a traditional cost-of-equity analysis. *See* Company's Brief, pp. 21-22.
[228] Trans. Vol. VI, pp. 1216-1219.
[229] OCC also nonsensically argues that the overall ROR being recommended in the Stipulation is unreasonable when compared to the approved RORs for other utilities reported in the Regulatory Research Associates (RRA) material. As OCC's witness acknowledged, differences in actual capital structure and differences in the actual cost of debt – both of which can and do differ among utilities – affect the calculation of ROR. Companies with higher debt ratios and those with lower embedded cost of debt will necessarily have lower RORs than companies with higher equity

ROE for **<u>any</u>** electric utility, as reported by the Regulatory Research Associates, since January 1, 2016, and it is significantly below the authorized ROE for every other electric distribution utility regulated by this Commission. OCC's recommendation is almost 172 basis points below a stipulated ROE that OCC itself agreed to just a few months ago.[230]

Importantly, OCC's recommendation for an extremely low authorized ROE would adversely impact Duke Energy Ohio's creditworthiness, its financial integrity, its ability to raise significant needed capital, and, ultimately, its rates for customers.[231] The Commission should disregard OCC's false claims that the stipulated ROE is unreasonably high as compared to ROEs granted to other utilities. Rather, the evidence clearly shows just the opposite: OCC's own proposed ROE is unreasonably lower than that approved for any other electric utility in the country.[232]

iii. The stipulated 9.84 percent ROE is reasonable for use in calculating riders such as Rider DCI.

OCC's argument that a lower ROE should be used for Rider DCI is absurd and indicates a misunderstanding of market-derived ROEs.[233] As Dr. Morin testified:

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ratios and embedded debt rates. The timing of debt issuances can play a significant role in one utility having a lower ROR than another, because interest rates may vary significantly over time. Accordingly, relying on RORs as a basis for evaluating the reasonableness of the Stipulation is irrational. Consider, for example, the currently approved RORs for FirstEnergy and Ohio Power. In Case No. 07-551-EL-AIR, *et al.*, the Commission approved an overall ROR of 8.48 percent, almost 100 basis points more than the 7.54 percent ROR being recommended for Duke Energy Ohio. In Case No. 11-351-EL-AIR, *et al.*, the Commission approved an ROR of 7.78 percent for Columbus Southern Power and 7.97 percent for Ohio Power. And, although the overall ROR recommended in the pending DP&L stipulation is slightly lower than the recommendation for Duke Energy Ohio, this is due to the fact that the debt ratio for DP&L is slightly higher and the cost of debt used in that calculation is slightly lower than for Duke Energy Ohio, while the ROE stipulated for DP&L (by parties including OCC) is higher than the 9.84 percent ROE in the Duke Energy Ohio Stipulation.

[230] *In the Matter of the Application of the Dayton Power & Light Company for an Increase in its Electric Distribution Rates,* Case No. 15-1830-EL-AIR, *et al*., Stipulation and Recommendation, pg. 5 (June 18, 2018). *See also.In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals,* Case No. 07-551-EL-AIR, *et al*., Opinion and Order (January 21, 2009); and *In the Matter of the Application of Ohio Power 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. 16-1852-EL-SSO, *et al.,* Opinion and Order, pp. 15, 116-117, (April 25, 2018).

[231] Morin Test. (Duke Energy Ohio Ex. 21), pp. 5-7.

[232] *See* OCC's Initial Brief, pp. 40, 83-86.

[233] *See Id*., pp. 40-41.

> [My] recommended market-derived ROE for Duke Energy Ohio is estimated from market information on the cost of common equity for other comparable electric utilities. To the extent that the market-derived cost of common equity for other utility companies already incorporates the impacts of these or similar mechanisms, no further adjustment is appropriate or reasonable in determining the cost of common equity for Duke Energy Ohio. To do so would constitute double-counting.[234]

In support of his position, Dr. Morin noted that most, if not all, electric utilities use various rate adjustment mechanisms outside of base rate cases.[235] The use of such mechanisms is widespread in the electric utility industry and, as a result, such use is necessarily embedded in financial data for the industry (such as bond ratings, stock prices, and business risk scores).[236] Bottom line, while riders such as Rider DCI may reduce risk on an absolute basis, they do not do so on a relative basis compared to other utilities, because, as noted, such riders are prevalent in the industry and most other utilities have similar riders in place.[237] Dr. Morin further noted empirical evidence supporting his position – specifically, a recent comprehensive study by the Brattle Group[238] that investigated the impact of a particular risk-mitigating mechanism – revenue decoupling – on risk and the cost of capital and found that its effect on risk and cost of capital, if any, is statistically undetectable.[239] The agreed-upon 9.84 percent ROE is reasonable, supported, and appropriate to use in the calculation of riders like Rider DCI. OCC's proposed ROE is not reasonable, not supportable or supported, and not appropriate for any purpose.

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[234] Morin Test. (Duke Energy Ohio Ex. 21), pp. 62-63.
[235] *Id.*, pg. 63.
[236] *Id.*, pg. 63.
[237] *Id.*, pg. 63.
[238] Wharton, Vilbert, Goldberg & Brown, *The Impact of Decoupling on the Cost of Capital: An Empirical Investigation*, The Brattle Group, February 2011.
[239] Morin Test. (Duke Energy Ohio Ex. 21), pg. 64.

iv. OCC's disapproval of Staff's use of forecasted yields and long-term bond yields in its CAPM analysis is unfounded and unsupportable.

It is entirely appropriate to use forecasted yields in a CAPM analysis. Indeed, the seminal cases of *Hope* and *Bluefield*[240] require that a forward-looking "capital attraction" standard be met. The *Bluefield* opinion states that, for a return on shareholders' investments to be "reasonable," it should be "reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."[241] Similarly, *Hope* holds that rates should be sufficient to allow a company "to "maintain its credit and to attract capital."[242] Meeting the required capital attraction standard is a function of ascertaining investors' expectations about the future. As Company witness, Dr. Morin, testified:

> The CAPM is a forward-looking model based on expectations of the future. As a result, in order to produce a meaningful estimate of investors' required rate of return, the CAPM must be applied using data that reflects the expectations of actual investors in the market. While investors examine history as a guide to the future, it is the expectations of future events that influence security values and the cost of capital.[243]

Cost of capital models, including both the CAPM and DCF models, are prospective (*i.e.*, forward-looking) in nature and therefore must take into account current market expectations for the future because investors price securities on the basis of long-term expectations, including interest rates.[244] As a result, in order to produce a meaningful estimate of investors' required rate of return, the CAPM must be applied using data that reflects the expectations of actual investors

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[240] *Bluefield Water Works Co. v. Public Serv. Comm'n*, 262 U.S. 679 (1923); *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591 (1944). *See also*, Morin Test. (Duke Energy Ohio Ex. 21), pp. 8-10, 13-14.
[241] *Bluefield*, 262 U.S. at 693
[242] *Hope*, 320 U.S. at 603.
[243] Morin Test. (Duke Energy Ohio Ex. 21), pg. 37.
[244] *Id.*, pp. 13-14.

in the market.[245] While investors examine history as a guide to the future, it is the expectations of future events that influence security values and the cost of capital.[246] Additionally, investors' required returns can and do shift over time with changes in capital market conditions, hence the importance of considering interest rate forecasts.[247] The fact that organizations such as Value Line, IHS (Global Insight), Energy Information Administration (EIA), and Congressional Budget Office (CBO), among many others, devote considerable expertise and resources to developing an informed view of the future, and the fact that investors are willing to purchase such expensive services, confirms the importance of economic/financial forecasts in the minds of investors.

OCC is also mistaken in its belief that short- or medium-term bond yields should be used in the CAPM model. Rather, 30-year Treasury bonds have the longest term to maturity and the yields on such securities should be used as proxies for the risk-free rate in applying the CAPM.[248] Because common stock is a very long-term investment, as are most utility investments,[249] the longest possible government bond yields (*i.e.*, yields on 30-year Treasury bonds) should be used to estimate the risk-free rate in the CAPM model.[250] As Dr. Morin testified:

> The appropriate proxy for the risk-free rate in the CAPM is the return on the longest-term Treasury bond possible. This is because common stocks are very long-term instruments more akin to very long-term bonds rather than to short-term Treasury bills or intermediate-term Treasury notes. In a risk premium model, the ideal estimate for the risk-free rate has a term to maturity equal to the security being analyzed. Since common stock is a very long-term investment because the cash flows to investors in the form of dividends last indefinitely, the yield on the longest-term possible government bonds, that is the yield on 30-year Treasury bonds, is the best measure of the risk-free rate for use in the CAPM.

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[245] *Id.*, pg. 37.
[246] *Id.*, pg. 38.
[247] *Id.*, pg. 38.
[248] *Id.*, pg. 33.
[249] Consider the fact that the investments being made in the system using external financing are for projects with useful lives closer to the 30-year life. In fact, the average useful life being proposed by Staff in the Company's rate case application is approximately 33 years. (On Schedule B-3.2 of the Staff Report, the gross plant of $2.680 billion divided by proposed annual depreciation expense of $81.05 million equals approximately 33 years.)
[250] Morin Test. (Duke Energy Ohio Ex. 21), pg. 34.

> The expected common stock return is based on very long-term cash flows, regardless of an individual's holding time period. Moreover, utility asset investments generally have very long-term useful lives and should correspondingly be matched with very long-term maturity financing instruments.[251]

As Dr. Morin explained, another reason for utilizing the longest maturity Treasury bond possible is that common equity has an infinite life span, and the inflation expectations embodied in its market-required rate of return will therefore be equal to the inflation rate anticipated to prevail over the very long term.[252] That same expectation should be embodied in the risk-free rate used in applying the CAPM model.[253] The yields on 30-year Treasury bonds will more closely incorporate within their yields the inflation expectations that influence the prices of common stocks than do short-term or medium-term Treasury bonds.[254]

Additionally, short-term rates are volatile and fluctuate widely, and are largely politically administered rates (*e.g.*, short-term Treasury bills are used by the Federal Reserve as a policy vehicle to stimulate the economy, to control the money supply, etc.). As a practical matter, it does not make sense to match the longer-term return on common stock to a volatile short-term Treasury bill.[255]

OCC's Initial Brief suggests that investors and regulatory bodies should place little weight on interest rate forecasts because they are often wrong, and that, therefore, such forecasts should not be used as proxies for the risk-free rate in implementing the CAPM. Notably, OCC's witness, Dr. Duann, did not offer any published academic support for that statement. As

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[251] *Id.*, pp. 33-34.
[252] *Id.*, pg. 34.
[253] *Id.*, pp. 34-35.
[254] *Id.*, pg. 35.
[255] *Id.*, pg. 35.

discussed above, investors' required returns can and do shift over time with changes in capital market conditions.[256]

v. OCC's claim that the equity risk premium is overstated is wrong.

OCC is wrong on the equity (or market) risk premium issue. OCC's witness erroneously subtracted bond returns from stock returns rather than subtracting the income component of bond returns from stock returns. As discussed in Dr. Morin's testimony, the income component (*i.e.*, the coupon rate) is a far better estimate of expected return than the total return (*i.e.*, the coupon rate plus capital gains), because realized capital gains/losses are largely unanticipated by investors.[257] In other words, bond investors focus on income rather than realized capital gains/losses. This correction increases Dr. Duann's market risk premium estimate by 100 basis points, which is the historical difference in the market risk premium based on total bond returns and the market risk premium based on bond income returns.[258] As Dr. Morin explained in his testimony:

> The historical market risk premium estimate is based on the results obtained in Duff & Phelps' 2016 Valuation Handbook (formerly published by Morningstar and earlier by Ibbotson Associates), which compiles historical returns from 1926 to 2015. This well-known study shows that a very broad market sample of common stocks outperformed long-term U.S Government bonds by 6.0%. The historical MRP [market risk premium] over the income component of long-term/Government bonds rather than over the total return is 7.0%. The historical MRP should be computed using the income component of bond returns because the intent, even using historical data, is to identify an expected MRP. The income component of total bond return (i.e., the coupon rate) is a far better estimate of expected return than the total return (i.e., the coupon rate + capital gain), because both realized capital gains and realized losses are largely unanticipated by bond investors. The long-horizon (1926-2015) MRP (based on income returns, as required) is 7.0%.[259]

[256] *See generally Id.*, pg. 25. *See also*, Morin, Roger A., Ph.D., *New Regulatory Finance* (2006 ed.), Ch. 9, pp. 299-303, for a discussion of empirical studies demonstrating that forecasts are superior predictors than historical data.
[257] Morin Test. (Duke Energy Ohio Ex. 21), pg. 39.
[258] *Id.*, pg. 39-40.
[259] *Id.*, pg. 39.

The Commission should completely disregard OCC's flawed claims that the market risk premium is overstated.

vi. Applying unequal weights to the CAPM and DCF does not violate regulatory principles.

OCC's argument that unequal weights should not be applied to CAPM and DCF cost of equity results is unsupported by either financial theory or Commission precedent. Regulatory financial theory holds that multiple cost of equity methodologies should be employed, and that judgment should be used in determining how to use the various methodologies, rather than rigid mechanics.[260] As Dr. Morin testified in this proceeding, the weight accorded to any one method may vary depending on the circumstances.[261] Commission precedent demonstrates that the Commission has used unequal weightings of cost of equity methodologies in order to determine an appropriate and reasonable ROE.[262]

vii. Flotation costs are an appropriate adjustment in an ROE analysis.

Reflecting issuance, or flotation, costs is necessary, contrary to OCC's assertion. OCC argues that flotation costs are already accounted for in current stock prices and that adding such an adjustment would constitute double counting.[263] This claim is not substantiated in the record and, moreover, it is wrong. The stock price does not change the fact that a portion of the capital contributed by equity investors is not available to earn a return because it is paid out in the form of flotation costs.[264] In issuing common stock, a company's common equity account is credited by an amount less than the market value of the issue, so the company must earn slightly more on

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[260] *See*, Morin, Roger A., Ph.D., *New Regulatory Finance* (2006 ed.), Ch. 15, pp. 430, 443-444, for a discussion of the importance of using multiple methodologies to estimate cost of capital, and the importance of using judgment rather than mechanics in weighing such methodologies.
[261] Morin Test. (Duke Energy Ohio Ex. 21), pg. 16.
[262] *In the Matter of Cincinnati Bell Telephone Co*., Case No. 96-899-TP-ALT, Supp. Opinion and Order (Nov. 9, 1999).
[263] *See* OCC's Brief, pp. 81-83.
[264] Morin Test. (Duke Energy Ohio Ex. 21), pg. 54 and Appendix B.

its reduced equity base in order to produce a return equal to that required by shareholders.[265] These costs exist regardless of the stock price. The reality is that there are transaction costs – flotation costs – associated with obtaining common equity capital. As a result, a portion of the capital contributed by equity investors is not available to earn a return because it is paid out as flotation costs.

The Commission has previously recognized the need to reflect flotation costs in a utility's cost of equity. For example, in a 1980 *Cincinnati Gas and Electric Company* case, the Commission stated the following:

> The fundamental assumption of any market-based approach to determining the cost of equity is that the cost of equity capital is equal to the investor's return requirement. Flotation costs reduce the proceeds of equity security issues, thereby creating a permanent difference between the capital base upon which the company can earn and the total capital supplied by the investor. . . . Thus, the adjustment for flotation costs must be applied to both old and new externally raised equity capital if the earnings opportunity is to equal the investor's required return.[266]

OCC's Brief also argues that there is no actual cost basis for a flotation cost adjustment. Again, this reflects a misunderstanding of how flotation costs are treated. The flotation adjustment is analogous to the process of depreciation, which allows the recovery of funds invested in utility plant. The recovery of flotation expense continues year after year, whether or not the Company issues new capital in the future, until recovery is complete – in the same way that the recovery of past investments in plant and equipment through depreciation allowances continues in the future even if no new construction is contemplated.[267] In the case of common

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[265] *Id*.
[266] *In the Matter of the Application of Cincinnati Gas and Electric Co.*, Case No. 80-260-EL-AIR, Opinion and Order, pp. 34-36 (March 18, 1981); *see also In the Matter of the Application of Dayton Power and Light Co*., Case No. 80-687-EL-AIR, Opinion and Order (July 15, 1981) and *In the Matter of the Application of Cleveland Electric Illuminating Co*., Case No. 81-146-EL-AIR, Opinion and Order (March 17, 1982).
[267] Morin Test. (Duke Energy Ohio Ex. 21), pp. 54-56 and Appendix B.

stock that has no finite life, flotation costs are not amortized. Thus, the recovery of flotation costs necessitates an upward adjustment to the allowed return on equity.[268]

viii. The stipulated 9.84 percent ROE is reasonable and should be approved.

The record evidence undeniably supports the Stipulation's 9.84 percent ROE. Both Staff and the Company provided detailed analysis demonstrating a reasonable range for an electric distribution utility such as Duke Energy Ohio. The negotiated and stipulated 9.84 percent ROE is within that range. In contrast, OCC's proposed ROE is absurdly low and outside any range of reasonable ROEs approved by this Commission. OCC's arguments are unpersuasive and fail even its own test of reasonableness, as OCC's recommendation is below any ROE approved for any investor-owned electric utility since January 1, 2016.[269] The Commission should, therefore, approve the base distribution rates as proposed in the Stipulation, including the 9.84 percent ROE.

c. The gross revenue conversion factor is reasonable, is not overstated, and should be approved.

The Gross Revenue Conversion Factor (GRCF), as used by the Staff in its Staff Report and as incorporated in the proposed Stipulation, is reasonable, is supported by Ohio law, and should not be adjusted. OCC argues that the GRCF should be adjusted to opportunistically produce an unreasonably large base distribution rate reduction for the test year revenue requirement.[270] OCC argues that the test year revenue requirement should be adjusted *only* to include the impact of a single component of the Company's overall revenue requirement (federal

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[268] A simple example provided by Dr. Morin illustrates this concept. A stock is sold for $100, and investors require a 10 percent return, that is, $10 of earnings. But if flotation costs are 5 percent, the Company nets $95 from the issue, and its common equity account is credited by $95. In order to generate the same $10 of earnings to the shareholders, from a reduced equity base, it is clear that a return in excess of 10 percent – in this case, 10.53 percent – must be allowed on this reduced equity base. *See* Morin Test. (Duke Energy Ohio Ex. 21), pg. 54 and Appendix B 56.

[269] Duann Test. (OCC Ex. 7), Attachments DJD-5 and DJD-6.

[270] OCC's Brief, pp. 36-37.

corporate income taxes), which changed nine months **after** the end of the test period used in the Distribution Case. Contrary to OCC's arguments, this adjustment is not supported by Ohio's rate-making statutes, is unfairly opportunistic and based upon faulty reasoning, and is likely to be moot. Consequently, OCC's recommendation should be ignored as it relates to the Company's base distribution revenue requirement.

OCC's adjustment to the GRCF calculation is unsupportable and would require the Commission to both disregard and violate R.C. 4909.15(C) by making post-test year adjustments to the base distribution revenue requirement, in order to account for a single change in a utility expense that occurred nine months **after** the test year. R.C. 4909.15(C) provides, in pertinent part:

> Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.[271]

Ohio's rate-making statutes are unambiguous. A test period must be used to determine the revenues and expenses of the Company, and the test period is required to be a twelve-month period that begins no more than six months prior to the date the application is filed and that ends not more than nine months after the application is filed, unless the Commission orders otherwise.[272] Here, the Commission did not order a different test period to be used. All of the expenses and all of revenues used in the application are evaluated over the course of the distribution rate case. The test year revenues and expenses have been factored into the final settlement resolution of the Distribution Case and are exclusively within the Company's

[271] R.C. 4909.15(C); Division D provides that a water, sewer, or gas utility may make adjustments to the test period for expenses that are expected to occur.
[272] *Id.*

proposed test year. The Company filed its application to adjust it base distribution rates on March 3, 2017. The test period of the Company's Distribution Case, upon which all of the Company's base distribution-related expenses were calculated, is the twelve month period ended March 31, 2017.

OCC insists that the GRCF should be adjusted to account for the change in the federal corporate income tax (FIT) rate that went into effect January 1, 2018.[273] It is noteworthy that OCC is not suggesting that the test year revenue requirement be updated for any other change in expenses, such as higher labor costs, higher vegetation management expenses, etc., that also became evident after the end of the test year. Rather, OCC opportunistically proposes that the test year revenue requirement be adjusted for one single item that happens to favor OCC's position. Admittedly, a party is not required to be "fair" in its litigation position but it is beyond the pale for OCC to so self-servingly recommend only changes that favor its position.

It is undisputed that the FIT rate during the test period was 35 percent. Similarly, there is no dispute that, as a result of the Tax Cuts and Jobs Act of 2017 (TCJA), the FIT rate was reduced to 21 percent effective January 1, 2018. However, OCC ignores that the change in the FIT occurred nine months after the end of the test year used in the Distribution Rate Case, nearly ten months after the Company filed its application, nearly a full year after the Company filed its notice of a base electric distribution rate increase with the Commission, and months after the Staff Report was issued in the Distribution Case.[274] It would be highly inappropriate, not to mention at odds with R.C. 4909.15(C), to modify the test year revenue requirement for a change in just one expense item (federal income taxes), without updating for changes in other expenses. Unless OCC is willing to entertain updating the Company's test year revenue

[273] OCC Brief at 37.
[274] The Company filed its pre-filing notice with the Commission on January 31, 2017, in the Distribution Case, and the Staff Report was issued in that case on September 26, 2017.

requirement for all cost items that have changed since March 31, 2017, it would be patently unfair to modify the test year revenue requirement for the FIT rate. OCC's argument to adjust the GRCF to account for the lower FIT rate is unreasonable and unsupportable under Ohio law.

It must also be recognized that the Company has already begun flowing most of the FIT-related benefits for base distribution rates through the Company's Rider DCI and already has a pending application to flow through 100 percent of the remaining benefits for base electric distribution related income tax savings.[275] When the Commission approves that application, OCC's arguments regarding the GRCF to use in the base distribution revenue requirement calculation will be moot, inasmuch as customers will be receiving 100 percent of the benefit of lower income taxes going back to January 1, 2018. The Commission has a forum already before it to consider the refund due to Duke Energy Ohio's electric distribution customers and a proposed mechanism, through a discrete credit rider, that Duke Energy Ohio proactively seeks to implement. The Commission should ignore OCC's adjustments to the GRCF as unsupportable, unreasonable, unfair, unlawful, and moot.

d. Rider PSR is reasonable and supportable under Ohio law.

i. The Commission's authority to approve Rider PSR is not preempted by FERC jurisdiction.

OCC argues that the Commission does not have jurisdiction to approve Rider PSR. In OCC's view, FERC has exclusive jurisdiction in this area under the Federal Power Act, and FERC has preempted the field.[276] OCC is wrong and ignores the important differences between the facts of this case and the facts of cases where federal preemption exists. Moreover, OCC's unduly broad view of federal preemption is not supported by either the Federal Power Act or recent federal appellate court decisions.

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[275] *In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017,* Case No. 18-1185-EL-UNC, *et al.,* Application (July 25, 2018).
[276] OCC Initial Brief, pg. 13.

ii. Federal preemption under the Federal Power Act is much narrower than OCC claims.

Field preemption exists where Congress has forbidden the States to take action in the field that the federal statute preempts.[277] By its explicit terms, the Federal Power Act's declaration of policy states that the Act's regulation of the sale of energy at wholesale "extend[s] only to those matters which are not subject to regulation by the States."[278] Courts have repeatedly held that not every state statute that has some indirect effect on wholesale rates is preempted, recognizing there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market.[279] Similarly, courts have recognized "the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy."[280] Courts have also emphasized "the distinction between 'measures **aimed directly at** interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate."[281] These decisions make clear that OCC's expansive view of federal preemption under the Federal Power Act is not supported by case law, and that a significant amount of latitude and deference is given to states to regulate matters of state concern.

iii. A recent Seventh Circuit Court of Appeals decision makes clear that preemption does not apply to Rider PSR.

A recent Seventh Circuit Court of Appeals decision provides additional insight in the issue of FERC preemption. This case – *Electric Power Supply Assoc. v. Star*[282] – examined Illinois legislation subsidizing some of that state's nuclear generating facilities, which Illinois

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[277] *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).
[278] 16 U.S.C. § 824(a).
[279] *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014)(citations omitted).
[280] *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1300 (Sotomayor, J., concurring)(*quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 518 (1989))(2016).
[281] *FERC v. Elec. Power Supply Ass'n.*, 136 S. Ct. 760, 776, (*citing Oneok*, 135 S. Ct. at 1600)(2016)(emphasis *sic*).
[282] *Elec. Power Supply Ass'n v. Star,* 2018 U.S. App. LEXIS 25980 (7th Cir. 2018).

believed would shut down if not subsidized. The subsidies were to be calculated in part by reference to the average annual energy prices in the PJM market. The Electric Power Supply Association (EPSA) conceded that, while a state may take many steps that **affect** the wholesale price of power, a state may not **regulate** the wholesale price of power. In EPSA's view, the Illinois nuclear subsidies would indirectly regulate the auction by using average auction prices as a component in the subsidy calculation.

The Seventh Circuit Court disagreed. In its decision, the Court clarified that certain decisions (the decisions OCC relies upon) draw a line between state laws whose effect depends on a utility's participation in an interstate auction (which is forbidden) and state laws that do not so depend but that may affect auctions (which is allowed). The Seventh Circuit noted as follows:

> This feature – that the subsidy depended on selling power in the interstate auction – is what led the [*Talen*] Justices to conclude that Maryland had transgressed a domain reserved to the FERC. The Court stressed that its decision covers only state rules that depend on participating in the interstate auction, stating: "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain. . . . Nothing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures 'untethered to a generation's wholesale market participation.'"[283]

The Seventh Circuit Court concluded:

> [T]hat's what Illinois has done. To receive a credit, a firm must *generate* power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts. . . . [284]

Further, the Court emphasized:

> [B]ecause states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.[285]

[283] *Id.*, pg. 14.
[284] *Id.*, pg. 13.
[285] *Id.*, pg. 15.

An even more recent Second Circuit Court of Appeals decision[286] follows the Seventh Circuit's reasoning, and similarly concludes that the state of New York's program of zero-emission credits ("ZECs") for nuclear power plants is not field preempted because there is no impermissible "tether" between the ZEC program and wholesale market participation.

Similar to both the Illinois and New York cases,[287] Rider PSR does not require or depend upon participation in the PJM auctions. Those counterparties to the ICPA that have an entitlement to capacity and energy from OVEC may use the PJM auctions (or other wholesale markets) to sell such capacity and energy, but they are not required to do so. As Duke Energy Ohio witness Spiller stated on cross-examination, it is possible that the capacity and energy provided to Duke Energy Ohio under the ICPA could be sold through bilateral contracts, as opposed to being sold into the PJM wholesale markets.[288] Thus, on this basis alone, Rider PSR would fall into the category of a rider that does not depend on a utility's participation in an interstate auction, but simply one that may affect auctions, which is allowed.

iv. The cases relied upon by OCC are distinguishable from Rider PSR.

OCC relies heavily on the *Nazarian*[289] and *Talen Energy Marketing*[290] cases in support of its preemption argument. But the facts in both cases were quite different from the case at hand. In *Nazarian*, the state of Maryland sought to remedy a perceived deficiency in generation resources resulting from lack of PJM incentives to build new generation. Maryland's remedy was to solicit proposals for the construction of a new power plant, along with incentives for the

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[286] *Coalition for Competitive Electricity v. Zibelman,* 2018 U.S. App. LEXIS 27605 (2nd Cir. 2018).
[287] Additionally, it is important to emphasize that the wholesale markets are quite volatile, while OVEC's production costs are relatively stable, and whether or not Rider PSR will be a net charge to customers during the Stipulation's term is unknown at this point. As a result, although the cited FERC preemption cases deal with subsidies, it is more accurate to characterize Rider PSR not as a subsidy, but as a hedge, for which a premium may be paid, against wholesale rate and price volatility.
[288] Trans. Vol. I, pg. 121.
[289] *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014).
[290] *Hughes v. Talen Energy Marketing LLC,* 136 S.Ct. 1288 (2016).

winning bidder in the form of a long-term revenue stream secured by contracts for differences. Here, in contrast, the state of Ohio is not taking any actions to procure new generation for the state. Rather, Duke Energy Ohio is seeking to hedge rate and price volatility for its customers through reliance on long-existing OVEC generating plants, as well as to provide support for maintaining Duke Energy Ohio's credit quality (which ultimately benefits customers).[291] Maryland's activities would have directly affected wholesale prices in the PJM region, while Rider PSR simply relies on the stable cost structure of the OVEC plants to hedge wholesale price volatility for customers and to preserve financial integrity for the utility.[292] Unlike the *Nazarian* situation, Rider PSR will neither directly nor indirectly set the rates paid for wholesale transactions. No provision of Rider PSR can have any impact on the prices of wholesale power provided by OVEC. Notably, the *Nazarian* court stated:

> [I]t is important to note the limited scope of our holding, which is addressed to the specific program at issue. We need not express an opinion on other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative. It goes without saying that not every state statute that has some indirect effect on wholesale rates is preempted [*citing Schneidewind*, 485 U.S. at 308], for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market.[293]

OCC's reliance on *Talen Energy Marketing* is similarly misplaced. In *Talen*, similar to the *Nazarian* case, the state of Maryland sought to incentivize new generation, in part by requiring Maryland distribution utilities to enter into long-term (20-year) cost-based (rather than market-based) contracts with the entity proposing to construct new generation. Importantly, the *Talen* court conceded that "incidental effects of state regulation upon the federal markets may not cause preemption."[294] *Talen*, like *Nazarian*, is distinguishable from the case at hand. In

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[291] *See* Duke Energy Ohio witness Spiller's testimony on cross-examination, where she explains the dual purpose of Rider PSR. Trans. Vol. I, pp. 90-91, 110.
[292] *Id.*
[293] *Nazarian*, 2014 U.S. App. LEXIS 10155, pg.478.
[294] *Id.*, pg. 479.

Talen, as in *Nazarian*, the state of Maryland was attempting to procure and incentivize new generation in the state. In this case, Duke Energy Ohio is simply proposing to use its entitlement to the output from long-existing OVEC generation to hedge wholesale price volatility for the benefit of its customers, while at the same time supporting the Company's credit quality.

To summarize: Federal preemption does not apply to Rider PSR. Rider PSR does not involve the direct procurement and incentivizing of generation by the state. Instead, Rider PSR is a tool for hedging rate and price stability for customers, and for preserving the utility's credit quality (also ultimately for the benefit of customers). Approval of hedging products is traditionally a state regulatory function, as is protecting a utility's financial integrity.[295] Further, Rider PSR involves neither new generation nor actions by the state to procure or build new generation. Although different factually from the recent *Star* case in Illinois, like the situation in *Star*, Rider PSR will involve selling power the Company receives under a FERC-authorized contract from OVEC either into the PJM markets or through bilateral contracts. And, to the extent the OVEC generation affects wholesale prices, it does so only by continuing the generation of electricity from long-existing generating plants, just as any other generator offering into the wholesale market. Approval of Rider PSR, which will serve a dual purpose of hedging rate and price volatility for customers, is not preempted by the Federal Power Act.

[295] *See, e.g., In the Matter of the Long-Term Forecast Report of Duke Energy Ohio and Related Matters; In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Duke Energy Ohio and Related Matters*, Case No. Case No. 07-118-GA-FOR, *et al.*, Opinion and Order (January 16, 2008)(approving a stipulation that, among other things, included commitments regarding the Company's natural gas hedging strategy); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval to Change Accounting Methods*, Case No. 14-1615-GA-AAM, Opinion and Order (December 14, 2014)(approving a regulatory asset for the company's pipeline safety program, based in part on the impact to its financial integrity); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illumination Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing (August 16, 2017)(affirming its order approving an ESP that included terms and conditions specifically to assist the companies maintain financial health).

v. Rider PSR is not a generation subsidy but rather serves as both a hedge and a protection of the company's financial stability.

OCC incorrectly argues that Rider PSR is a generation subsidy. This ignores the evidence presented during this matter, and as outlined herein, that Rider PSR actually serves the two-fold purpose of being a hedging mechanism and a tool to protect the financial stability and credit rating of the Company.[296] Duke Energy Ohio does not own or operate the OVEC generation assets. Rather, Duke simply is a party to a contractual relationship, under the ICPA, a FERC-jurisdictional contract having been filed and accepted by FERC.[297] Rider PSR does not provide any subsidy because none of the dollars collected or revenues received in the market go to OVEC. OVEC recovers its costs pursuant to the terms and conditions of the FERC-authorized ICPA, which has absolutely no bearing on Rider PSR. Rider PSR is simply the mechanism that makes Duke Energy Ohio, the electric distribution utility responsible for providing customers with an SSO, whole for its proposal to dedicate its entitlement to nine percent of the total OVEC output to customers as a hedge against market price volatility. The unique structure of the ICPA, coupled with the structure of the Rider PSR, affords the Company the opportunity to use its OVEC entitlement as a hedge in the manner described throughout these proceedings. As with other sponsoring companies under the ICPA, Rider PSR will not subsidize OVEC's participation in the wholesale markets. Nor will it impact the price at which Duke Energy Ohio will offer its capacity and energy entitlement. There is absolutely no evidence in the record to suggest otherwise. Any claims that Rider PSR creates a subsidy are just wrong and intentionally misleading.

Duke Energy Ohio's Rider PSR is not some novel and earth-shattering proposal never before seen before this Commission. Both American Electric Power Company (AEP-Ohio) and

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[296] Trans. Vol. I, pg. 110.
[297] *Ohio Valley Electric Corporation*, Docket Nos. ER11-3441-000, *et al.* (Letter Order, May 23, 2011).

the Dayton Power & Light Company (DPL) also use their OVEC entitlements as hedging mechanisms in a fashion similar to what is contained in the Stipulation. The Commission has already ruled in favor of the reasonableness of Rider-PSR-like mechanisms as hedges against market volatility.[298] As fully explained in the Company's Brief, the OVEC costs and revenues reflected in Rider PSR are exactly the same costs and revenues included in similar riders approved for AEP Ohio and DP&L.[299] Like Duke Energy Ohio, both DP&L and AEP Ohio are Ohio-jurisdictional utilities that are also sponsoring companies under the ICPA. All three companies incur the same category of OVEC costs in proportion to their power participation ratio, and, at the same time, all three utilities will receive a proportional share of the output (energy and capacity) from OVEC through the ICPA. Further, all three utilities will likely bid that power into the same PJM markets, subject to the same PJM tariffs and the same FERC regulatory frameworks, and will bear the same wholesale power market risks. And all three companies will likely receive the same PJM capacity and energy prices for that power. The only difference between the three utilities in this regard is the timing of their proposals to the Commission.

Also important is the fact that Rider PSR serves to protect the financial stability of Duke Energy Ohio. As described in the testimony of Duke Energy Ohio witnesses Steven Fetter, Morin, and Sullivan, the Company's ability to maintain its credit quality is particularly crucial in light of substantial near-term financing needs of approximately $2.5 billion over the next five years.[300] These capital improvement programs are critical to the ongoing financial health of Duke Energy Ohio. OCC and the Conservation Group dismiss offhand the potential damage to

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[298] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order (Oct. 20, 2017); *In the Matter of the Application of Ohio Power 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. 13-2385-EL-SSO, *et al.*, Fourth Entry on Rehearing (Nov. 3, 2016).

[299] Company's Brief, pg. 45.

[300] Morin Test. (Duke Energy Ohio Ex. 21), pg. 61; Sullivan Supp. Test. (Duke Energy Ohio Ex. 20), pg. 13.

the Company's credit rating, and subsequently to its financial stability, should Rider PSR not be approved. They are wrong. As noted in Mr. Sullivan's testimony, the Company faces several credit challenges, as expressly articulated by the credit rating agencies, including the size of the capital program and the uncertainty regarding the approval of Rider PSR.[301] The credit rating agencies are clearly monitoring the outcome of these proceedings and, in particular, the outcome regarding Rider PSR. Indeed, OCC's witness Duann includes a two-page press release summary rating agency report from Moody's Investor Service (Moody's Press Release) dated August 10, 2017, as an attachment to his direct testimony.[302] The Moody's Press Release specifically refers to Duke Energy Ohio's OVEC proposal, its use of riders as "supportive" of credit quality, and specifically identifies potential risks of a downgrade for a less supportive or less consistent regulatory environment.[303] Duke Energy Ohio's witness Sullivan includes the complete, seven-page Moody's Credit Opinion (Moody's Credit Opinion) on this same issue, dated August 11, 2017.[304] The Moody's Credit Opinion provides even greater detail confirming the importance of regulatory consistency, the impacts on the Company's credit metrics, and the risk of a downgrade, "[i]f the outcome of future base rate cases is less favorable such that CFO pre-working to debt falls below 19% on a sustained basis."[305]

The Moody's Credit Opinion provides even greater detail regarding the view of consistent regulatory treatment as it relates to the treatment of OVEC and that the Company's current outlook is based upon similar and consistent regulatory treatment:

> In March 2017, following the PUCO's approval of a similar request by another Ohio transmission and distribution utility, Duke Ohio filed to adjust the PSR to pass through the net costs related to its contractual commitments to OVEC. The company's [*sic*] has also requested the PSR rider to be continued in the ESP IV period. Given the precedent set for OVEC cost recovery in the state, *our positive*

[301] Sullivan Supp. Test. (Duke Energy Ohio Ex. 20), pg. 7.
[302] Duann Test. (OCC Ex. 7), Attachment DJD-7.
[303] *Id.*
[304] Sullivan Supp. Test. (Duke Energy Ohio Ex. 20), JLS-1 pg. 2.
[305] *Id.*

outlook incorporates a view that recovery of Duke Ohio's OVEC related costs will ultimately be approved.[306]

The record is clear that rating agencies highly value regulatory consistency and are aware that both AEP-Ohio and DP&L have received approval of requests that are substantially the same as Rider PSR. As stated by Mr. Sullivan on cross-examination, "50 percent of how they ascribe credit ratings relate to the regulatory framework of a utility including the consistency and predictability of regulation as well as the ability to recover costs and earn a return in a timely and sufficient manner."[307] The evidence clearly indicates that the outcome of Rider PSR will have a direct impact on the financial stability of Duke Energy Ohio. Of equal importance is the fact that the doctrine of regulatory consistency is at play here and that, should the credit rating agencies sense a lack of regulatory consistency, all of the utilities in Ohio would be negatively affected.

vi. Rider PSR is not a transition charge.

OCC, the Conservation Group, and IGS all restate in their post-hearing briefs their belief that Rider PSR amounts to an unlawful transition charge pursuant to R.C. 4928.38. As thoroughly discussed in the Company's Brief, this assertion is incorrect and is in direct conflict with well-established Commission precedent and the record in these proceedings. In fact, as recently as September 19, 2018, the Commission has reaffirmed its position that OVEC-related riders such as Rider PSR are not transition costs. Specifically, in denying an application for rehearing on this specific topic raised by these same parties (in a case relating to DP&L), the Commission stated that:

> The purpose of transition revenue was to allow electric distribution utilities to recover the costs of generation assets used to provide generation service to customers prior to the unbundling of rates in S.B. 3, if such costs could not be recovered through the market. However, OVEC's generation output was used to provide generation service to the U.S. Department of Energy and its predecessors prior to January 1, 2001. Therefore, as discussed above, the OVEC contractual

[306] *Id.* at 3 (e*mphasis added*).
[307] Trans. Vol. IV, pg. 734.

> entitlement, which was a wholesale transaction between OVEC and DP&L, was not "directly assignable or allocable to retail electric generation service provided to electric consumers in this state." (Emphasis added). R.C. 4928.39(B). Moreover, at the time of the enactment of S.B. 3 and the transition to a competitive market on January 1, 2001, OVEC's generation assets were used to serve OVEC's sole customer, the U.S. Department of Energy. Thus, DP&L was not "entitled an opportunity to recover the costs" within the meaning of the statute. Accordingly, we affirm our finding that costs related to OVEC's generation assets do not meet the criteria for transition costs under R.C 4928.39(B) or (D). Since OVECs generation assets were used to provide generation service to the U.S. Department of Energy and its predecessors prior to the transition to a competitive market on January 1, 2001, costs related to OVEC's generation assets cannot be the basis for transition charges or their equivalent.[308]

The OVEC contract discussed in depth by the Commission in the DP&L case is the same contract that is at hand in the present proceedings. The arguments raised by the opposing parties in that matter are the same arguments raised by the opposing parties here. As previously noted in the Company's Brief, even IGS witness J. Edward Hess conceded on cross-examination that, although he disagreed with the decision, the Commission has already decided this matter.[309] The only distinguishing factor between Duke Energy Ohio's situation and that of AEP-Ohio or DP&L relates to the historic treatment of our respective OVEC entitlement interests: Duke Energy Ohio never recovered its OVEC entitlement through its fuel clause.[310] None of the opposing parties provides any new arguments or facts that warrant a change in this Commission precedent.

vii. Rider PSR fits within allowable categories for an ESP and should not be made bypassable.

In its Initial Brief, IGS argues, unpersuasively, that the Commission cannot approve Rider PSR as it is not within the allowable categories for an ESP as it amounts to the collection of generation charges through distribution rates and because it is proposed to be non-bypassable

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308 *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, *et al.*, Third Entry on Rehearing, pp. 27-28 (Sept. 19, 2018).

309 Trans. Vol. VI, pg. 1150.

310 Trans. Vol. V, pp. 1057-1058.

charge. IGS continues to misconstrue Rider PSR as a generation charge. In its argument, IGS incorrectly asserts that Duke Energy Ohio has an "ownership" interest in the OVEC assets.[311] As noted in its Post Hearing Brief, Duke Energy Ohio does not own any generation assets and the OVEC entitlement has never been used to provide retail electric generation service to Duke Energy Ohio's customers.[312] The record in these proceedings is replete with evidence that the OVEC assets are owned by OVEC, a separate and distinct legal entity. What Duke Energy Ohio does have is a contractual entitlement, via the ICPA, to a percentage of the output of those assets.[313] As with the argument relating to transition charges addressed above, Commission precedent has rejected this very same argument in recent cases. With regard to OVEC-related riders, the Commission has found that a non-bypassable rider that is designed to act as a hedge that will mitigate spikes in wholesale market prices is a benefit to both shopping and non-shopping utility customers and is authorized under R.C. 4928.143(B)(2)(d).[314] Furthermore, the "bypassability" of such a charge is within the purview of the Commission.[315]

e. The Commission is not limited to addressing the impacts of the TCJA in these proceedings.

i. Impacts of the TCJA are being addressed in more recent case – perhaps even more quickly than they would have been in this case.

Contrary to OCC's claims, the Commission is not limited to addressing the impacts of the TCJA in the Distribution Case, nor is it required to do so. Indeed, the Commission itself opened its own investigation into the impacts of the TCJA on all jurisdictional utilities in Case No. 18-

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[311] IGS's Brief, pg. 44.
[312] Company's Brief, pg. 58.
[313] Wathen 2nd Supp. Test. (Duke Energy Ohio Ex. 30), pg. 19.
[314] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, *et al*., Third Entry on Rehearing, pp. 30-31 (Sep. 19, 2018).
[315] *Id.*

47-AU-COI in January 2018.[316] The Stipulating Parties acknowledged that fact, recognizing that the issues associated with the TCJA were complex and contentious, and that attempting to resolve all of those issues as part of the Stipulation had the potential to significantly delay resolution of the issues that were already agreed upon.

The Stipulation preserves all parties' rights to argue about any issue related to the TCJA in the proper forum, ensuring that all were still entitled to due process in evaluating the TCJA. Toward this end, the Stipulating Parties agreed to defer the matter to a proceeding already initiated by the Commission to address the TCJA.[317] The Stipulating Parties acknowledged this, agreeing that the Commission's existing and separate forum to address the TCJA was the appropriate way for all concerned parties to address their respective issues as to how the TCJA should impact utilities' rates by expressly reserving the rights of all Signatory Party to take any position regarding the TCJA. The Stipulation specifically provides:

> It is the intent of the Signatory Parties to resolve all remaining issues concerning the impact of the TCJA, through Case No. 18-047-AU-COI, (the COI), a successor proceeding, or some other proceeding. The Signatory Parties understand that the Commission is reviewing the full impact on all jurisdictional utilities' rates resulting from the TCJA in the COI, and an order in that proceeding, a successor proceeding, or some other proceeding may result in additional impacts to Duke Energy Ohio's distribution rates and/or riders, including rates and riders addressed by this Joint Stipulation. The Signatory Parties agree that nothing in this Joint Stipulation shall limit or restrict in any manner, the rights of the Parties to make whatever arguments they deem appropriate in any other proceedings relevant to the TCJA, including the COI.[318]

Clearly, the Stipulating Parties intended to resolve the remaining issues of the TCJA as part of that existing process, whether in that specific investigation proceeding, a subsequent proceeding, or some other proceeding.[319] Indulging OCC's demand to address the TCJA in this settlement would undermine this specific reservation of rights for other parties that have an

[316] *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Entry, January 10, 2018.
[317] Stipulation (Joint Exhibit 1), pg. 25.
[318] *Id.*
[319] *Id.*

interest in how the TCJA should impact Duke Energy Ohio's electric distribution rates. It is not necessary, as other opportunities already exist to accomplish the same result without upending the Stipulation.

There is no dispute that, as a result of the TCJA, the FIT was reduced to 21 percent effective January 1, 2018. Indeed, the Company voluntarily and proactively updated the only two riders for electric service that included a component of the revenue requirement for income taxes. For electric customers, the Company's Distribution Capital Investment Rider (Rider DCI) and its Distribution Reliability – Infrastructure Modernization Rider (Rider DR-IM) were both updated to adjust the pre-tax return calculation reflecting the lower FIT rate. Both of these riders, as updated for the lower FIT, were approved by the Commission for rates effective April 1, 2018.[320] While these rider changes address the vast majority of the impact of the reduction in the FIT for Duke Energy Ohio's electric distribution customers, it does not reflect the entire impact of the FIT reduction.

Subsequent to the commencement of the hearing on the Stipulation in this case, Duke Energy Ohio filed an application in a new case, Case No. 18-1185-EL-UNC, *et al*. (Rider TCJA Case), requesting Commission approval to create a discrete rider, Rider ETCJA, to flow back 100 percent of the TCJA benefits not already reflected in the Company's electric rates, beginning October 1, 2018.[321] The application in that case expressly incorporates the full benefit of the lower FIT rate on current and on the agreed-to base rates. Duke Energy Ohio initiated that separate docket in an attempt to facilitate the Commission's stated public-interest goal of transparently conveying TCJA benefits to retail customers. The ability to expeditiously resolve

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[320] *In the Matter of the Reports Enclosing Quarterly Rider DCI Schedules and Tariffs of Duke Energy Ohio, Inc.*, Case No. 17-2088-EL-RDR, Finding and Order (March 28, 2018); *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust Rider DR-IM for 2016 SmartGrid Costs*, Case No. 17-1403-EL-RDR, Finding and Order (March 21, 2018).
[321] *See In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1185-EL-UNC, *et al.*, Application (July 25, 2018).

the TCJA issues through a separate, utility-specific proceeding is supported by the recently opened docket regarding the resolution of the TCJA impacts for AEP Ohio.[322]

Duke Energy Ohio's proposed Rider ETCJA is designed to provide the Company's electric distribution customers with the all remaining benefits of the TCJA, including as they relate to the Company's base distribution rates, as a discrete and transparent credit rider to base distribution rates.

ii. The Law does not require that the TCJA changes be reflected in base rates as part of this proceeding, especially when the Commission has other forums to accomplish the same task.

OCC insists that the base distribution revenue requirement, using a test year of the twelve months ending March 31, 2017, should reflect the lower FIT rate resulting from the TCJA. OCC argues that an Ohio Supreme Court decision[323] supports its position that the Commission **must** address the TCJA changes in the Company's Distribution Case. The Commission, however, is not so constrained in the context of evaluating the reasonableness of this Stipulation and, contrary to OCC's assertion, it has the necessary discretion in matters of rate design to address this issue through other forums.[324] And it should.

Inasmuch as the Company has already filed an application in a separate docket to ensure that its electric distribution customers receive 100 percent of the benefits of the TCJA, including the benefit of the lower FIT rate being sought by OCC, all of OCC's concerns on this matter are effectively moot. If the Commission approves the Company's pending application in Case No. 18-1185-EL-RDR, *et al*., customers will receive all of the TCJA-related benefits being sought by

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[322] *In the Matter of Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Motion for a Procedural Schedule and Request for Expedited Ruling (June 8, 2018).
[323] *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212, 12 N.E.2d 765 (1938).
[324] *See, e.g., In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider;* Case No. 14-1693-EL-RDR, *et al*., Opinion and Order, pp 248-249 (March 31, 2016) (referencing its "considerable discretion with respect to rate design"). *See also Indus. Energy Users-Ohio v. Ohio Power Co*., 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 27 (citations omitted).

OCC in this case. Consequently, there is no need for the Commission to even address arguments about the equity, reasonableness, or legality of OCC's misguided attempt to make an out-of-period adjustment to the base distribution rates agreed to in the Stipulation.

The specific change to the test year revenue requirement being sought by OCC is to reduce one expense item to reflect a change that occurred long after the Company filed its application in the Distribution Case, long after the conclusion of Staff's investigation in the Distribution Case, and long after the release of the Staff's Report of Investigation.[325] OCC's proposal conspicuously excluded all other potential changes to the Company's costs of providing electric distribution service that, like the TCJA, occurred well after the rate case test year. It would be highly inappropriate and unfair, not to mention at odds with R.C. 4909.15(C), to modify the test year revenue requirement for a change in just one expense item (income taxes), without updating for changes in other expenses (*e.g.*, labor costs have increased, vegetation management costs are known to be much higher than what was included in the test year). If the Commission desires to adjust the Company's base distribution rates to account for the changes in costs related to the TCJA, it should also then be willing, now and in all future rate cases, to entertain updating the Company's test year revenue requirement in base distribution rates for all cost items that have changed since the end of the test year. It would be patently unfair to modify the test year revenue requirement for only one item.

Again, the Company has already begun flowing most of the benefits for base distribution rates through the Company's Rider DCI and its Rider DR-IM and already has a pending application to flow through 100 percent of the remaining benefits for base electric distribution-related income tax savings.[326] The Commission has a forum already before it to consider the

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[325] Distribution Case, Staff Report, September 26, 2018.
[326] *In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017,* Case No. 18-1185-EL-UNC, *et al.,* Application (July 25, 2018).

refund due to Duke Energy Ohio's electric distribution customers and a proposed mechanism through a discrete credit rider that Duke Energy Ohio proactively seeks to implement.

f. The stipulated reliability standards are more stringent, not less.

The standards agreed to in the Stipulation for SAIFI and CAIDI are aggressive and will result in extremely reliable, safe service for Duke Energy Ohio's customers. Duke Energy Ohio witnesses Ms. Hart and Dr. Brown provided information about what programs will be added that will enable improvements in safety and reliability and how such improved reliability will be achieved.[327] Dr. Brown provided a great deal of discussion around the details of the calculation of SAIFI and CAIDI.[328] Dr. Brown explained why it is that CAIDI staying the same or increasing does not mean that reliability will not improve.[329] Likewise, he explained that SAIFI decreasing does mean that reliability will be getting better.[330] Most importantly, Dr. Brown explained why the reliability targets in the stipulation reflect a significant improvement in reliability.[331]

Staff witness Nicodemus likewise explained how reliability was improving and how CAIDI and SAIFI are calculated such that an increasing CAIDI value does not mean that reliability is getting worse. Importantly, Mr. Nicodemus provided a table showing Duke Energy Ohio's SAIDI performance beginning as far back as 2013 and continuing through 2025.[332] In spite of these thorough explanations and sound evidence, OCC persists in arguing that reliability will be lower. OCC simply refuses to follow the math.

OCC lays out the requirements for a reliability standards application as contained in Rule 4901:1-10-10(B)(4)(a), O.A.C., and then argues that the standards in the Stipulation do not

[327] Hart Test. (Duke Energy Ohio Ex. 17), pp. 6-15; Brown Test. (Duke Energy Ohio Ex. 12), pp. 9-11.
[328] Brown Test. (Duke Energy Ohio Ex. 12), pp. 15-23.
[329] *Id.*, pp. 7-8.
[330] *Id.*, pg. 7.
[331] *Id.*, pg. 9.
[332] Nicodemus Test. (Staff Ex. 3), pp. 11-13.

comply with these requirements.[333] But again, OCC is confused. The requirements of Rule 4901:1-10-10 specify what is to be included in a company's application for new reliability standards. OCC does not claim that the Company's application is deficient. There is no rule that states that a stipulation in a case must somehow follow the same requirements. OCC misapplies the regulations here. But the resulting Stipulation in these proceedings with respect to reliability, much like all the other provisions in the Stipulation, resulted from negotiations that began with the filing of applications. So the Company's application in the reliability standards case contained provisions fulfilling each of the requirements of the Commission's rules.[334] Accordingly, the application formed a basis for discussion and settlement. OCC's argument that the Stipulation is inconsistent with these regulations misses the point.

Finally, as Mr. Nicodemus explained, Duke Energy Ohio has committed to a nearly 30 percent reduction in SAIFI, which translates to 30 percent fewer customers who will experience an outage at all.[335] As Mr. Nicodemus explains, Duke Energy Ohio's commitment to improved reliability aligns with customer's interests.[336] This is an astoundingly positive outcome for Duke Energy Ohio customers and OCC should stand up and applaud, rather than oppose.

g. The record shows that Rider ESRR and changes to the Company's vegetation trim cycle are justifiable and necessary to provide safe, reliable service and reasonably priced service.

Duke Energy Ohio witness Karen M. Hayden explained the Company's program and recent experiences with challenges to its vegetation management program.[337] Ms. Hayden is responsible for providing strategic direction in the execution of vegetation management for Ohio, Indiana, Kentucky, North Carolina, South Carolina, and Florida.[338] She is the only witness that

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[333] OCC's Brief, pg. 114-119.
[334] Reliability Case, Application.
[335] Nicodemus Test. (Staff Ex. 3), pg. 13.
[336] *Id.*, pg. 13.
[337] Hayden Test. (Duke Energy Ohio Ex. 12), pg. 5.
[338] *Id.*, pp. 1-2.

is able to provide current and knowledgeable testimony concerning the challenges she is encountering with respect to the vegetation management industry. Ms. Hayden explained that sourcing specialists engage in a request for proposal (RFP) process to seek out companies that can provide the best service at the least cost to accomplish this work.[339] However, as Ms. Hayden further explained, the market for employees able to do such work has become constricted.[340] In addition to increases in cost, it is challenging to find available resources, regardless of cost.[341] Accordingly, the Stipulation provides one means by which to alleviate some of this problem: changing the Company's vegetation management trim cycle to five years from the current four. In addition to permitting the Company to receive additional cost recovery for dollars spent, the arties mitigated the cost by changing to the five-year cycle.

OCC is alone in opposing this obviously necessary provision. In its opposition, OCC argues that Rider ESRR is not appropriate because "Tree related outages have been the source of more customer interruption minutes ("CIM") in each of the past two years than any other outage cause."[342] OCC further observed that the Company was unable to meet its trim cycle requirements for 2016 and 2017. But Duke Energy Ohio witness Karen Hayden explained that the supplier/contractor was asking for a higher fee even though they were bound by an existing contract.[343] When Duke refused to pay higher prices, the contractor walked off the job.[344] Thereafter, the Company was unable to get additional contractors on board at a price that "wasn't completely outrageous."[345] As good stewards of customer dollars, the Company took the prudent option.

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[339] *Id.*, pp.4-5.
[340] *Id.*, pg. 5.
[341] *Id.*, pg. 5.
[342] OCC Initial Brief pg. 120.
[343] Trans. Vol. III, pg. 485.
[344] *Id.*, pg. 485.
[345] *Id.*, pg. 485.

Rather than recognize the value provided by the terms of the Stipulation in addressing a thorny problem, OCC instead opposes the Stipulation. But OCC's witness, Mr. Lanzalotta, has no experience in this area and has never reviewed the Company's tree trimming specifications and guidelines that are provided to the companies performing such work.[346] And he has never reviewed any of the Company's cost data related to tree trimming, so he would have no possible way to counter Ms. Hayden's testimony.[347] Mr. Lanzalotta's opinions about how the Company should manage its vegetation are entirely speculative and uninformed and should not be regarded as authoritative in any way. Instead, the Commission should appreciate the solution offered by the terms of the Stipulation as related to vegetation management. This is a problem for Duke Energy Ohio and other Ohio utilities that is not easily solved. The Stipulation represents the best possible solution and is reasonable. Rider ESRR will be audited by the Commission Staff and OCC's noted concerns about "whether the Company has evidence that it has actually incurred additional tree-trimming expenses" can be easily addressed in the normal process of a rider proceeding. OCC's opposition to this portion of the Stipulation is not well reasoned and should be disregarded.

h. Rider SCR's circuit breaker provision does not result in an anticompetitive subsidy and is a necessary protection for customers and the Company.

The Stipulation calls for the long-standing Rider SCR to continue in substantially its current form.[348] Rider SCR provides a means to true up the differences between the invoiced cost of SSO service provided through the competitive auction construct and the revenue collected by Duke Energy Ohio through its retail energy and retail capacity riders (Riders RE and RC).[349] As is currently the case, Rider SCR also recovers the costs associated with

[346] Trans. Vol. X pg. 1648.
[347] *Id.*, pg. 1648.
[348] Stipulation (Joint Ex. 1), pg. 6.
[349] ESP Case, Application (Duke Energy Ohio Ex. 2), pp. 9-11.

conducting the auctions, as well as costs associated with any audits, consultants, or other incremental costs incurred by or billed to the Company to procure SSO service.[350] The only change proposed to Rider SCR in the Stipulation is to account for Staff's revenue requirement adjustment related to the net metering in its Staff Report.[351]

Since its inception, Rider SCR, has been "conditionally" bypassable.[352] This means that if certain conditions exist, the rider will transition from being avoidable by customers who shop to unavoidable. Specifically, as long as the balance of Rider SCR is less than 10 percent of Duke Energy Ohio's overall actual SSO revenue for the most recent quarter for which data is available, shopping customers would avoid the rider. However, if the balance is equal to or exceeds 10 percent of the overall actual SSO revenue, Duke Energy Ohio the rider can become non-bypassable. This designation would persist only for as long as the rider balance is equal to or exceeds the stated threshold of 10 percent of overall actual SSO revenue. Rider SCR, with this "circuit breaker" provision, was the product of a stipulation agreed to, adopted, and approved by the Commission in Duke Energy Ohio's 2011 ESP proceeding, nearly eight years ago.[353] Only one party, IGS, opposes the continuance of this aspect of Rider SCR.

IGS persists in its crusade to increase the price-to-compare provided by Duke Energy Ohio's SSO without regard to the impact on customers. The Commission has previously rejected IGS's arguments to eliminate this Rider SCR "circuit breaker" and should continue to do so here.[354] Nothing has changed. The justification for this circuit breaker provision is to avoid the proverbial "last man standing" situation, whereby as more customers shop, there are fewer

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[350] *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. 11-3549-EL-SSO, *et al.*, Opinion and Order, pg. 17 (Nov. 22, 2011).
[351] Stipulation (Joint Ex. 1), pp. 21-22.
[352] ESP III, Opinion and Order, pg. 65 (April 2, 2015).
[353] *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. 11-3549-EL-SSO et al.*, Stipulation, pg. 8; Opinion and Order, pg. 12.
[354] ESP III, Opinion and Order, pg. 65 (April 2, 2015).

and fewer customers left paying the cost for the Company to meet its provider-of-last-resort obligation to ensure an SSO is available for customers in the event of supplier default. The higher the avoidable charge, the more likely customers will shop. This is precisely what IGS hopes to achieve. The current Rider SCR threshold provides the necessary protection for both customers and the Company.

Rider SCR's ability to become non-bypassable protects customers that, for whatever reason, are unable to shop or cannot switch quickly enough. It also protects the Company by providing it some measure of assurance that it will recover its costs for meeting the statutory obligation to provide an SSO. IGS's own witness agrees that Duke Energy Ohio has an SSO obligation; if there is one customer or no customers, it still has to offer an SSO and would still incur costs.[355] Duke Energy Ohio is entitled to the opportunity to recover its costs for providing SSO service and Rider SCR's circuit breaker is that opportunity.

Rider SCR is simply the mechanism to timely pass through specific charges the Company incurs in providing its SSO. No more, no less. The conditions that would lead to the Rider SCR exceeding the 10 percent threshold would likely persist for more than one quarter (*i.e.*, the frequency of the Rider SCR filings); so, absent this mechanism, the alternative is protracted litigation over the question of bypassability, which could unnecessarily drag on for multiple periods – and all the while, the balance of dollars to be collected under Rider SCR would continue to grow.

Finally, allowing an unreasonably large balance (*i.e.*, greater than the 10 percent threshold) of under-recovery to flow through Rider SCR on a bypassable basis would risk undermining the competitive balance between SSO auction winners and CRES providers. The SSO price-to-compare (*i.e.*, all bypassable charges) would increase relative to CRES offers at an

[355] Trans. Vol. VI., pp. 1126-1127.

accelerating pace, leading to more switching, an ever-increasing imbalance between the revenue collected under Riders RC and RE, and the payments to SSO auction winners. The "spiral" can easily be avoided by including a reasonable threshold past which Rider SCR automatically becomes non-bypassable.

The Commission should disregard IGS's attempt at undermining the conditional bypassability of Rider SCR. The Commission should approve the Rider SCR as agreed in the Stipulation and allow the circuit breaker threshold of 10 percent continue.

i. The Company should have the flexibility to offer time-of-use rates.

IGS also opposes the Stipulation insofar as it does not prevent the Company from offering time-of-use rates.[356] Although there is no such requirement for time of use rates set forth in the Stipulation itself, the Staff recommended that the Company do so in its Staff Report in the rate case proceeding, and the Company is amenable to doing so.[357] Staff noted that it was not aware that any marketer is offering a time-of-day rate that reflects PJM wholesale electricity prices in the Company's service territory. Therefore, Staff provisionally recommended offering a time-differentiated rate to residential customers until such time the Commission has made a determination that time-of-day rates are available to customers in the retail market place.[358] IGS can solve its own issue here by offering such rates in the Company's service territory and elsewhere. IGS merely seeks to avoid having to compete in the marketplace.

j. The MRO versus ESP test is satisfied.

The record demonstrates that the Stipulation results in an ESP that is more favorable in the aggregate than the results of a MRO. Both Mr. Wathen and Staff witness Donlon provided detailed discussions of the ESP and MRO comparisons in their respective testimonies supporting

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[356] IGS's Brief at 27.
[357] Staff Report of Investigation, September 26, 2017, pg. 21; Trans. Volume II, pg. 686.
[358] *Id*.

the Stipulation, both concluding that the stipulated ESP is indeed better.[359] Mr. Donlon performed a review of past precedent with respect to which riders and costs that should be included in the quantitative ESP versus MRO test and evaluated the stipulated ESP's pricing and other terms.[360] Mr. Donlon also performed a qualitative review of the benefits of the Stipulation.[361] Together, these quantitative and qualitative benefits demonstrate that the stipulated ESP is more favorable in the aggregate than the results under an MRO.[362]

Duke Energy Ohio's Initial Post Hearing Brief thoroughly discusses and details the many benefits of provided under the stipulated ESP and how the record unequivocally proves that terms and conditions are more favorable in the aggregate than the results of an MRO.[363] So too, Staff's Initial Post Hearing Brief provides its own discussion and recitation of evidence reaching the same conclusion.[364] The Commission's decision in this regard should be easy.

i. The Commission should consider concessions made by the stipulating parties in reaching a negotiated ESP.

The resolution of these Consolidated Cases would not have been possible absent the ability to negotiate with interested stakeholders regarding the numerous issues included in these various cases. OCC claims that Duke Energy Ohio is inappropriately seeking credit for withdrawing riders that were proposed in its applications but were negotiated and traded as part of the final settlement package.[365] OCC is wrong. These concessions demonstrate that the Stipulation indeed was the product of serious bargaining. Moreover, the fact that concessions were made and specific riders were removed from the final Stipulation and, particularly, in arriving at the ESP component of the settlement, should be given some weight. Mr. Wathen's

[359] Wathen 2nd Supp. Test (Duke Energy Ohio Ex. 30), pp. 32-35; Donlon Test. (Staff Ex. 17), pg. 18.
[360] Donlon Test. (Staff Ex. 17), pp. 14-16.
[361] *Id.*, pp. 17-23.
[362] *Id.*
[363] *See* Company's Brief, pp. 53-57.
[364] Staff's Brief, pp. 35-45.
[365] OCC's Brief, pg. 140.

point in testimony as it relates to the ESP versus MRO test was that the Company's originally filed ESP, which included several additional provisions that were not contained in the final negotiated ESP, had already satisfied the more favorable in the aggregate test from the outset.[366] The removed provisions included, among other things, a regulatory mandates rider (Rider RM) and an incentive ratemaking mechanism (Rider IRM). Excluding these riders should make the ESP even more favorable as compared to an MRO. Although OCC brands these riders as flawed, there is no reason to believe that they could not have been approved as part of a fully litigated ESP.

For example, had the Rider RM been included as part of the final ESP, the changes resulting from the TCJA, as well as any other change in law going forward, would have had a mechanism to allow immediate recognition in rates. Over time, that rider could have worked in favor of either the Company or customers. Either way, it would have provided a benefit in that both the Company and customers would have been made whole with regard to regulatory mandates resulting from a change in law. Nevertheless, the Company agreed not to litigate such matters, and even that itself is a benefit. It saves the settling parties, opposing parties, and the Commission the time and effort of having to address that specific issue. As Mr. Wathen explained, the Stipulation is unique in its breadth, and the resolution of the various matters and concessions made could not have occurred absent the consolidation and weighing of all the issues by the settling parties:

> Because settlement of the ESP is a component of a larger global settlement involving other important cases, significant benefits accrue to customers, the Company, and other stakeholders that may otherwise not be realized but for the global settlement. The settlement must be viewed as a package and it must be assumed that at least some of the benefits derived from the package may not be available if each case were fully litigated independently. In other words, it cannot be assumed that benefits such as the $19.17 million base rate reduction would be realized if the base rate case was fully litigated rather than settled as part of the overall Stipulation. Similarly, the funding commitments

[366] Wathen 2nd Supp. Test (Duke Energy Ohio Ex. 30), pp. 32-35.

> for low-income weatherization, cooperation agreements with various parties, withdrawal of various riders, reliability commitments, and spending caps, may not have been realized or at least acquiesced to absent this global compromise of multiple proceedings.
>
> For all the reasons I described in my initial testimony in Case No. 17-1263-EL-SSO and because of the added benefits that come with settling other cases along with the ESP, it is clear that the ESP, as part of this overall package, is more favorable than the results that would be achieved under an MRO.[367]

Likewise, the negotiated reduction in the base distribution rates is a quantifiable benefit of the Stipulation that could only have happened in the context of resolving these Consolidated Cases, including the ESP. Duke Energy Ohio had filed its Distribution Case seeking a $15 million increase. While Staff recommended a range of a decrease, Duke Energy Ohio did not concede these issues and, like many of the settling parties, timely filed objections explaining the various errors discovered in the Staff Report.[368] Nonetheless, the Company agreed, and indeed was required, to set those objections aside, in supporting the Stipulation.[369] Again, these concessions demonstrate the reasonableness of the Stipulation, the serious bargaining that occurred, and, given that the settlement was inextricably tied to all consolidated cases, the fact that it results in an overall ESP that is more favorable in the aggregate than the results of an MRO. The overwhelming evidence thus demonstrates that the Stipulation itself is reasonable, meets the Commission's three-part test, and further results in an ESP that is more favorable than the results of an MRO.

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[367] *Id.*

[368] *See* Duke Energy Ohio's Objections to the Staff Report, Case No. 17-032-EL-AIR, *et al.*, filed October 26, 2017.

[369] In accordance with the Attorney Examiner's verbal evidentiary ruling at a telephonic prehearing conference on June 19, 2018, and as confirmed by an email dated June 21, 2018, the Company was limited in the evidence it could present at the hearing to only that evidence that was compatible with the Stipulation. Thus, the Company was not permitted to offer its objections to the Staff Report into the record. *See, e. g.*, Trans. Vol. V, pp. 937-940.

ii. The stipulated ESP, including Rider PSR, remains more favorable in the aggregate than the results of an MRO.

OCC inaccurately describes the Company's Rider PSR as a quantifiable harm to customers that results in the stipulated ESP failing the "more favorable in the aggregate" test.[370] To reach such a conclusion, however, OCC must misapply the ESP versus MRO test to focus on a single issue – the forecasted cost of Rider PSR – to the exclusion of the other benefits provided by the rider and all provisions of the stipulated ESP. As thoroughly discussed above, as well as in both Staff's Brief and the Company's Brief, the record clearly shows that the ESP is more favorable **<u>in the aggregate</u>** than an MRO. Moreover, OCC ignores the overwhelming evidence that Rider PSR indeed provides benefits to customers. The Commission has already established that mechanisms like Rider PSR provide benefits to customers through the provision of a counter-cyclical and physical hedge against volatile future wholesale market prices.[371] Additionally, the record in this case shows that Rider PSR provides an important benefit insofar as supporting the Company's credit metrics, which, as clearly identified by rating agencies, are on the cusp of erosion.[372] OCC's own witness included this same evidence in his testimony.[373]

While the forecast submitted by Mr. Rose did show that Rider PSR, factoring in all demand costs of the OVEC ICPA, was projected to be a net cost, his analysis also showed that on a cash-going forward basis, OVEC was dispatchable in the PJM wholesale markets because it was positive on a cash-going forward basis.[374] OVEC's costs are five times **<u>less</u>** volatile than the

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[370] OCC's Brief, pg. 142.

[371] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 16-395-EL-SSO, Opinion and Order (October 20, 2017); *In the Matter of the Application of Ohio Power 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. 13-2385-EL-SSO, *et al.*, Fourth Entry on Rehearing (Nov. 3, 2016).

[372] Sullivan Supp. Test. (Duke Energy Ohio Ex. 20), JLS-1, pg. 2.

[373] Duann Test. (OCC Ex. 7), Attachment DJD-7.

[374] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pp. 21-23.

market.[375] This means that, as market prices rise, OVEC's stability provides the opportunity for greater benefits to customers by way of greater potential credits against rates.

Moreover, although Mr. Rose did not quantify the value of OVEC as a hedge against the more volatile market, he unequivocally stated that there was value and assessing such a value required more than just a look at the costs of the hedge.

> Q. And you would agree that for – it would be worth it to customers to charge them somewhere between 77 and 94 million dollars under Rider PSR, that hedge value should be greater than the charges under the rider, correct?
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> A. No, I've not come to that specific conclusion. That's a judgment for the Commission and that's only part of the information. You need to know how volatile the market conditions are or could be and also the degree to which unexpected outcomes in terms of even higher bills would impact customers, so you need more information than just the expected value. You need a sense of what the volatility is and what the Commission believes is the reasonable level of hedging that's required and particularly over the period of time here.[376]

Given the pending growth in capacity retirements in PJM, regulatory changes related to carbon, and market reforms in the PJM currently before FERC, particularly with respect to resiliency and capacity, the potential value of this hedge is likely to grow.[377]

The ESP versus MRO test is whether or not the ESP is, **<u>in the aggregate</u>**, more favorable than the results of an MRO. It is not whether one component of the ESP terms and conditions results in a total cost to the exclusion of all other qualitative benefits, including all other terms of the ESP. The Commission should disregard OCC's baseless claims and rely upon the clear and convincing evidence that the ESP is more favorable in the aggregate than the results of an MRO.

[375] *Id.*, pg. 21; Donlon Test. (Staff Ex. 17), pg. 15.
[376] Trans. Vol. II., pp. 249-250.
[377] Rose Supp. Test. (Duke Energy Ohio Ex. 8), pp. 22-23.

B. Other Issues Raised by Opposing Parties.

1. The Commission should ignore the marketers' attempts to reallocate costs to provide an SSO to non-switching customers.

Under R.C. 4928.141, Duke Energy Ohio must stand ready to serve any customer with an SSO, regardless of whether the SSO is willingly chosen by the customer or is thrust upon the customer due to competitive supplier default.[378] The availability of an SSO for retail electric service is a benefit provided under Ohio law to every customer of the electric distribution utility. It is not a service provided to only customers actually taking the SSO. This obligation creates unique risks for Duke Energy Ohio, whereby Duke Energy Ohio must be prepared to serve any customer. Competitive suppliers have no such obligation or risk under Ohio law, a fact acknowledged by IGS and RESA witness Hess.[379] Although a CRES provider can choose to provide generation service to retail customers, the EDU is required by law to serve any customer that asks for such service. And because SSO service is a benefit to **all** customers, the EDU's unavoidable costs to create and ensure that a SSO is available for all customers are appropriately reflected in the distribution utility's base distribution rates.

IGS and RESA argue, self-servingly, that the Commission should unbundle Duke Energy Ohio's costs required to develop, process, implement, and operate an SSO and only charge customers that actually take SSO service.[380] IGS and RESA argue that the Company's offering an SSO amounts to a subsidized rate and proposes that the Commission reallocate approximately $23.1 million in the Company's cost of service and place that responsibility solely upon those customers that either elect or are forced into taking the Company's SSO service.[381] IGS recommends that this be accomplished through the creation of two opposing riders, one to credit

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[378] R.C. 4928.141.
[379] Trans. Vol. VI, pp. 1118.
[380] IGS's Brief, pp. 16-33; RESA's Brief, pp. 8-9.
[381] Hess Test. (RESA-IGS Ex. 1), Ex. JEH 1.

customers that switch or shop, the other to charge customers that do not or cannot.[382] The Commission should not fall into this trap. IGS and RESA are simply seeking the creation of what amounts to a shopping credit to incentivize switching from Duke Energy Ohio's SSO and penalize those who either cannot or do not switch.

Mr. Hess' proposal for allocation of approximately $23.1 million in costs solely to SSO customers is unsupportable and offends the most basic principles of cost causation. Mr. Hess identifies a laundry list of the Company's "costs" of service that he alleges should be allocated solely and directly to SSO customers. These costs include, but are not limited to, call center infrastructure and employees, printing and postage, various business operations and personnel, regulatory assessments and taxes.[383] Mr. Hess ignores the fact that Duke Energy Ohio not only deploys these resources to ensure SSO service is available to all customers (both shopping and non-shopping), but also to support and provide service to customers who do-in-fact shop or switch to a CRES. For example, on cross-examination, Mr. Hess acknowledged that Duke Energy Ohio receives calls from customers about CRES providers and does not charge CRES providers for handling those calls.[384] However, he had no concept of the number of those calls or if the Company responds to the CRES customer calls or simply refers them to the CRES.[385]

IGS and RESA apparently have a delusion that the costs of providing SSO service by an EDU are avoidable to the utility. That is simply not the case. Just as the wires, conduit, poles, etc., are unavoidable and provide a benefit to both SSO customers and CRES customers by delivering generation service to customers, virtually all of the costs listed in the IGS Initial Brief are unavoidable and provide a benefit to SSO customers and to CRES customers.[386] Regardless of whether a customer is taking service from a CRES provider or not, the Company must

[382] *Id.*, pg 4.
[383] *Id.*, pg. 12.
[384] Trans. Vol. IV, pg. 1131.
[385] *Id.*
[386] IGS's Brief, pp. 7-8.

maintain a call center; must employ legal, regulatory, and compliance personnel; must incur expenses for information technology labor, infrastructure, and software; must maintain office space for employees; must employ administrative support and human resources staff for employees; must incur costs for office supplies; must employ accountants and auditors; and must incur printing and postage to communicate with customers. None of these costs varies with the level of SSO load. IGS and RESA would have the Commission believe that these costs would disappear if all customers took service from CRES providers. That is absolutely not true. Even if all customers are taking service from CRES providers, Ohio law requires that Duke Energy Ohio must make SSO service available to any customer, regardless of whether it is because of CRES default or simply the customer's choice.

IGS also suggests in its Initial Brief that certain Uncollectible Expenses, Regulatory Assessments, and Cash Working Capital should only be paid for by SSO customers. First, IGS's proposal regarding the Uncollectible Expense is moot. Its own proposal only addresses those Uncollectible Expenses that contain a discount rate. Duke Energy Ohio's purchase of receivables program includes a zero percent discount rate. Therefore, by its own condition, IGS's proposal regarding uncollectible expense is inapplicable.

Although the Company does not disagree with the IGS regarding the notion that OCC and PUCO maintenance fees are influenced by revenue, the Staff has consistently rejected the theory that there is a "causal relationship" between revenue and the maintenance fees.

Finally, it is not clear what IGS means by Cash Working Capital. No customer pays Duke Energy Ohio for any cash working capital. There has not been any recovery of a return on cash working capital in Duke Energy Ohio's base rates since at least before deregulation began. In a footnote, IGS attempts to rationalize its argument by suggesting that, although no customer has been asked to pay a return on cash working capital in at least twenty years, IGS would have the Commission require that SSO customers, and only SSO customers, pay some return on cash working capital. IGS's argument is nonsensical and should be ignored.

The record actually shows that the Company spends considerable resources providing services to CRES customers. Duke Energy Ohio witness Wathen explained, under cross examination, that all calls to Duke Energy Ohio go to its call center, including customer complaints about CRES providers.[387] Moreover, Staff witness Craig Smith testified under cross examination by IGS, based upon personal knowledge, that Duke Energy Ohio spends an "exorbitant amount of time answering questions on CRES-related issues."

> Q. And if a customer were to call Duke's call center with a concern about a CRES-related product, would you agree that Duke is supposed to refer that customer to the CRES provider for resolution?
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> A. That's not what Duke does.
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> Q. What are they supposed to do then?
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> A. They are supposed to handle the distribution customer's complaint or questions as they pertain to the -- the account, and many a times those questions have to do with their CRES provider. I actually sat on -- this January, sat in on about an hour's worth of Duke's calls at their call center, and many of those calls, almost 40 percent of them had to do with a CRES account, a CRES issue. It was high bill issues and a lot of the call center deals with a lot of CRESs. They have to explain to the customers what government aggregation is, why they have a rate, who these people are. It was -- they spent an exorbitant amount of time answering questions on CRES -- CRES-related issues.[388]

Both Mr. Wathen and Staff witness Smith are correct. The Company does devote significant resources to supporting customers that shop and are served by CRES providers as well as those that do not. These services to administer the SSO are available to all customers regardless of whether or not they switch to a competitive provider. Because these services are provided by Duke Energy Ohio to meet its legal obligation as a provider of last resort through an SSO under

[387] Trans. Vol. V, pg. 991.
[388] Trans. Vol. IX, pg. 1911.

Chapter 4928, the costs to ensure that service is available to all customers should be borne by all customers.

IGS's claims and implications that Duke Energy Ohio's SSO rates are artificially low do not hold water.[389] There is absolutely no evidence that Duke Energy Ohio's current SSO pricing structure is adversely impacting the competitive market. In fact, the evidence is to the contrary. IGS's own witness, Mr. Hess, used 2016 switching statistics for Duke Energy Ohio in the preparation of his testimony filed in June 2018.[390] Albeit outdated and stale, those statistics demonstrated that customer switching levels are substantial, and that more than half of Duke Energy Ohio's customers had switched away from the SSO at that time.[391] His information did not even reflect the robust switching levels that exist presently, or the level that existed when Mr. Hess actually prepared or filed his testimony in these proceedings.[392] Mr. Hess acknowledged that the Commission maintains such customer switching statistics, both in terms of customer count and total MW sales and that such information is publicly available and accurate.[393] More recent Commission reports show that Duke Energy Ohio's monthly switching levels for 2018 have been close to 60 percent, higher switching levels than that of either Ohio Power Company or the Dayton Power & Light Company.[394] Mr. Hess admitted under cross examination that CRES providers have the largest market share in Duke Energy Ohio's service territory, not the SSO.[395] Moreover, as explained by Duke Energy Ohio's President, Ms. Spiller, Duke Energy Ohio currently has more than eighty registered CRES providers in its service territory.[396] It

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[389] IGS's Brief, pg. 17.
[390] Hess Test. (RESA-IGS Ex. 1), pg. 10.
[391] Trans. Vol. VI, pp 1189-1191.
[392] *Id.*, pp 1136-1138.
[393] *Id.*
[394] *See* Duke Energy Ohio's Retail Market Activity (CRES vs. SSO) by Customer Account, available at: https://app.powerbigov.us/view?r=eyJrIjoiOTY5YTRmMWUtYWFmYi00YzAwLWEzMjgtMzVlMTU1YzU0MjMzIiwidCI6IjUwZjhmY2M0LTk0ZDgtNGYwNy04NGViLTM2ZWQ1N2M3YzhhMiJ
[395] Trans. Vol. VI, pg. 1141.
[396] Trans. Vol. I, pg. 63.

would be difficult to argue that competition in Duke Energy Ohio's service territory suffers from a lack of competition when there are eighty different suppliers willing to compete for load. Any claim that the pricing structure of Duke Energy Ohio's SSO is somehow adversely impacting competition is simply untrue.

No other party to this proceeding advocates for a change in the cost allocation structure for Duke Energy Ohio to provide its SSO. Not even customer groups make such a suggestion. In fact, both Staff and OCC vehemently oppose the creation of this "shopping credit," which harms customers while benefitting IGS and RESA.[397] While IGS claims that creating its shopping credit/penalty mechanism is acceptable because it would be revenue neutral to Duke Energy Ohio, the fact remains that such a mechanism may not always result in such revenue neutrality. Moreover, it ignores the significant harm it places on customers that may not have the ability to find a supplier willing to provide them service or those whose supplier defaults. This is because IGS proposal acts as both a carrot to incentivize the customer to switch to a competitive supplier and as a substantial penalty to the customer for remaining on the SSO service. The more customers that avoid this charge by switching, the fewer the customers remain to pay for the provision of such service. Thereby creating the proverbial death spiral that leaves the "last customer standing" with full responsibility for SSO costs. Those final customers will likely be those customers that have no place to turn other than the SSO. Unlike the distribution utility, CRES have a choice whether or not to serve a customer and can refuse based upon credit quality.

With 60 percent of customers already switching, implementing such a mechanism to artificially drive customers away and penalizing them for taking Duke Energy Ohio's SSO service means that fewer and fewer customers will be left to pay for the SSO costs, creating the potential that the Company may not be fully compensated for providing its backstop electric

[397] Smith Test. (Staff Ex. 15), pp. 4-5; Willis Rebut. (OCC Ex. 22), pp. 4-8.

service to customers. Even if Duke Energy Ohio's territory experienced 100 percent switching levels, Duke Energy Ohio would still have the statutory obligation to have an SSO as the backstop against supplier default. Under IGS proposal, although Duke Energy Ohio would still incur costs to ensure that SSO service is available to all customers, it would have no means to recover such costs.

The Commission should ignore the allocation proposal by IGS and RESA and see it for what it truly is, a penalty for customers that take Duke Energy Ohio's SSO service, a service that Duke Energy Ohio is required by law to make available non-discriminatorily to all customers. Whether by choice or through default of a supplier, the SSO service should remain as both a lifeline and a reasonable alternative to customers for retail electric service.

2. Annual cost information for OVEC and Rider PSR should remain confidential.

In their Post-Hearing Briefs, the Conservation Group and OCC continue their crusade to undermine the confidential and trade secret information of Duke Energy Ohio, its witness Mr. Rose, and OVEC.[398] The Commission has now addressed these arguments twice, once at the hearing and then nearly a month later through a separately filed, and arguably improper and untimely motion for reconsideration.[399] Now the Commission must do so once again. Nothing has changed. This information is and remains confidential, proprietary trade secret information and is entitled to protection from public disclosure under Ohio law.[400] Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily

[398] Conservation Group's Rider PSR Brief, pp. 25-30.
[399] Motion for Reconsideration, Memorandum in Support and Request for Expedited Treatment (Aug. 9, 2018); Attorney Examiner Entry (Sept. 6, 2018)(denying motion for reconsideration).
[400] R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43. R.C. 149.43 specifies that the term public records excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *See, e.g., State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[401]

When the Company initially filed the Supplemental testimony of its witness Mr. Rose on June 6, 2018, the Company included a Motion for Protective Order that detailed the nature of the confidential information contained in Mr. Rose's supplemental testimony, explained the reasons why this information is confidential to the Company, to Mr. Rose and his company, ICF Consultants, Inc., as being derived from proprietary modeling tools such as forecasts of energy and capacity prices, natural gas, coal and CO_2 prices and forecasts related to power plants that participate in the competitive wholesale markets.[402]

The Conservation Group, however, continues to claim that the Company "failed to offer any evidence to support its claim for trade secret status" for the information at issue. This is untrue. The Conservation Group just disagrees with the conclusion that the evidence previously offered by the Company is sufficient to justify confidential treatment. The Conservation Group raises no new argument that was not already considered, countered by the Company, and ultimately rejected by the Attorney Examiner. Twice. It is also important to recognize that the decision whether or not to treat particular information as confidential is, in reality, a process of weighing the public's need for the information against the company's need to keep it confidential.[403] As the decider of fact, the Commission (or, on the Commission's behalf, the Attorney Examiner) is uniquely qualified to weigh the evidence before it and to find that the Company's evidence is sufficient to protect the

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[401] R.C. 1333.61(D).
[402] Motion for Protective Order (June 6, 2018).
[403] *See, e.g., In the Matter of the Application of The Toledo Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service*, Case No. 95-299-EL-AIR, *et al.*, 1996 Ohio PUC LEXIS 36 ¶6 (Jan. 4, 1996); *In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval to an Electric Service Agreement with American Steel & Wire Corporation,* Case No. 95-77-EL-AEC, 1995 Ohio PUC LEXIS 436, ¶5 (June 8, 1995).

information from disclosure. That is precisely what happened here. Twice. The Company's witness explained the need for the confidential treatment and the Attorney Examiners agreed.

The Conservation Group also disputes the importance to be placed on the treatment of comparable information in other electric utilities' proceedings. In the Motion for Reconsideration the Conservation Group states that, although "Commission precedent is to some extent instructive, when it comes to trade secret determinations each decision must be made based on the evidence in the record."[404]

As the Attorney Examiner correctly cited in the Commission's September 6, 2018 Entry, the Company has already released the aggregated total cost to customers.[405] The annual projections for each individual year of the Rider PSR would expose an overall competitive position.[406] The projected annual numbers related to power plants that participate in the competitive wholesale market and maintain independent economic value.[407] The Commission has routinely and correctly ruled in a similar manner in past cases, involving the exact same information.

The Commission should not upend its established precedent here. Especially when the record supports continued confidential treatment of this sensitive information regarding generating plant operating in the competitive wholesale energy markets.

3. The Commission should not change the Stipulation to include Customer Education Funds.

The Cincinnati Clean Energy Foundation's (CCEF) objects to the Staff Report filed the Company's Distribution Rate Case because Staff did not recommend recovery of costs associated with a customer education campaign in base distribution rates.[408] The Commission

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[404] Motion for Reconsideration, pg. 9.
[405] Attorney Examiner Entry, pg. 5 (Sept. 6, 2018)(denying motion for reconsideration).
[406] *Id*.
[407] *Id*.
[408] Cincinnati Clean Energy Foundation (CCEF) Brief, pp. 4-5.

should disregard this objection, as it has nothing to do with the decision before the Commission, namely whether the Stipulation reached in these consolidated proceedings is reasonable.[409]

CCEF does not argue that the Stipulation is unreasonable. CCEF does not argue that the exclusion of this funding results in the Stipulation failing the Commission's three-part test. CCEF simply believes that the Commission should amend the Stipulation to allow these funds to be included in the test year of the Company's base distribution revenue requirement.[410] The Commission should not grant CCEF's program funding request, nor should it order Duke Energy Ohio to make such funding available without providing Duke Energy Ohio cost recovery. Such a directive would result in an unlawful taking.

The stipulating parties have agreed to an overall base rate revenue reduction as part of this settlement. The reduction presumably includes Staff's exclusion of these education costs from base rate recovery, as the rate reduction was premised upon the Staff Report. As CCEF acknowledges, the customer education funding are incremental as they are costs outside of the Company's test year.[411] Therefore, granting CCEF's request would actually serve to increase the Company's test year revenue requirement because it would increase Duke Energy Ohio's annual expense. Increasing the Company's costs results in a corresponding increase to its revenue requirement, thereby actually reducing (lowering) the negotiated base rate revenue reduction. The Commission should not approve the CCEF's request to fund the customer education program.

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[409] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).
[410] CCEF's Brief pg. 4.
[411] *Id.*, pp. 4-5.

4. The Stipulation's call for an audit of the Company's purchase of CRES accounts receivables program is reasonable and should be approved.

The Stipulation provides that Duke Energy Ohio will continue its current Purchase of Accounts Receivable (PAR) program and related recover rider, UE-GEN.[412] This includes the continuation of the Company's existing policy to purchase CRES receivables at zero discount.[413] To ensure that Duke Energy Ohio is only purchasing receivables it is authorized to purchase under the program, and that Duke Energy Ohio's internal processes and controls for monitoring CRES provider compliance with the PAR Program agreement are sufficient, the Stipulating Parties agree that an independent audit should occur.[414] The intent of this audit is to ensure that only appropriate commodity-based charges are being included in the Company's PAR Program by CRES as is required under the Company's tariffs.[415]

RESA alone opposes this audit and recommends that, if the Commission approves the Stipulation, it restrict the audit scope.[416] RESA says it is concerned that the Commission is overstepping its authority and that the Commission should define non-commodities and only provide forward-looking guidance.[417] RESA's opposition to this audit is curious if not alarming. Assuming CRES providers are following the Company's tariffs and are not surreptitiously including improper charges, there should be no issue or concern. RESA's contrary position actually demonstrates the need for the Commission to approve and conduct such an audit.

The Company attempts to adequately manage its PAR Program and enforces its tariffs. However, if CRES providers have found ways to abuse this process and include improper

[412] Stipulation (Joint Ex. 1), pg. 22.
[413] Spiller Test. (Duke Energy Ohio Ex.5), pg. 9.
[414] Stipulation (Joint Ex. 1), pg. 22.
[415] *Id*.
[416] Ringenbach Test. (RESA-IGS Ex.6), pg. 7.
[417] *Id*.

charges as part of this program, the Company and this Commission should be made aware of it. The proposed audit creates that forum and should be approved.

5. A market-based billing solution is not necessary because Duke Energy Ohio's proposal for a new CIS is beneficial for all its customers.

The Stipulation provides a forum and cost recovery mechanism for Duke Energy Ohio to proceed with the implementation of its much needed, new CIS, Customer Connect System.[418] The Stipulation provides this opportunity through Rider PF's third component.[419] As described in the Stipulation, Rider PF component three will be used for the recovery of costs related to an infrastructure modernization plan, to be filed in a separate proceeding that will be subject to a hearing.[420] This infrastructure modernization plan will include, but is not limited to, the new CIS.[421] The new CIS Customer Connect System will provide the ability for customers of Duke Energy Ohio and CRES suppliers to use the granular usage date captured by AMI to receive personalized utility service opportunities, according to their preferences, whether in the form of rate options or other usage-related services.[422]

As demonstrated, the Company's current information system is decades old and nearing obsolescence.[423] As originally designed and intended in its day, the Company's current CIS was limited in capability in that its primary function was solely to aggregate monthly usage data for billing purposes.[424] With robust customer choice and a stated desire by the Commission to innovate and enhance the customer electricity experience,[425] this antiquated CIS is not able to support the technologies, experiences and data granularity desired by customers, marketers,

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[418] Stipulation (Joint Ex. 1), pg. 17.
[419] *Id*.
[420] *Id*., pg. 18.
[421] *Id*.
[422] Henning Dist. Test. (Duke Ex. 6), pg. 12.
[423] Spiller Test. (Duke Ex. 5), pg. 18.
[424] Henning Dist. Test. (Duke Ex. 6), pg. 9.
[425] See A Roadmap to Ohio's Electricity Future, Pg. 4. Available at: https://puco.maps.arcgis.com/apps/Cascade/index.html?appid=59a9cd1f405547c89e1066e9f195b0b1

Duke Energy Ohio and third party competitive suppliers.[426] The new CIS will provide such platform capability and is far more than a simple billing system.

IGS and RESA are opposing the creation of this new CIS and instead advocate for the Company and this Commission to unnecessarily spend time and resources evaluating whether or not Duke Energy Ohio should abdicate its responsibility for billing customers completely.[427] IGS recommends that the Commission require the Company to evaluate the costs and benefits of transferring all billing responsibilities to CRES providers and SSO auction winners and compare these costs and benefits to those expected under the new CIS.[428] The Commission should not open this Pandora's box. This proposal will cause confusion and inconvenience for customers, and will likely eliminate competitors who currently participate in Duke Energy Ohio's Choice program.

IGS's proposal will adversely impact customers by creating confusion and inconvenience. Duke Energy Ohio is uniquely situated as the only combination natural gas and electric utility operating in Ohio. Any initiative to remove the billing function from Duke Energy Ohio must carefully evaluated for the impact on the substantial number of combination gas and electric customers that today, receive a single bill for such services. The single bill for both natural gas and electric service is a significant convenience to customers. The Commission should not discount this fact.

Duke Energy Ohio has no way to analyze which of the eighty-plus CRES providers registered to provide service in its territory have discrete customer billing capability. Requiring CRES providers or auction participants to take on customer billing responsibility will likely unreasonably and unnecessarily exclude many CRES providers that currently are serving

[426] Henning Dist. Test. (Duke Ex. 5), pp. 9-12.
[427] IGS's Brief, pg. 33.
[428] *Id.*, 34.

customers, and either force them to no longer participate in Duke Energy Ohio's customer choice program or invest in their own billing systems. There is no evidence that those CRES providers or auction winners that do have a billing system today, will have the functionality envisioned with the new CIS. Even in such a situation, Duke Energy Ohio must also have its own platform available to communicate with and provide metering and billing services to its natural gas customer base. IGS's myopic and self-serving recommendation is focused solely on Duke Energy Ohio's status as an electric distribution utility, completely ignoring the fact that the Company is also a natural gas local distribution company.

IGS is missing the intent of the CIS, which as stated above, is more than the simple billing aggregation system of the past. IGS's recommendation fails to consider that Duke Energy Ohio, as the POLR for electric commodity service, must have a way to administer customer switching and transferring back to SSO service in the event of a supplier default.[429] Moreover, as the electric distribution utility responsible for providing not just SSO service, but also distribution and metering services, Duke Energy Ohio must have a way to collect and synthesize the granular customer energy usage data that IGS and RESA so greatly demands be made available to CRES providers.

Nonetheless, the Stipulation, if approved as filed, creates the forum to address and explore all issues with the Company's new CIS and the functionality necessary to best serve Duke Energy Ohio's customers. The Commission should recognize IGS's recommendation for what it really is, an attempt to erode Duke Energy Ohio's connection with its electric (and natural gas) customers altogether for IGS's own self-serving interests. The Commission should disregard IGS's recommendation for a market-based solution as a substitute for Duke Energy Ohio to implement a new CIS to communicate and provide service to customers.

[429] R.C. 4929.14

6. Proposals for supplier consolidated billing, non-commodity billing, and enroll from my wallet should be rejected.

a. Supplier consolidated billing is not beneficial to Duke Energy Ohio's customers.

Duke Energy Ohio is the only combination electric and gas distribution utility operating in Ohio. This results in the Company, and its customer base being uniquely situated. Duke Energy Ohio has three categories of customers, electric only, natural gas only, and combination natural gas and electric. It is this latter category that sets Duke Energy Ohio apart from all other utilities under this Commission's jurisdiction, and which makes supplier consolidated billing complex, unreasonable, non-beneficial and confusing to customers.

Both IGS and RESA advocate that the Commission impose supplier consolidated billing upon Duke Energy Ohio's customers, without even considering whether they want it or not.[430] IGS all too simplistically describes its supplier consolidate billing proposal as the inverse of traditionally utility billing where the supplier, rather than the utility issues a single bill that contains the customer's generation, supply, and distribution charges, and assumes the responsibility of collecting the utility's distribution receivables.[431] IGS justifies supplier consolidated billing as "enabl[ing] CRES providers to offer more innovative products and services through direct billing and should eliminate the need for a supplier to utilize dual billing."[432] IGS's claims are misleading and inaccurate.

First, nothing prevents CRES providers from offering these services today and billing for them independently. Any implication that Duke Energy Ohio's utility consolidated billing is somehow preventing that ability or somehow disadvantaging customers is simply untrue. CRES are free to offer such products and services today. They just need to bill non-commodity

[430] IGS's Brief, pp. 36-37; RESA's Brief, pp.6-7.
[431] IGS's Brief, pg. 36.
[432] *Id.*, pg. 37.

services separately for the commodity based services. Second, while supplier consolidated billing may indeed provide greater convenience to the supplier to comingle their commodity and non-commodity products and services, for Duke Energy Ohio's combination electric and gas customers, it will create greater inconvenience and burdens.

The vast majority of Duke Energy Ohio's customers are combination electric and natural gas customers and receive a single bill for both services. IGS's own witness acknowledges that those combination customers presently receive a single bill from Duke Energy Ohio electric and natural gas services.[433] Because Duke Energy Ohio offers utility consolidated billing, combination customers can shop independently for electric and natural gas commodities and switch to either a single or separate CRES and Competitive Retail Natural Gas Suppliers (CRNGS) for those two commodities. Utility consolidated billing allows combination customers to receive a singly bill with all utility services (electric and natural gas) included regardless of the identity of their suppliers. This allows combination customers to shop independently for both their electric and natural gas commodity services and not be limited to a single supplier for both services.

IGS's own witness Matthew White identifies and describes the conundrum, inefficiency, and inconvenience that is created for combination customers with supplier consolidated billing.[434] He also identifies a legitimate concern with a third party electric and natural gas suppliers having access to one-another marketer's rate offerings for a combination customer.[435] His recommendation, is to simply allow only electric CRES providers to engage in supplier consolidated billing, to the detriment of CRNGS, and then require Duke Energy Ohio to issue a

[433] Trans. Vol. X, pg. 1684.
[434] White Test. (RESA-IGS Ex. 5), pg. 11.
[435] *Id*.

separate bill for natural gas service, which most of its electric customers do use.[436] Under Mr. White's proposal, if a customer wishes to continue to receive a single bill for both their electric and natural gas services, as they have for decades, the customer's shopping choices would be limited to choosing a supplier that is willing to offer both gas and electric commodity service.[437]

Mr. White's proposal creates a process that actually restricts customer choice and provides a competitive advantage to those suppliers, like IGS, that provide both commodity options for customers. Such a limitation on customer choice is at odds with the state policy goals in R.C. 4928.02 and could result in situations where a CRES, knowing that a customer wishes to maintain the convenience of a single bill for both electric and gas services, could leverage the pricing of one commodity over the other resulting in a customer paying an overall higher cost for utility services then they could if they were able to shop independently for each commodity. Utility consolidated billing allows customers to shop for both commodities separately with the added convenience of a single bill for utility service. The Commission should not force that to change.

The Commission should not require supplier consolidated billing, without fully considering the impact to customers from both a cost and convenience perspective. Mr. White has no idea what his recommendation to incorporate supplier consolidate billing would cost.[438] He performed no analysis.[439] He makes no recommendation who should pay for the build out of such capability clearly designed to advantage CRES providers to the exclusion of all others. Mr. White agreed that it is appropriate for the Commission to consider the impact of supplier consolidated billing on combination customers.[440]

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[436] *Id*.
[437] *Id*.
[438] Trans. Vol. X. pg. 1662.
[439] *Id*., pg. 1681.
[440] *Id*., pg. 1686.

Although he made no recommendation in his direct testimony how to address the issue of utility receivables through supplier consolidated billing, Mr. White did concede under cross examination that there should be parity with the discount rate, if any, in the purchase of receivable programs with utility consolidated billing and supplier consolidated billing.[441] Mr. White agrees that, with supplier consolidated billing, suppliers should purchase the utilities receivables, and in Duke Energy Ohio's case, with no discount.[442]

Supplier consolidated billing raises numerous concerns that should be addressed before the Commission determines Duke Energy Ohio should implement such a program. The Stipulation already creates a forum for such discussion to occur through the Company's separately filed Infrastructure Modernization Plan docket.[443] This separate forum is an ideal opportunity for the Commission to examine all issues, and for stakeholders other than IGS and RESA to weigh in on whether such a process is reasonable and in customers' interests. The Commission should not make any rash decisions in this case and reject IGS and RESA's demand to implement supplier consolidated billing.

b. Duke Energy Ohio should not be forced to include non-commodity charges for CRES services on customer bills.

IGS and RESA both rehash previously decided arguments that would urge the Commission to force Duke Energy Ohio to permit CRES providers to include non-commodity products and services on utility consolidated billing.[444] The Commission has previously addressed this issue as part of the litigation of Duke Energy Ohio's last ESP and denied these demands based upon sound reasoning.[445] Nothing has changed since the Commission last addressed these issues. Although they argue as if this is a natural aspect of the CRES business,

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[441] *Id*., pg. 1687.
[442] *Id*., pg. 1687.
[443] Stipulation (Joint Ex. 1), pg. 17.
[444] IGS's Brief, pp. 36-37; RESA's Brief, pg. 7.
[445] ESP III, Opinion and Order, pg. 89 (April 2, 2015).

the proposal is actually a revolutionary expansion of the Ohio legislature's intent. As the Commission previously held, because all customers must bear the costs of unpaid bills, and because Duke Energy Ohio does not have the technology to separate commodity and non-commodity charges from third party suppliers, it is not reasonable to allow such charges to be added to bills.[446]

Likewise, IGS's arguments that non-commodity billing on utility consolidated bills should be required for CRES providers because Duke Energy Ohio currently allows its affiliate, Duke Energy One to bill for its own non-commodity services on bills today are irrelevant.[447] Duke Energy One is affiliated with Duke Energy Ohio, as both entities are members of the Duke Energy Corporation family. As the Commission previously held on this exact issue, Duke Energy One does not provide retail electric service.[448] Its products are only non-commodity products.[449] It is not certified by the Commission as a CRES provider, and, indeed, Duke Energy One does not sell any retail electric services. CRES providers, on the other hand, by definition are sellers of retail electric services. They might also sell non-electric services, just as they might sell widgets, but it is their offering of retail electric services that causes them to be CRES providers. As the Commission has previously determined, Duke Energy One is not "parallel" to a CRES provider.[450]

Duke Energy Ohio operates under a valid and approved corporate separation plan. To the extent RESA or IGS imply or allege here (as they previously did in the Company's ESP III proceeding) that Duke Energy Ohio is somehow violating its corporate separation plan or acting contrary to Ohio law because it does not permit CRES providers to include non-commodity

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[446] *Id.*
[447] IGS's Brief, pg. 7.
[448] ESP III, Opinion and Order, pg. 89 (April 2, 2015).
[449] *Id.*, pp. 88-89.
[450] *Id.*, pg 89.

products and services on the bill, this case is not the proper forum.[451] Again, the Commission has already addressed such issues.

Duke Energy Ohio offers consolidated billing to CRES providers, for their electric service charges in accordance with Commission Rules. "Each electric utility shall coordinate with CRES providers to promote nondiscriminatory access to electric services, to ensure timely enrollment with CRES providers to maintain a customer's electric service, and to timely and correctly switch the customer's electric service between CRES providers."[452] "Electric utilities shall make consolidated billing available to CRES providers . . .."[453] It is critical that the Commission's carefully drafted rule indicates that the requirement to provide consolidated billing relates to electric services, and nothing else. The Company's own Supplier Tariff provides the details around available billing options, which options include consolidated billing.[454] The automated communication system established is designed to provide billing services efficiently and cost effectively. Due to the number of electric service accounts for which the Company provides billing, certainly standardization and computerization are critical elements of the process. Billing for third party non-commodity products and services adds additional complexity and confusion for customers, and creates the potential for CRES Providers to comingle their commodity and non-commodity products, the former is eligible for inclusion in the Company's PAR program and the latter is not.

IGS premises the inclusion of non-commodity charges on utility consolidated billing as a way for the competitive market to encourage the development of innovative products and services that add value to customers beyond the electric commodity.[455] While Duke Energy Ohio does not dispute that competition encourages such development, such a declaration does

[451] *Id.*, pp. 82-83.
[452] O.A.C. 4901:1-10-29(A) (emphasis added).
[453] O.A.C. 4901:1-10-29(G)(1).
[454] P.U.C.O. Electric No. 20, Sheet No. 39, Section X, Billing Services and Obligations.
[455] IGS's Brief, pg. 7.

not support mandatory inclusion of charges for these non-commodity services on the utility bill. CRES suppliers are free to offer and bill for such programs on their own. IGS's witness Mr. White conceded that, at least for IGS, they do.[456] These non-commodity services should remain separate and not be comingled with commodity billing or included within the utility's purchase of receivables programs. CRES suppliers are not prohibited from offering these products and services to Duke Energy Ohio's customers. Likewise, CRES suppliers are not required to participate in Duke Energy Ohio's consolidated billing program and are not required to participate in the Company's purchase of receivables program. If billing for such non-commodity products and services is essential to the CRES supplier business, they can choose to do so through their own billing processes and include both their commodity and non-commodity products and services, as IGS already does.[457]

While IGS and RESA urge the Commission to direct Duke Energy Ohio to include third-party non-commodity billing capability as part of the Company's forthcoming Customer Information System (CIS) design, such a request is not ripe or supported in this case. Neither IGS nor RESA has performed any calculations or provided any analysis regarding what it would cost to incorporate such capability. As IGS witness White acknowledged, Duke Energy Ohio's forthcoming CIS is a single platform that will be used across all of Duke Energy Corporation's (Duke Energy) operating companies in seven states.[458] Ohio is the only jurisdiction that has restructured for competition.[459] Mr. White admitted that of those seven states where Duke Energy has a utility presence, North Carolina, South Carolina, Florida, Kentucky, Indiana, and Tennessee are all fully regulated.[460] Only Ohio has restructured.[461] Therefore, any such

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[456] Trans. Vol. X, pg. 1674.
[457] *Id.*, pg. 1674.
[458] *Id.*, pp. 1676-1677.
[459] *Id.*, pp. 1676-1677.
[460] *Id.*, pp. 1676-1677.
[461] *Id.*, pp. 1676-1677.

capability included in the new CIS would be for use in Ohio only, and an Ohio-specific cost. Before ruling on whether Duke Energy Ohio must include such capability in its CIS, the Commission should first have the opportunity to understand the costs of implementing such functionality. The Stipulation creates such a forum.[462] IGS and RESA are not prohibited from raising these issues as part of the Company's future Rider PF Component three, Infrastructure Modernization proceeding. At that time, the Commission can evaluate whether or not such a service is reasonable, and if as part of the CIS, the costs to build out such capability are justifiable. There is no need for the Commission to decide this issue at this time and without full information regarding the costs, and desired capability of such functionality. The Commission should disregard the demands by IGS and RESA to implement non-commodity billing functionality at this time.

c. RESA's enroll from my wallet proposal is not necessary.

RESA's Enroll From My Wallet proposal is not necessary as customers already have the ability to enroll with suppliers nearly instantaneously, without having access to their account number, but in a manner that provides appropriate consumer protections. RESA has not demonstrated that customer shopping is being restricted through Duke Energy Ohio's current letter of authorization enrollment processes. Today customers already have the ability to sign up with a CRES, even if they do not have ready access to their account number. The current letter of authorization process provides a documented and near instantaneous method for customers to provide a CRES with authorization to receive the customer account number. This simple verification process is managed by Duke Energy Ohio and acts as a protection against customer slamming and for data privacy.

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[462] Stipulation (Joint Ex. 1), pg. 17.

This is not the first bite at the Enroll from My Wallet apple that RESA has attempted to take. The Commission has already addressed RESA's proposal multiple times, including as part of Duke Energy Ohio's last ESP, and appropriately rejected it.[463] The Commission has previously and rightfully identified concerns regarding customer slamming and privacy created by an automatic Enroll from My Wallet process where the CRES has unfettered access to customer accounts.[464] Nothing in RESA's proposal addresses or provides any attempt at resolving those concerns. Moreover, Duke Energy Ohio's current enrollment process for customers is completely electronic, nearly instantaneous, and does not produce delays. There is no basis of claim that the Company's current enrollment processes are unreasonable or somehow discouraging competition or choice.

RESA witness Theresa Ringenbach conceded that for commercial customers, Duke Energy Ohio's current electronic enrollment process, upon electronic receipt of a signed authorization, provides CRES providers with the customer account number within a few moments.[465] She admitted she was not familiar with the process for enrolling residential customers and whether it was similar.[466] Therefore, RESA cannot claim that the Company's process is somehow inadequate or creating a barrier for any customer to sign up with a CRES.

It is unknown what implementation of Enroll From My Wallet would cost customers. Ms. Ringenbach did not perform a cost analysis to implement Enroll From My Wallet.[467] The Commission should not approve such a program without proper assurance that customer data is protected, that the potential for unauthorized transfers is eliminated, and that full costs are known and considered reasonable.

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[463] ESP III, Opinion and Order, pg. 87 (April 2, 2015).
[464] *Id.*
[465] Trans. Vol. X, pg. 1706.
[466] *Id.*, pg. 1706.
[467] *Id.*, pg. 1706.

III. CONCLUSION

The Stipulation in these proceedings presents a reasonable, supported, and fair conclusion to multiple complex regulatory proceedings. Significant time, effort, and intention by all signatory parties, supporting and non-opposing, went into achieving such a fair and balanced resolution. The Stipulation was the product of nearly six months of negotiations that, as a complete package, results in regulatory certainty and stability for customers, stakeholders, and the Company for nearly seven years. The terms of the Stipulation are a package that, on balance, was designed to resolve issues of significant importance for the signing parties. The record clearly demonstrates that the Stipulation satisfies the Commission's three-part test for regulatory settlements and, equally as important, results in an ESP that is more favorable in the aggregate than the results of a MRO. For the reasons stated above, and as set forth in the Company's Brief, the Stipulation should be approved as filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic service, this 2nd day of October, 2018.

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Summary: Brief Reply Brief of Duke Energy Ohio, Inc. electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.