BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Modify Rider PSR.	)))	Case No. 17-0872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Amend Rider PSR.	)))	Case No. 17-0873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)))	Case No. 17-0874-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	)))	Case No. 17-0032-EL-AIR
In the Matter of the application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 17-0033-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)))	Case No. 17-0034-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	))))))))	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend Its Certified Supplier Tariff, P.U.C.O. No. 20.	)))	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	)))	Case No. 17-1265-EL-AAM

CONSERVATION GROUPS' APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, Environmental Law & Policy Center, Sierra Club, Ohio Environmental Council, , Environmental Defense Fund, and Natural Resources Defense Council (collectively, "Conservation Groups") hereby file this application for rehearing of the December 19, 2018 Opinion and Order ("Order") entered by the Public Utilities Commission of Ohio (the "Commission") in the above-captioned consolidated cases.

The Commission's Order approved a stipulation offered by Duke Energy Ohio, Inc. ("Duke") and other parties that intends to resolve the issues raised in Case No. 17-32-EL-AIR, et al. (*Rate Case)*, Case No. 17-872-EL-RDR, et al. (*PSR Case*), Case No. 17-1263-EL-SSO, et al. (*ESP Case*) and Case No. 16-1602-EL-ESS (*Standards Case*). The Order approved, among other elements of the stipulation, Duke's "Price Stabilization Rider" ("Rider PSR"). Through Rider PSR, Duke seeks to charge its share of Ohio Valley Electric Corporation ("OVEC") losses to customers, which Duke itself estimates at a $77 million customer loss through May 2025. The Order is unlawful and unreasonable for at least the following reasons:

1. The Commission failed to reasonably evaluate the impact of Rider PSR on the entire stipulation package.
2. The Commission unreasonably and unlawfully placed the burden on opposing intervenors to demonstrate why the stipulation should not be approved.

For these reasons, and those set forth in the accompanying Memorandum in Support, the Commission should reconsider its blanket approval of Rider PSR. Duke and the other parties supporting the stipulation have not shown that the significant projected costs of the rider, and the risk of even worse outcomes in light of the FES bankruptcy, are part of a reasonable stipulation package that benefits ratepayers and the public.

January 18, 2019

Respectfully submitted,

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MEMORANDUM IN SUPPORT

A significant element of the Stipulation and Recommendation ("Stipulation") proposed by Duke Energy Ohio, Inc. ("Duke") and approved by the Public Utilities Commission of Ohio ("Commission" or "PUCO") on December 19, 2018, is the "Price Stabilization Rider" ("Rider PSR"). Rider PSR allows Duke to charge its share of losses from the uneconomic Ohio Valley Electric Corporation ("OVEC") coal plants to customers, a share that Duke itself estimates at a $77 million customer loss through May 2025. That estimate of a $77 million charge to customers does not even account for the risk that the bankruptcy of OVEC sponsoring company FirstEnergy Solutions ("FES") and the bankruptcy court's rejection of the OVEC contract will increase costs for Duke as one of the remaining OVEC owners. All told, there is no dispute that the record evidence of the projected impacts of Rider PSR on ratepayers is exclusively and significantly negative, with no evidence to suggest that Duke's customers will do anything other than pay tens of millions of dollars under the rider over the next several years.

In approving the Stipulation, the Commission unreasonably and unlawfully disregarded its obligation to credibly weigh the impact of those projected losses and risks on the overall stipulation package, in part because the Commission improperly placed the burden on opposing parties to demonstrate that the Stipulation would not benefit ratepayers and the public in accordance with the applicable stipulation review standard. The result is that the Commission has not, in fact, reasonably determined that the

purported benefits of the Stipulation outweigh the acknowledged risks and harm of Rider PSR.

I. FACTS

A. OVEC

The best estimate by Duke's expert forecaster, Judah Rose, is that Duke's 9% share of OVEC under the Inter Company Power Agreement ("ICPA") will result in losses of $77 million, net present value, to be passed on to Duke's customers under PSR.[1] Importantly, Mr. Rose's projections are more negative in the near term years—through May 2022—when PJM capacity prices are known with certainty, and his forecast of OVEC losses becomes somewhat more less negative for Duke's customers beyond May 2022 when Mr. Rose projects a dramatic rise in power prices. Mr. Rose performed a sensitivity analysis relying on an U.S. Energy Information Administration ("EIA") natural gas forecast that shows a $62 million customer loss, net present value, during the term of Rider PSR.[2] The Rose EIA-based projection is the most-positive one in the record for Rider PSR. It is notably far worse than the projection underlying Duke's original proposal to charge customers for the costs of OVEC, presented in Duke's last Electric Security Plan ("ESP") case, where the Company forecast a $1 million customer loss during the first ten years of the OVEC rider, *i.e.*, through 2024.[3] Mr. Rose's forecast

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

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

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

also does not account for the risk of increased borrowing costs for OVEC in light of the FES bankruptcy that may well result in damage to OVEC's credit ratings.[4]

B. The Commission's December 19, 2018 Opinion and Order

The Order makes clear that the Commission addressed the Stipulation under its longstanding stipulation review standard, which focuses on three criteria:

> (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
> (2) Does the settlement, as a package, benefit ratepayers and the public interest?
> (3) Does the settlement package violate any important regulatory principle or practice?[5]

In addressing the application of this standard to Rider PSR, the Commission further explained:

> The advantages or disadvantages associated with a specific aspect of a settlement, in isolation, do not necessarily ensure that a Stipulation will be approved or denied. Thus, here, whether the PSR on its own is beneficial to ratepayers or not is not necessarily the deciding factor on whether the Stipulation meets the second prong of the Commission's three prong test; what matters is the rider's impact on the total package presented in the Stipulation.[6]

In accordance with this approach, although the Commission acknowledged that the record contains exclusively negative forecasts of the impact of Rider PSR on customers, the Order concluded "that these projections are not necessarily reliable and the rider has the potential to offer benefits."[7] In particular, the Commission determined that "[a]lthough the PSR currently projects to be a loss, the volatility of the markets,

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[4] Conservation Groups' Initial Brief at 11-12.
[5] Order at 56-57.
[6] Order at 102.
[7] *Id.*

particularly in times of extreme weather conditions, contrasted with the stability of OVEC's operating costs gives the PSR significant value as a hedge."[8]

In response to intervenor arguments that any hedge value of Rider PSR was not worth the likely significant costs to customers, the Commission recognized "that a rate stability proposal must not impose unreasonable costs on customers," and that it had previously rejected OVEC as a reasonable hedge under Rider PSR based on significantly *less* negative cost projections.[9] Nevertheless, the Order apparently discounted the undisputed forecasts of those costs based on a conclusion "that the evidence demonstrates that forecasting the market, particularly more than three years out, is extremely difficult."[10] The Order also cited "protections for consumers" in the form of Stipulation limitations on permissible OVEC cost recovery under Rider PSR "that were not available" when the Commission rejected OVEC as a hedge in Duke's prior ESP case. Finally, the Commission made the distinction that the review of OVEC cost recovery under Rider PSR as part of a Stipulation is simply subject to a different standard of review:

> [T]he application for ESP 3, and thus the original PSR, was not the result of a stipulation and each aspect of the application was fully litigated before the commission. Thereafter, the Commission considered, and made separate determinations, regarding each aspect of the application. Presently, the PSR is a major component of an inimitable and comprehensive stipulation. As discussed, stipulations are subject to a specific standard of review, and are given substantial weight by the Commission. While we indeed review every aspect of a proposed stipulation, our ultimate consideration is the settlement as a total package.[11]

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[8] *Id.*
[9] *Id.* at 103.
[10] *Id.*
[11] *Id.*

II. ARGUMENT

REHEARING ARGUMENT 1: The Commission failed to reasonably evaluate the impact of Rider PSR on the entire stipulation package.

The Commission itself stated the focus of its review in considering whether to approve Rider PSR as part of the Stipulation package: "what matters is the rider's impact on the total package presented in the Stipulation."[12] However, the Commission unreasonably and unlawfully failed to properly apply its own construction of the stipulation review standard.

First, the Commission effectively disclaimed any obligation to weigh the record evidence regarding the projected costs of Rider PSR for Duke's customers. The Order offered the blanket assertion "that these projections are not necessarily reliable" without any record citation, then followed up with the likewise unsupported statement that "the evidence demonstrates that forecasting the market, particularly more than three years out, is extremely difficult."[13] This approach of simply refusing to take a position on the validity of the record evidence represents a fundamental rejection of the Commission's obligation under R.C. 4903.09 to reach decisions "based upon . . . findings of fact." Importantly, the Commission failed to grapple with the fact that Mr. Rose's forecast is much-more negative in the near term—i.e., the years where the Commission correctly finds that his forecast is more reliable—and somewhat less negative beyond 2022. Nor does the Commission acknowledge that Mr. Rose's forecast already projects a dramatic increase in prices beyond 2022, and that even with Rose's projected price escalation in

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[12] Order at 102.
[13] *Id.* at 102, 103.

those out years, the OVEC units are still projected to be money losers. At the very least, the Commission must explain and make findings regarding why the possibility of smaller losses for customers beyond 2022 is outweighed, in its view, by the more-certain larger losses in the near-term years.

Moreover, the Commission's disregard of these negative forecasts is entirely inconsistent with its own precedent, including cases in which the Commission *has credited the long-term forecasts of the same witness*, Mr. Rose, as a viable basis for authorizing major utility proposals. Duke witness Mr. Judah Rose offered similar market forecasts (for different power plants) in an ESP proceeding for the FirstEnergy EDUs to support the argument that the Commission should authorize a similar "hedge" rider in that case, called "Rider RRS." Although the rider never ultimately took effect, the Commission did issue a 2016 order approving it, and stated:

> The first task in our analysis of Rider RRS is to determine a reasonable estimate of the net credit or charge based upon the evidence in the record of this case. The Commission notes that the record in this proceeding contains several publically available projections of the net revenues to be recovered under Rider RRS as well as multiple other analyses of revenue under the Rider. One of these projections was prepared by FirstEnergy witness Rose, while three projections were prepared by OCC witness Wilson. Each of these projections involved numerous variables, many of which are interrelated, over both an eight-year and fifteen-year span of time. The challenge before the Commission is to determine which projections are sufficiently reliable and how to harmonize the varying results of the projections which the Commission determines to be reliable. We note at the outset that projections and forecasts are predictions. They are predictions of future conditions and are based upon what is happening now and multiple additional assumptions. Considering the nature of the proposed Rider RRS as a potential hedge or insurance on electricity rates, in making its determination the Commission must choose from the most reliable of these projections and forecasts to make a determination of whether the Stipulations, as a package, benefit ratepayers. . . .

> Despite the various criticisms of the projections prepared by FirstEnergy witness Rose and the modeling prepared by FirstEnergy witness Lisowski, we are not persuaded by arguments against giving weight to the projections and models. Accordingly, based upon the evidence in the record, *the Commission finds that this projection by FirstEnergy witness Rose (Rose projection) is reliable*, and we will include the Rose projection in our determination of an estimate of the net revenues under Rider RRS.[14]

In other words, in just two years the Commission has made a complete about-face on the question of whether long-term market forecasts of the costs of a "hedge" rider based on a power plant—and specifically the forecasts of Duke's own witness, Mr. Rose—are in fact credible and should be relied upon. This is not a reasonable approach by any stretch of the imagination.

Second, even assuming—despite its own statements—that the Commission did give the negative forecasts about the impact of Rider PSR on customers some weight, the Commission did not address any of the substantial record evidence about the potential negative impacts of the FES bankruptcy in increasing OVEC costs, even above and beyond those projected by Duke's own expert. The word "bankruptcy" does not appear in the Order *a single time*. This blanket failure to consider the risks posed by the bankruptcy of Duke's OVEC co-owner, FES, to the Company's customers under Rider PSR means that the Commission could not have actually assessed "the rider's impact."

The Commission also failed to consider the possibility that regulatory requirement facing the OVEC units might drive Ride PSR's costs even higher than the Rose projections. OVEC's planning documents and Rose's projections assume that the U.S. EPA will repeal certain water effluent discharge requirements facing both OVEC plants. U.S. EPA as not even yet proposed repealing these requirements. It is possible that this

[14] PUCO Case No. 14-1297-EL-SSO, 3/31/2016 Order at 80-81 (emphasis added).

requirement is never repealed or is not fully repealed, which would increase OVEC's costs and Duke's customers' losses under Rider PSR.

Having failed to conduct any baseline determination of Rider PSR's costs to customers, the Commission's reference to the Stipulation's limits on certain OVEC costs for recovery under the rider as providing "protections for consumers" is unavailing. Fundamentally, none of the stipulating parties provided any record evidence as to whether or by how much those limitations would reduce the projected cost of OVEC. Thus, the Commission could not reasonably determine whether these provisions would in fact lessen the projected impact of Rider PSR on Duke's customers.

The Commission unreasonably and unlawfully failed to carry out its own self-assigned task: to determine "the rider's impact on the total package presented in the Stipulation."[15] The record provides only undisputed evidence of that impact being overwhelmingly negative, with additional unquantified risks from the FES bankruptcy, and the quantified (by OVEC) risk that that environmental requirements currently facing its plants are not repealed. Whatever the purported value of Rider PSR in providing rate stability as a hedge, the Commission recognized "that a rate stability proposal must not impose unreasonable costs on customers."[16] Thus, the Commission had an obligation to assess those costs in order to reasonably determine Rider PSR's impact on Duke's customers as part of the overall consideration of the merits of the stipulation package. The Commission never carried out that analysis, and thus the Order provides no basis for any aggregate conclusion about the value of the Stipulation as a whole.

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[15] Order at 102.
[16] *Id.* at 103.

REHEARING ARGUMENT 2: The Commission unreasonably and unlawfully placed the burden on opposing intervenors to demonstrate why the Stipulation should not be approved.

While the Ohio Supreme Court has approved the Commission's current standard for reviewing a stipulation, it has likewise made clear that the existence of a stipulation does not relieve a utility of the applicable burden of proof. In the words of the Court, "[t]he stipulation of some of the parties to this proceeding is, in itself, insufficient to satisfy this burden."[17] Stipulations are "merely . . . recommendations to the commission and, while entitled to substantial weight, they must be supported by the evidence of record to withstand scrutiny under the standard of review provided in R.C. 4903.13."[18] That admonition is certainly applicable here, where the ESP statute provides that "[t]he burden of proof in [an ESP] proceeding shall be on the electric distribution utility." R.C. 4928.143(C)(1). However, the Commission's lackluster review of Rider PSR as part of the Stipulation shows that it unreasonably and unlawfully put the burden of proof on the opponents of the Stipulation to disprove its merits.

This flaw is clear in the Commission's concluding response to the opposing intervenors' argument that it should abide by its ruling rejecting OVEC cost recovery under Rider PSR even where Duke projected much smaller costs to customers. The Commission disavowed the applicability of that precedent, distinguishing it on the basis that "the application for ESP 3, and thus the original PSR, was not the result of a stipulation and each aspect of the application was fully litigated before the commission.

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[17] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Utilities Comm'n*, 1994-Ohio-435, 68 Ohio St. 3d 559, 562–63, 629 N.E.2d 423, 426.
[18] *Id.*

Thereafter, the Commission considered, and made separate determinations, regarding each aspect of the application."[19]

By contrast, according to the Commission, in this case "the PSR is a major component of an inimitable and comprehensive stipulation. As discussed, stipulations are subject to a specific standard of review, and are given substantial weight by the Commission."[20] Hidden within this language appears to be a conclusion by the Commission that it is not sufficient for parties to argue that a stipulation provision will not benefit ratepayers and the public based upon the Commission's own prior determination, along with more recent and undisputed evidence of even higher costs. Indeed, nowhere in the Order does the Commission cite any evidence presented by Duke or any other party that would rebut the conclusion from the prior ESP case that Rider PSR is not good for customers. Instead, the Commission simply relied on the existence of a stipulation in this case as the key factor allowing it to ignore the undisputed evidence and its own precedent regarding the lack of value from Rider PSR.

The Commission's stipulation review standard can easily hide many evils wrapped into a larger "package." But the Ohio Supreme Court has made clear that even if the Commission may accept bad provisions as part of an overall beneficial package, it must hold parties to their burden of proof in showing those overall benefits. That includes reasonably assessing when a stipulation provision is in fact likely to be bad for customers. The Commission simply cannot weigh the merits of the Stipulation as a package without holding Duke to its burden to demonstrate the value of its individual

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[19] Order at 103.
[20] *Id.*

components. Here, the Commission relieved Duke of that burden and made no credible determination of the impacts of Rider PSR, and thus there is no reasonable or lawful basis to decide whether the net impacts of the Stipulation as a package are beneficial to ratepayers and the public.

III. CONCLUSION

R.C. 4903.09 requires the Commission to base its decisions on findings of fact, and R.C. 4928.143(C)(1) places the burden on Duke to provide the evidentiary basis for these findings of fact. The Order is not consistent with those requirements. The Commission did not make the necessary findings of fact regarding the impacts of Rider PSR, and absolved Duke of any obligation to rebut the prior Commission determination that OVEC cost recovery Rider PSR would not benefit ratepayers and the public. Therefore, the Order is both unreasonable and unlawful.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Conservation Groups' Application for Rehearing and Memorandum in Support has been served upon the following parties via electronic mail on January 18, 2019.

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This foregoing document was electronically filed with the Public Utilities

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1/18/2019 3:18:54 PM

in

Case No(s). 17-0032-EL-AIR, 17-0033-EL-ATA, 17-0034-EL-AAM, 17-0872-EL-RDR, 17-0874-EL-AAM,

Summary: Application for Rehearing electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club and Environmental Law & Policy Center and Ohio Environmental Council and Environmental Defense Fund and Natural Resources Defense Council