

**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
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In the Matter of the Application of Duke Energy Ohio Inc., for Approval to Change Accounting Methods.	)	Case No. 17-874-EL-AAM
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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
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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	)	Case No. 16-1602-EL-ESS
	)	

Pursuant to Chapter 4901:1-10, Ohio  
Admin. Code.

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**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF  
INTERSTATE GAS SUPPLY, INC.**

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## APPLICATION FOR REHEARING

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code (“O.A.C.”), Interstate Gas Supply, Inc. (“IGS Energy” or “IGS”) respectfully submits this Application for Rehearing of the Opinion and Order (“Order”) issued by the Public Utilities Commission of Ohio (“Commission”) on December 19, 2018 for the following reasons:

- A. The Order is unlawful and unreasonable inasmuch as it authorized Duke to recover the cost of competitive retail electric service through non-competitive service rates. R.C. 4928.05(A)(1) prohibits the Commission from exercising Chapter 4909 to regulate competitive retail electric services; therefore, the Order exceeded the scope of the Commission’s jurisdiction.**
- B. The Order authorized an anticompetitive, unlawful, and unreasonable subsidy to Duke’s competitive retail electric service in violation of precedent and State policy enumerated in R.C. 4928.02. *Elyria Foundry Co. v. Pub. Util. Comm’n*, 14 Ohio St.3d 305, 315 (2007).**
- C. The Order unlawfully and unreasonably rejected IGS proposal that would remedy Duke’s unlawful collection of competitive retail electric service costs through non-competitive service rates.**
- D. The Order is unlawful and unreasonable because it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission’s decisions. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). The Order failed to appropriately consider or address IGS’ arguments that the Stipulation recommended that the Commission: (1) unlawfully and unreasonably apply Chapter 4909 to authorize recovery of competitive retail electric service costs through non-competitive service rate structures; (2) unlawfully and unreasonably provided a subsidy to Duke’s competitive retail electric service rates in violation of R.C. 4928.02; and (3) the Order further failed to evaluate and address IGS’**

analysis and quantification of competitive retail electric service costs proposed for recovery in distribution rates.

- E. The Order is unlawful and unreasonable inasmuch as it concluded the existence of costs related to Duke's facilitation of the choice market may justify subsidizing SSO service. The Order's reasoning circumvents the statutory limitation against regulation of competitive retail electric services under Chapter 4909. The Order is also arbitrary, capricious, and an abuse of discretion given that choice-related costs are already directly assigned to CRES providers. *Forest Hills Utility Co. v. Pub. Util. Comm'n Ohio*, 31 Ohio St. 2d 46 (1972).
- F. The Order's determination that choice costs may justify subsidizing the standard service offer is against the manifest weight of the evidence. The record reflects \$23 million in SSO-related costs proposed for recovery in distribution rates; substantial CRES provider fees to cover choice-related costs; thus, the record demonstrates that additional costs should be allocated to the SSO even under the Order's unlawful reasoning. *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St. 3d 165; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n Ohio*, 76 Ohio St.3d 163, 166 (1996).
- G. The Order is unlawful and unreasonable inasmuch as it deviated from recent Commission precedent, which required a EDU to allocate to the SSO the portion of the OCC and PUCO assessments related to SSO retail electric generation. *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984).
- H. The Order is unlawful, unreasonable, and discriminatory inasmuch as it authorized Duke to impose switching fees and historical usage fees on CRES providers without evidentiary support in violation of R.C. 4909.15 and R.C. 4909.18. The application of these fees to CRES providers is discriminatory in violation of R.C. 4905.35 and 4928.02.
- I. The Order unlawfully, unjustly, and unreasonably permitted Duke to Discriminate against CRES providers in the provision of non-electric services on the utility consolidated billing in violation of R.C. 4905.35(A).

As discussed further in the Memorandum in Support, IGS respectfully requests that the Commission to grant this Application for Rehearing and correct the errors identified herein.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.**

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## **I. INTRODUCTION**

When the General Assembly restructured the Ohio electric market, it required incumbent electric distribution utilities (“EDUs”) to separate and unbundle their competitive and non-competitive services. Restructuring gave customers the right to choose the competitive services that they want and need. In order to preserve this right, EDUs were prohibited from rebundling their competitive services into non-competitive services. Each service was required to stand on its own. This paradigm protected customers from EDU abuses and ensured a level playing field for providers of competitive services.

On December 19, 2018, the Public Utilities Commission of Ohio (“Commission”) issued an Opinion and Order (“Order”) approving a Stipulation and Recommendation. As part of that Order, the Commission authorized Duke to establish rates with respect to its non-competitive distribution services. The Order also authorized Duke’s application to establish an Electric Security Plan (“ESP”), including a competitive standard service offer (“SSO” or “default service”).

The Order permitted Duke to recover costs related to its provision of standard service offer (“SSO” or “default service”) service through its non-competitive service rates. The Order requires shopping customers to pay for SSO services they do not receive in addition to the charges they pay to their CRES providers for the same services. This outcome is not only inequitable, but it also unlawful.

Under Ohio law, the Commission lacks the authority to allow the utility to recover costs to provide SSO generation service through distribution rates. Thus, the Order violated bedrock principles of Ohio law.

Making matters worse, the Order authorized the continuation of significant fees on CRES providers. The Order requires CRES providers to pay these fees—for non-competitive services that CRES providers cannot obtain from any other source other than the EDU—just to be able offer competitive services in Duke’s service area. These fees are in addition to the costs that CRES providers must incur to provide generation service to their customers. At the same time, the Order permits Duke to provide the same non-competitive services for free to customers taking service on the SSO.

The Order is equivalent to heads SSO customers wins; tails choice customers lose. It is unjust, unreasonable, unlawful, and fundamentally unfair to make CRES customers pay for their own costs whenever they shop in addition to paying for the cost related to SSO service. Costs associated with the SSO must be allocated to that service—not distribution rates. And, while the Order is particularly egregious for shopping customers, at the end of the day, it is harmful to all customers. Continued favoritism to default rate service stifles a true market for competitive retail competition from ever developing in Ohio.

Finally, while the Order provided a ray of hope that a future case may lead to billing parity between CRES providers and Duke’s own affiliates, contrary to Ohio law, the Order permits Duke to continually discriminate in the provision of non-commodity services in the near term.

Therefore, IGS urges the Commission to grant this application for rehearing and to correct the errors identified herein.

## **II. BACKGROUND**

### **A. Restructuring and Unbundling**

In 1999, Amended Substitute Senate Bill (“S.B. 3”) restructured the Ohio electric market. S.B. 3 “restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service.”<sup>1</sup> “In short, each service component was required to stand on its own.”<sup>2</sup> The foundation for competition was established by requiring “the three components of electric service — generation, transmission, and distribution — to be separated.”<sup>3</sup> This process was initially implemented through the electric transition plans filed by the investor owned utilities to implement the mandate in S.B. 3. The Commission took a hatchet to separate the existing pancaked rates into distribution, transmission, and generation. While this first step was important, as it laid the initial foundation for customers to evaluate differing competitive retail electric service options from different suppliers, the Commission has not finished the job as the legislature intended.

Through restructuring, the General Assembly eliminated the Commission’s authority over competitive retail electric services, except for certain limited areas such as regulating the establishment of the SSO. But the Commission has no authority to regulate or provide compensation for competitive retail electric services through distribution rates. Indeed, “a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963.”<sup>4</sup>

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<sup>1</sup> *Industrial Energy Users-Ohio v. Pub. Util. Comm’n*, 117 Ohio St. 3d 486, 487 (2008).

<sup>2</sup> *Migden-Ostrander v. Pub. Util. Comm’n*, 102 Ohio St. 3d 451, 452-53 (2004).

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

<sup>4</sup> R.C. 4928.05(A)(1).

## **B. The Distribution Rate Case**

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

On October 26, 2017, IGS submitted objections to the Staff Report. As is relevant to the Stipulation, IGS objected to the Staff Report's failure to recommend that Duke unbundle from distribution rates costs related to the provision of competitive generation service via the SSO.<sup>5</sup> Many of the costs necessary to support the SSO are proposed for recovery in Duke's allowance for operation expense (operation and maintenance expense or "O&M"). These costs are identified and supported in the C-Schedules attached to the Application. The Staff Report provides an analysis of the costs contained on these schedules. But, absent from the Staff Report is any recommendation to appropriately refunctionalize the SSO costs that are necessary to support that service. The operation and maintenance expense categories that the Staff Report failed to analyze and allocate to the default service include:

- (1) Call center infrastructure and employees to maintain appropriate customer service for SSO customers;<sup>6</sup>

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<sup>5</sup> Objections of Interstate Gas Supply, Inc. and Summary of Major Issues at 4-7 (Oct. 26, 2018).

<sup>6</sup> For example, the Stipulation permits Duke to collect \$5,107,749 in call center expenses through electric distribution rates. IGS Ex. 11 (Duke Response to IGS-02-010, Case Nos. 17-32-EL-AIR, *et al.*).

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

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

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<sup>7</sup> Although the Staff Report recommends that Duke not collect a Cash Working Capital expense, this recommendation does not change the fact that Duke does in fact incur a capital cost to pay auction suppliers. Staff Report at 11. By failing to allocate a cash working capital requirement to the SSO rate, Duke thereby subsidizes this cost through revenue collected through distribution rates.

suppliers must incur to support their own rates. Witness Hess identified that these costs exceed \$23 million.<sup>8</sup>

One of the most egregious subsidies related to Duke's request to collect its OCC and PUCO assessments through distribution rates. Under Ohio law, these annual assessments are directly related to a utility's—a CRES providers is considered a utility for purposes of the assessment—total intrastate revenues, which includes SSO revenue.<sup>9</sup> For example, if Duke collected \$300 million in SSO revenue<sup>10</sup> and a CRES provider collected \$300 million revenue, both would pay the same assessments for their generation-related revenue.<sup>11</sup> It defies reason and principles of fair play to permit Duke to recover its assessment through non-competitive distribution rates while CRES providers must collect their assessments through their competitive service rates.

In addition to the internal costs that CRES incur, CRES providers often must pay Duke additional fees, for example, switching fees, billing fees, and interval data fees.<sup>12</sup> Yet, customers are not required to pay switching fees to return to the SSO.<sup>13</sup> Similarly, Duke charges per bill fees to CRES providers to utilize the bill ready function.<sup>14</sup> Finally,

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<sup>8</sup> RESA/IGS Ex. 1 at JEH-1.

<sup>9</sup> R.C. 4911.18; R.C. 4905.10.

<sup>10</sup> Because Duke also collects revenue related to its distribution services, it would pay an additional assessment related to the distribution revenue it collects. IGS is not proposing to allocate this distribution revenue-related portion of Duke's PUCO and OCC assessments to the SSO.

<sup>11</sup> Tr. Vol. XI 1929-30.

<sup>12</sup> IGS Ex. 8 (Duke Response to IGS-INT-01-016(b), Case Nos. 17-1263-EL-SSO, *et al.*). The terms of this charge are set forth on Tariff Sheet 52.4.

<sup>13</sup> *Id.* at (a). The terms of this charge are set forth on Tariff Sheet 52.4.

<sup>14</sup> IGS Ex. 8 (Duke Response to IGS-INT-01-17, Case Nos. 17-1263-EL-SSO, *et al.*).

Duke charges CRES providers \$32 for each interval data request.<sup>15</sup> These fees have accounted for millions of dollars over the last few years.<sup>16</sup> Each of the fees discussed above are in addition to and apart from the substantial, non-wholesale costs that CRES providers must incur to make a competitive product available.

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

### **C. The ESP Case**

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

### **D. The Price Stabilization Rider Case**

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<sup>15</sup> IGS Ex. 8 (Duke Response to IGS-INT-02-01(h), Case Nos. 17-32-EL-AIR, *et al.*). The terms of this charge are set forth on Tariff Sheet 52.4.

<sup>16</sup> *Id.*



On March 30, 2017, Duke filed an application to recover costs through the PSR. The PSR proposal would shift the cost and risk of OVEC ownership to Duke distribution customers. Under the proposal Duke would sell the energy and capacity from the OVEC coal plants into PJM Interconnection, LLC's ("PJM") wholesale capacity and energy markets.<sup>17</sup> If the wholesale market revenues that Duke receives are less than the cost-based rate that Duke must pay to OVEC under the ICPA, then Duke would collect the difference from its distribution customers through the PSR.<sup>18</sup>

#### **E. The Reliability Standards Case**

Finally, on July 22, 2016, Duke filed an application to establish reliability performance standards. Although Duke has continually increased its total recovery of distribution-related revenue, it has often failed to satisfy its reliability performance standards.

#### **F. The Stipulation and Recommendation**

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

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<sup>17</sup> Duke Ex. 29 at 7.

<sup>18</sup> *Id.* at 4-8.

lost revenues since January 1, 2018, the SCR Rider to potentially subsidize the SSO rate, and extension of Rider DCI that was authorized under the prior ESP.

Regarding to the Distribution Case Application, the Stipulation proposed that Duke decrease its base distribution rates.<sup>19</sup> The Stipulation failed to address IGS' objection to the Staff Report's failure to unbundle SSO-related costs; thus, the Stipulation would permit Duke to recover SSO-related costs through distribution rates.

Regarding the ESP Application, the Stipulation proposed that Duke extend the DCI, subject to annual cost caps. "Capital costs included in Rider DCI shall be those recorded in FERC Accounts 360 through 374."<sup>20</sup> Further, the Stipulation permits Duke to recover through Rider DCI up to \$20 million associated with battery storage "for the purpose of deferring circuit investments or addressing distribution reliability issues."<sup>21</sup> In order to qualify for cost recovery under the DCI, the battery investments "[m]ust qualify as distribution equipment under the FERC uniform system of accounts authorized for collection via the Rider DCI and subject to the Rider DCI caps."<sup>22</sup>

The proposed PF Rider has three components:

1. Incremental costs associated with the Commission's PowerForward initiative.

Such costs shall only be authorized following Commission approval in a subsequent proceeding.<sup>23</sup>

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<sup>19</sup> This proposed recommendation is deceptive, given that the Stipulation permits Duke to increase total distribution rates through the rider mechanisms proposed under the ESP.

<sup>20</sup> Joint Ex. 1 at 12.

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.*

<sup>23</sup> Joint Ex. 1 at 16-18.

2. Recovery of costs associated with early retirement and replacement of Duke's ineffective advanced metering infrastructure ("AMI"), as well the provision of interval customer energy usage data ("CEUD") to customers, CRES providers, and third parties, and settlement of CRES PJM statements based upon CEUD for all customers.<sup>24</sup>
3. Provisions related to the implementation of an infrastructure modernization plan, as well as a proposal to upgrade the customer information system ("CIS"). Cost recovery will be the subject of a separate proceeding. The Stipulation, however, did not require Duke to include a proposal for supplier consolidated billing or non-commodity billing functionality for CRES providers—even though Duke offers that capability to its affiliate, Duke Energy One, Inc.<sup>25</sup>

Regarding the PSR, the Stipulation largely recommends approval of the PSR as originally filed by Duke, with some minor adjustments which do not provide significant value.<sup>26</sup> Based upon Duke's own testimony, the PSR is projected to be a charge on day one of the ESP and remain a charge for the duration of the ESP.<sup>27</sup>

In conjunction with the filing of the Stipulation, Duke moved to consolidate the proceedings that are subject to the Stipulation. Intervenor the Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, the Office of the Ohio Consumers' Counsel, and the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

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

Retail Energy Supply Association and IGS submitted a memorandum in opposition, noting the different statutory structures applicable to distribution rate cases and SSO cases. On May 9, 2018, the Attorney Examiner granted Duke's motion to consolidate, noting that the Commission will respect the specific statutory criteria applicable to distribution rate applications and ESP applications while hearing evidence within the context of a combined hearing and briefing process.

### **G. The Opinion and Order**

On December 19, 2018, the Commission issued an Opinion and Order authorizing the Stipulation. The Order is unlawful substantively and procedurally. As discussed below, the Order largely places a rubber stamp on the proposals discussed above.

The Order authorized Duke to establish non-competitive distribution services rates. But, included in that non-competitive service cost recovery, the Order authorized Duke to recover the cost of providing competitive SSO service. While acknowledging that this will occur, the Order indicated that it cannot separate SSO-related costs from distribution rates without evaluating costs related to the provision of the customer choice program.<sup>28</sup> Thus, the Order acknowledges that Duke's distribution rates will recover costs related to the provision of competitive SSO service, but indicated such cost recovery may be justified if there are equal costs related to the Choice program. The consequence of this decision is that Choice customers will subsidize the provision of SSO service through their distribution rates for the next several years.

While the Order required a comparison of SSO to choice costs before it would make the SSO pay its fair share, in a separate section, the Order authorized the

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<sup>28</sup> Order at 82.

continuation of fees that are currently assessed to CRES providers. The Order reached this conclusion despite Duke's failure to present any justification for the fees in either the Distribution Case or the ESP case.<sup>29</sup> The Order indicated that these fees were authorized in a prior case, and stated, in reliance on *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984), "before altering a lawful order, the Commission is required to provide and explanation for the change."<sup>30</sup> The Order further indicated that "RESA has not presented sufficient evidence that circumstances have changed since the fees were last altered in 2011 . . . ."<sup>31</sup>

Regarding Duke's proposal to file a future application to update its CIS, IGS commends the Order for requiring Duke to propose a process for supplier consolidated billing. This portion of the order provides a rare ray of light for the competitive market. At the same time, however, the Order fell short inasmuch as it would permit Duke's ongoing discrimination against CRES providers. Specifically, the record reflects that under its current CIS, Duke lists non-commodity items on customers billing statements for its affiliate, Duke Energy One.<sup>32</sup> Yet, Duke has rejected formal requests from IGS to place its non-commodity charges on the utility bill.<sup>33</sup> Duke also acknowledged that its proposed CIS design could list non-commodity charges as a separate billing line item, yet it won't commit to knowing whether the system will be configured to facilitate CRES non-

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<sup>29</sup> RESA/IGS Ex. 1 at JEH-5; IGS Ex. 6 at 3-4.

<sup>30</sup> Order at 87.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at MW-1 (Duke Response to IGS-INT-01-020(b)).

<sup>33</sup> RESA-IGS Ex. 5 at 12.

commodity billing “until the Design phase of the project is complete.”<sup>34</sup> Rather than mandating equal treatment, the Order indicated that “we will not require that Duke’s CIS plan include non-commodity billing or a specific components; nor will we require stakeholder input before Duke submits its filing.”<sup>35</sup>

Regarding Duke’s battery proposal, the Order did not squarely address the legal matters presented by the parties. Rather, the Order stated that “The Commission will allow the battery storage project to go forward, as a pilot project.”<sup>36</sup> The Order indicated that “the project should be subject to pre-approval from the Commission and ongoing monitoring. Duke should file its application detailing its proposed battery storage project in a separate proceeding.”<sup>37</sup> But, the Order also states that, “as stated in the Stipulation, cost recovery of the project will be eligible and recoverable through Rider DCI.”<sup>38</sup>

### **III. SETTLEMENT EVALUATION CRITERIA AND LEGAL STANDARD**

Before approving a contested settlement, the Commission must find that: (1) the settlement is a product of serious bargaining among capable, knowledgeable parties; (2) the settlement, as a package, benefits ratepayers and the public interest; and; (3) the settlement package does not violate any important regulatory principles or practices.<sup>39</sup> A settlement is not evidence and it is not binding on the Commission. It is a recommendation

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<sup>34</sup> *Id.* at MW-1 (Duke Response to IGS-INT-01-020(d)) (emphasis added).

<sup>35</sup> Order at 86.

<sup>36</sup> Order at 72.

<sup>37</sup> Order at 72-73.

<sup>38</sup> Order at 73.

<sup>39</sup> *Consumers’ Counsel v. Pub. Util. Comm’n*, 64 Ohio St.3d 123, 126 (1992). See, also, *AK Steel Corp. v. Pub. Util. Comm’n*, 95 Ohio St.3d 81, 82-83 (2002).

by parties to a proceeding on how the Commission should address and resolve contested issues and nothing more. A settlement cannot provide the Commission with authority. A settlement does not allow the Commission to disrespect procedural or substantive requirements established by the General Assembly or the Commission's rules.

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

Nevertheless, to the extent that Section IV of the Stipulation approved by the commission in the ETP Order can be considered an order authorizing the early end of Mon Power's MDP, that order was premature. *It was based upon an optimistic assumption that the requisite levels of the switching rate or effective competition would be achieved by December 31, 2003, an assumption that proved to be unwarranted, making any such order ending the MDP unenforceable because the order exceeded the statutory authority of the commission.*<sup>40</sup>

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

In a distribution rate case, “the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.” R.C. 4909.18 and R.C. 4909.19(C). Interpreting this standard, the Supreme Court of Ohio has stated that the “company appropriately bears the risk that property not included in its application and not made available for timely verification will be excluded from rate base.” *Ohio Edison Co. v. Pub. Util. Comm’n*, 63 Ohio St. 3d 555, 558; *Cincinnati Bell Tel. Co. v. Pub. Util.*

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<sup>40</sup> *Monongahela Power Co. v. Pub. Util. Comm’n*, 104 Ohio St.3d 571, 2004-Ohio-6896 at 26 (2004) (emphasis added).

*Comm'n Ohio.*, 12 Ohio St. 3d 280, 287 (Cincinnati bell “failed to sustain its burden of proof when it offered no testimony before the commission on the issue of its requested budget adjustment.”)

As discussed below, the Order applied the Commission’s traditional ratemaking authority under Chapter 4909 to authorize Duke to recover SSO-related costs through its distribution service rates. Consequently, the Order required choice customers to pay twice for competitive retail electric services—once through their distribution rates to pay for service provided to SSO customers, and a second time for the services provided by their CRES provider. The General Assembly prohibited the Commission from authorizing the recovery of competitive services through non-competitive distribution rates. Thus, the settlement violates Ohio law, discriminates against choice customers, and is contrary to the public interest. On rehearing, the Commission should eliminate from distribution rates approximately \$23 million in SSO-related costs and reallocate those costs to SSO service. Moreover, the Commission should eliminate Duke’s unsubstantiated supplier fees.

In an ESP case, the applicant must demonstrate that each provision is permissible under the statutory provisions contained in R.C. 4928.143. Moreover, the provisions of the ESP, must be “more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.” In other words, the outcome of the ESP must be more favorable than what would occur under a fully market-based outcome. “The burden of proof in the proceeding shall be on the electric distribution utility.” R.C. 4928.143(C)(1).

#### **IV. ARGUMENT**



**A. The Order is unlawful and unreasonable inasmuch as it authorized Duke to recover the cost of competitive retail electric service through non-competitive service rates. R.C. 4928.05(A)(1) prohibits the Commission from exercising Chapter 4909 to regulate competitive retail electric services; therefore, the Order exceeded the scope of the Commission's jurisdiction.**

The Order authorized Duke to increase its distribution rates pursuant to Chapter 4909. The Order declined to adopt IGS' suggestion to unbundle and eliminate from Duke's proposed distribution rate recovery the costs associated with the provision of the SSO. The Order stated that "separating SSO-specific costs from distribution rates would likewise necessitate separating any costs specifically related to the customer choice program."<sup>41</sup> Thus, Duke's non-competitive distribution service rates will, in part, include test year expense and capital costs, including a rate of return on those costs, related to the provision of competitive retail electric service to SSO customers. In this respect, the Order erred.

Prior to 1999, Ohioans received one bundled rate for all retail electric services. At the time, all retail electric services were regulated under Chapter 4909. Under this traditional form of regulation, commonly referred to as economic regulation, the Commission established retail electric rates based upon a formula.<sup>42</sup> The Commission was required to follow the formula—"the Commission may not legislate in its own right."<sup>43</sup>

Senate Bill 3 restructured the retail electric market, separating the distribution, transmission, and generation functions that were traditionally provided through pancaked

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<sup>41</sup> Order at 82.

<sup>42</sup> *Office of Consumers' Counsel v. Pub. Util. Comm'n*, 67 Ohio St. 2d. 153 (1981).

<sup>43</sup> *Id.* at 166.

bundled rates. The purpose of unbundling was to separate the competitive and non-competitive functions so that customers could “shop” for their competitive retail electric service.

Additionally, SB 3 eliminated the Commission’s authority to regulate or provide compensation to support competitive retail electric service through non-competitive service rates regulated under Chapter 4909. Indeed, the General Assembly specifically provided that “*a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters **4901. to 4909.**, 4933., 4935., and 4963.*” R.C. 4928.05(A)(1) (emphasis added). SB 3 removed the Commission’s jurisdiction to regulate competitive retail electric service under Chapter 4909. In other words, the Commission lacks authority to authorize the recovery of costs related to competitive retail electric services in a distribution rate case filed under R.C. 4909.18. Thus, the Commission may only regulate non-competitive service in a base distribution rate case.

By law, the SSO is an EDU offering of a competitive retail electric services: it is “*a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.*”<sup>44</sup> The Order permitted Duke to recover incremental overhead and administrative costs components to provide retail electric generation service—specifically, bypassable competitive retail electric service under the SSO service—through distribution rates authorized under R.C. 4909.18.<sup>45</sup> Indeed, IGS

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<sup>44</sup> RC. 4928.141(emphasis added). R.C. 4928.03.

<sup>45</sup> Tr. Vol. XI at 1896-97 (Duke incurs call center expenses related to the SSO); Tr. Vol. XI at 1897 (Duke incurs costs related to SSO billing functionality); Tr. Vol. XI at 1897 (Duke incurs costs to modify bypassable

put forth evidence demonstrating that these costs exceed of 23 million.<sup>46</sup> Moreover, these costs are comparable to the costs that CRES providers must incur simply to make a competitive product available.<sup>47</sup>

The Commission's authority to supervise and regulate the SSO is limited to R.C. 4928.141-144. "Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code."<sup>48</sup> Of those statutes, the Commission's ability to establish rates is limited to R.C. 4928.142 and 4928.143. Therefore, The Order violated the explicit prohibition against application of Chapter 4909 to regulate and grant cost recovery for competitive retail electric services.

**B. The Order authorized an anticompetitive, unlawful, and unreasonable subsidy to Duke's competitive retail electric service in violation of precedent and State policy enumerated in R.C. 4928.02. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 14 Ohio St.3d 305, 315 (2007).**

Ohio law states "the public utilities commission *shall ensure* that the policy specified in section 4928.02 of the Revised Code is *effectuated*."<sup>49</sup> Under the plain language of the law, the Commission must effectuate the State policy. Webster's defines "effectuated" as "to cause or bring about (something): to put (something) into effect or

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

<sup>46</sup> RESA/IGS Ex. 1 at JEH-1.

<sup>47</sup> RESA/IGS Ex. 1 at 6-9.

<sup>48</sup> R.C. 4928.05(A)(1). Conversely, "On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909." R.C. 4928.05(A)(2).

<sup>49</sup> R.C. 4928.06(A) (emphasis added).

operation.”<sup>50</sup> Thus, in other words, the Commission must cause the State policy to be implemented, it must put the State policy into effect.

Specifically, state policy requires the Commission to “[e]nsure the availability of unbundled and comparable retail electric service.”<sup>51</sup> Ohio policy further requires the Commission to ensure that customers have “nondiscriminatory, and reasonably priced retail electric service.”<sup>52</sup> Likewise, the Commission must “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.”<sup>53</sup>

Further, the Supreme Court has noted that the General Assembly “restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service.”<sup>54</sup> To that end, the General Assembly “required the unbundling of the three major components of electric service — generation, distribution, and transmission — *and the components that make up* the three major service components.”<sup>55</sup> “In short, each service component was required to stand on its own.”<sup>56</sup>

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<sup>50</sup> <https://www.merriam-webster.com/dictionary/effectuate>.

<sup>51</sup> R.C. 4928.02(B); *see also* R.C. 4928.05(A)(1) eliminating authority to apply traditional regulatory authority to unbundled competitive services.

<sup>52</sup> R.C. 4829.02(A).

<sup>53</sup> R.C. 4928.02(H).

<sup>54</sup> *Industrial Energy Users-Ohio v. Pub. Util. Comm’n*, 117 Ohio St. 3d 486, 487 (2008) (emphasis added)

<sup>55</sup> *Industrial Energy Users-Ohio v. Pub. Util. Comm’n*, 117 Ohio St. 3d 486, 487 (2008).

<sup>56</sup> *Migden-Ostrander v. Pub. Util. Comm’n*, 102 Ohio St. 3d 451, 452-53 (2004).

The Court has rebuffed prior attempts to rebundle the recovery of competitive services through non-competitive distribution rates. For example, in *Elyria Foundry Co. v. Pub. Util. Comm'n*, 14 Ohio St.3d 305 (2007), the Commission authorized FirstEnergy to recover SSO-related fuel costs through distribution rates. Following an appeal, the Court held that “[f]uel is an incremental cost component of generation service. Thus, by allowing that generation-cost component to be deferred and subsequently recovered in a distribution rate case, or alternatively allowing FirstEnergy to apply generation revenues to reduce distribution expenses, the commission violated R.C. 4928.02(G).”<sup>57</sup>

Here, the record evidence shows that the Order authorized Duke to recover through distribution rates costs components related to the provision of the SSO—similar costs that CRES providers must incur to offer a competitive product. Rather than requiring SSO service to “stand on its own,” the Order authorized Duke to bundle components related to the provision of retail electric generation—the competitive SSO—into distribution rates and therefore provide the SSO with an anticompetitive subsidy. The subsidy is collected disproportionately from shopping customers; therefore, it is discriminatory. The Order authorized a result that violates Ohio law and Supreme Court precedent that prohibits anticompetitive subsidies and requires unbundled and comparable rates.

**C. The Order unlawfully and unreasonably rejected IGS proposal that would remedy Duke’s unlawful collection of competitive retail electric service costs through non-competitive service rates.**

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<sup>57</sup> *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St.3d 305, 315 (2007).

In conjunction with its rejection of IGS' proposal to unbundle from distribution rates costs related to the SSO, the Order rejected IGS proposal to establish a non-bypassable credit and bypassable charge to reallocate to the SSO costs associated with the provision of that service. Given that the Order unlawfully and unreasonably determined that Duke may recover competitive retail electric service costs through nonbypassable rates, in eliminating IGS' proposed credit and charge rider, the Order permits Duke to further violate Ohio law. IGS' proposal would cure the Commission's error. As discussed above, the Order is unlawful and unreasonable and should be modified on rehearing to eliminate Duke's recovery of SSO costs through distribution rates. While the Order should eliminate such unlawful distribution-based cost recovery, IGS does not object to the Commission permitting DP&L to collect such costs through a bypassable rate as recommended by witness Hess.

**D. The Order is unlawful and unreasonable because it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission's decisions. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). The Order failed to appropriately consider or address IGS' arguments that the Stipulation recommended that the Commission: (1) unlawfully and unreasonably apply Chapter 4909 to authorize recovery of competitive retail electric service costs through non-competitive service rate structures; (2) unlawfully and unreasonably provided a subsidy to Duke's competitive retail electric service rates in violation of R.C. 4928.02; and (3) the Order further failed to evaluate and address IGS' analysis and quantification of competitive retail electric service costs proposed for recovery in distribution rates**

R.C. 4903.09 requires the Commission to address competing arguments and provide a record upon which the Supreme Court of Ohio may evaluate the Commission's decisions. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011); *In re Comm'n Rev. of Capacity Charges of Ohio Power Co.*, 147

Ohio St. 3d 59, 70-72 (2016). The Order failed to comply with this requirement in several respects.

First, IGS challenged the legality of applying the Commission's Chapter 4909 authority to provide recovery for competitive retail electric service costs through non-competitive service rates.<sup>58</sup> As discussed previously, IGS argued that R.C. 4928.05(A)(1) prohibits the Commission from applying its traditional ratemaking authority under Chapter 4909 in this nature. The Order failed to substantively address IGS' argument.<sup>59</sup>

Second, IGS argued that recovering SSO-related costs through non-competitive services rate structures would run afoul of State Policy and precedent set forth in *Elyria Foundry Co.*, 14 Ohio St.3d 305 (2007).<sup>60</sup> The Order failed to address IGS' argument.<sup>61</sup>

Finally, IGS' testimony and briefs presented a comprehensive thoughtful analysis and quantification of SSO-related costs unlawfully proposed for recovery through distribution rates.<sup>62</sup> Specifically, IGS identified these costs to exceed \$23 million.<sup>63</sup> The Order rejected IGS' proposed allocation of costs without substantively addressing IGS' position.<sup>64</sup>

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<sup>58</sup> Initial Brief at 16-26.

<sup>59</sup> Order at 82.

<sup>60</sup> Initial Brief at 23.

<sup>61</sup> Order at 82.

<sup>62</sup> *Id.* at 6-9, 16-19

<sup>63</sup> *Id.*; IGS/RESA Ex. 1 at JEH-1.

<sup>64</sup> Order at 82.

Accordingly, on rehearing, the Commission should fully address IGS' arguments and render conclusions of law based upon the record.

**E. The Order is unlawful and unreasonable inasmuch as it concluded the existence of costs related to Duke's facilitation of the choice market may justify subsidizing SSO service. The Order's reasoning circumvents the statutory limitation against regulation of competitive retail electric services under Chapter 4909. The Order is also arbitrary, capricious, and an abuse of discretion given that choice-related costs are already directly assigned to CRES providers. *Forest Hills Utility Co. v. Pub. Util. Comm'n Ohio*, 31 Ohio St. 2d 46 (1972).**

The Order stated that "separating SSO-specific costs from distribution rates would likewise necessitate separating any costs specifically related to the customer choice program."<sup>65</sup> The Order erred for several reasons.

First, the Order is incorrectly concluded that the Commission has authority to regulate or provide cost recovery related to the SSO through distribution rates pursuant to the Commission's traditional ratemaking authority.<sup>66</sup> The Commission has no such authority; therefore, the existence of choice-related costs cannot justify otherwise unlawful cost recovery related to SSO service.

Second, the "netting" concept alluded to by the Order is arbitrary, unjust, and unreasonable inasmuch as it attempts to justify subsidizing the SSO based upon a flawed comparison. To start, unlike SSO customers, ***shopping customers are already paying fees to Duke for services rendered.*** These fees have added up to ***millions of dollars.***<sup>67</sup>

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<sup>65</sup> Order at 82.

<sup>66</sup> R.C. 4928.05(A)(1).

<sup>67</sup> RESA/IGS Ex. 6 at 3-4; RESA/IGS Ex. 1 at 8-9 and JEH-5.



Duke has not even attempted to quantify the reasonableness of these fees, which may overcompensate Duke for services provided to CRES providers and their customers. It is arbitrary and capricious to net choice-costs against SSO service costs when the record reflects that no such costs are actually recovered through distribution rates—they are already directly assigned to CRES providers.

Third, although shopping customers and CRES providers are already compensating Duke for the services they receive, these services do not relate to competitive retail electric service. When Duke incurs cost related to the choice market, these costs relate to services that are a traditional monopoly function. For example, when Duke provides meter data through an Electronic Data Interchange transaction to a CRES provider, there is no other way to obtain that data to be able to bill a customer.<sup>68</sup> Moreover, that same data is being used for SSO customers without a fee. When Duke provides such service to CRES providers, it is not in fact providing a competitive retail electric service. The provision of the CRES product is handled by the CRES, which sends an EDI transaction in the other direction to administer the product. Thus, the Order sought to net choice and SSO-related costs based upon a flawed apples to oranges comparison. Moreover, if the services Duke provided to the choice market are truly a function of distribution service and if the Commission includes them in any netting methodology, the fees and shopping penalties should be eliminated.

**F. The Order's determination that choice costs may justify subsidizing the standard service offer is against the manifest weight of the evidence. The record reflects \$23 million in SSO-related costs proposed for recovery in distribution rates; substantial CRES provider fees to cover choice-related costs; thus, the record demonstrates that**

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<sup>68</sup> RESA/IGS Ex. 6 at 3-4.

**additional costs should be allocated to the SSO even under the Order's unlawful reasoning. *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St. 3d 165; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n Ohio*, 76 Ohio St.3d 163, 166 (1996).**

In a distribution rate case “the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.” R.C. 4909.18 and R.C. 4901.19(C). Assuming arguendo that the Commission may net choice-related costs against SSO-related costs, the Order is not supported by the manifest weight of the evidence. Indeed, the record contradicts the Order's conclusion. As the Supreme Court has held, “[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.” *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n Ohio*, 76 Ohio St.3d 163, 166 (1996). *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St. 3d 165.

IGS submitted testimony indicated that based upon the amount of revenue recommended in the Staff Report, Duke would recover in excess of \$23 million in SSO-related costs through distribution rates.<sup>69</sup> No other quantitative estimate of the SSO subsidy was provided in this case. To avoid allocating this amount to the SSO, the Order relies upon the alleged existence of choice-related costs. But the Order failed to cite any evidence to quantify such costs. At the same time, the record reflects that Duke already collected significant, unsubstantiated switching fees and historical usage fees from CRES providers, adding up to millions of dollars in just a few years.<sup>70</sup> Thus, the record reflects there are over \$23 million in SSO-related costs in distribution rates and zero

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<sup>69</sup> RESA/IGS Ex. 1 at JEH-1.

<sup>70</sup> IGS/RESA Ex. 6 at 3-4.

uncompensated choice-related costs. The Order's failure to allocate \$23 million in SSO-related costs—even under the Order's own flawed methodology—is contrary to the manifest weight of the evidence and reflects an abuse of discretion. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n Ohio*, 76 Ohio St.3d 163, 166 (1996). Therefore, the Commission should grant this application for rehearing and eliminate SSO-related costs from distribution service recovery and reallocate such costs to SSO service.

**G. The Order is unlawful and unreasonable inasmuch as it deviated from recent Commission precedent, which required a EDU to allocate to the SSO the portion of the OCC and PUCO assessments related to SSO retail electric generation. *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984).**

As discussed above, IGS' testimony and briefs urged the Commission to allocate to the SSO all costs associated with the provision of that service. One of the components related to the PUCO and OCC assessments, which are partially the consequence of the amount of generation-related revenues Duke collects. The Order rejected IGS' recommendation in its entirety.

A recent Commission order, however, in the Dayton Power and Light Company's distribution rate case reached a different result.<sup>71</sup> In that litigated case, the Commission required DP&L to allocate the portion of the OCC and PUCO expense that was the result of DP&L's generation-related revenue.<sup>72</sup> The Supreme Court of Ohio has indicated that, for the sake of certainty in the regulatory process, the Commission should issues order consistent with its precedent. *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984). Given the court's directive, the Order is unlawful and unreasonable

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<sup>71</sup> *In the Matter of the Application of The Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case Nos. 15-1830-EL-AIR, *et al.*, Opinion and Order at 10, 12 (September 26, 2018).

<sup>72</sup> *Id.*

inasmuch as it has issued inconsistent orders unbundling PUCO and OCC-related expenses in one utility service territory but not another within the same year. On rehearing, the Commission should correct this error and direct Duke to remove from its distribution rates the portion of the OCC and PUCO assessments that resulted from Duke's collection of SSO-related generation revenues.

**H. The Order is unlawful, unreasonable, and discriminatory inasmuch as it authorized Duke to impose switching fees and historical usage fees on CRES providers without evidentiary support in violation of R.C. 4909.15 and R.C. 4909.18. The application of these fees to CRES providers is discriminatory in violation of R.C. 4905.35 and 4928.02.**

The Order states that Duke's switching fee and historical usage fees were approved in a prior order. Regarding both fees, the Order states that no evidence was presented to demonstrate that either fee is unreasonable. The Order is incorrect factually and legally, and failure to correct the Order would further discriminate against shopping customers.

Initially, the Order's reliance *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984) is misplaced. That case simply holds that when the Commission establishes precedent, for the sake of predictability, it should honor that precedent in future case. And, should the Commission determine that it must deviate from its prior precedent, it must justify its new direction. Here, IGS is not seeking for the Commission to modify any prior precedent or Commission orders, rather, IGS requests that the Commission uphold its long-standing precedent that charges, whether to suppliers or customers, must be based upon actual evidence in the record.

The Order is incorrect that IGS was required to demonstrate the unreasonableness of the switching fee and the historical usage fee. This is a distribution rate case in which

Duke requested authority to increase its rates for non-competitive services. This includes the services that Duke provides to CRES providers. Pursuant to R.C. 4909.15(C)(1), the “revenues and expenses of the utility shall be determined during a test period.” In a distribution rate case, “the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.” R.C. 4909.18 and R.C. 4909.19(C).

Accordingly, *Duke’s costs for providing non-competitive services to CRES providers is embedded in the test year expense in this case.* Likewise, *the revenues that Duke collects pursuant to these fees is a credit to Duke’s costs.* Therefore, the combined impact of Duke’s fees and expenses is embedded in the revenue requirement the Order authorized. Given’s Duke’s burden of proof, the Order should have required it to demonstrate that its fees are just and reasonable if they are to be assessed at all. Duke, however, provided no evidentiary support for such fees and the Order cited no record evidence to support the calculation of the fees. Therefore, the Order is unlawful and unreasonable. “A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.” *Cleveland Elec. Illum. Co. v. Pub. Util. Comm’n Ohio*, 76 Ohio St.3d 163, 166 (1996). *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St. 3d 165. Just as the Commission has previously declined to authorize rates without an evidentiary basis, the Order should have directed Duke to eliminate its unsubstantiated switching fee and historical usage fee. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n Ohio.*, 12 Ohio St. 3d 280, 287. The Order impermissibly shifted the burden of demonstrating the unreasonableness of these fees to IGS.

Moreover, selectively imposing switching fees on customers when they request a change in their generation provider violates Ohio law. Under R.C. 4905.35, “[n]o public

utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.” Moreover, it is the state policy to “[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.”<sup>73</sup> It is unduly discriminatory and unreasonable to impose a switching fee on customers only when they are selecting a CRES provider, while imposing no fee on customers when they are selecting the SSO.<sup>74</sup> To the extent that the Order does not eliminate the switching fee altogether, at a minimum, it must be applied to customers that switch to the SSO.

**I. The Order unlawfully, unjustly, and unreasonably permitted Duke to Discriminate against CRES providers in the provision of non-electric services on the utility consolidated billing in violation of R.C. 4905.35(A).**

The record reflects that Duke’s current CIS lists non-commodity items on customer billing statements for its affiliate, Duke Energy One.<sup>75</sup> It also reflects that Duke has rejected formal requests from IGS to similarly place its non-commodity charges on the utility bill.<sup>76</sup> Despite this clear undeniable discrimination, the Order permits this unjust result to continue. The Order erred.

Under R.C. 4905.35(A), a public utility is prohibited from giving “any undue or unreasonable advantage to any person, firm, corporation, or locality, or subject any person, firm, *corporation, or locality to any undue or unreasonable prejudice or*

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<sup>73</sup> R.C. 4928.02.

<sup>74</sup> RESA/IGS Ex. 1 at JEH-1 (Duke Response to IGS INT-01-16a).

<sup>75</sup> *Id.* at MW-1 (Duke Response to IGS-INT-01-020(b)).

<sup>76</sup> RESA-IGS Ex. 5 at 12.

*disadvantage.*” (emphasis added). Moreover, R.C. 4928.17(A)(2) and (3) expressly prohibit Duke from providing *any affiliate or part of its business engaged in the supply of nonelectric products and services* with an unfair competitive advantage through the preferential use of its utility billing and mailing systems.

The law expressly prohibits Duke to give any undue or unreasonable advantage to any corporation. Here, as Duke recognizes, it is allowing Duke Energy One, a corporation, to place Duke Energy One’s non-commodity services on Duke’s utility bill. Duke also acknowledges it does not allow CRES providers to do the same. Therefore, Duke is providing an advantage to Duke Energy One.

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

## **V. CONCLUSION**

For the reasons stated herein, IGS urges the Commission to grant this Application for Rehearing. It is unjust, unreasonable, discriminatory on multiple fronts, contrary to the public interest, and would violate Ohio law. The Commission should grant this Application for Rehearing and ensure that customers are not penalized for exercising their right to

shop. Further, the Commission should eliminate the discriminatory and unsubstantiated fees that Duke has sought to impose upon CRES providers and their customers.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Interstate Gas Supply, Inc.* was served this 18th day of January 2019 via electronic mail upon the following:

**/s/ Joseph Olikar**

Joseph Olikar

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Summary: Application electronically filed by Helen Sweeney on behalf of Interstate Gas Supply, Inc.