In The
Supreme Court of Ohio

In the Matter of the Application of Duke energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service	:	Case No. 2018-973 On appeal from the Public Utilities Commission of Ohio, Case Nos. 14-841-EL-SSO and 14-842-EL-AAM
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.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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 R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service	:	Case No. 2018-712 On appeal from the Public Utilities Commission of Ohio, Case Nos. 14-841-EL-SSO and 14-842-EL-AAM
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THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

This case is about protecting the public. Energy markets are inherently volatile, creating uncertainty for customers. Recent extreme weather events demonstrate how quickly and significantly markets can fluctuate. The Public Utilities Commission of Ohio (Commission) has taken this problem squarely in hand by approving a placeholder rider that created an opportunity to minimize market volatility. The zero placeholder Price Stability Rider (Zero Placeholder Rider or Rider PSR) will work in the opposite direction from market prices. When market prices rise, customers will see a credit on their electricity bills, reducing their overall cost. The Commission did not approve a rate. It did not authorize the recovery of any cost. It did not generate any revenue for the utility.

No ratepayer paid a single dime because of the Commission's decision approving the placeholder in this case. Rather, the Commission delineated certain facts that Duke Energy Ohio, Inc. (Duke Ohio) must demonstrate in a future case to recover certain purchased power contract costs.

The rider was approved only as a "zero placeholder", recovering from or crediting to customers exactly zero until such time as the Commission might order otherwise in some subsequent proceeding. The primary goal of this appeal by the Ohio Consumers' Counsel (OCC or the Appellant) is to avoid that possible future approval by the Commission. This appeal has nothing to do with any actual charges or credits because the rider was set at zero. Appellant has failed to demonstrate prejudice or harm caused by the Commission's order and this appeal is only an inappropriate request for an advisory opinion regarding the legality of the rider.

The Commission reasonably and lawfully approved Duke Ohio's Zero Placeholder Rider. Furthermore, the Commission properly found that Duke Ohio's Electric Security Plan (ESP) is better in the aggregate than a market rate offer (MRO). The Commission acted within the law to protect the interests of ratepayers, and its order should be affirmed.

STATEMENT OF THE FACTS AND CASE

The Commission, in the case below, modified and approved an application of Duke Ohio for an electric security plan (ESP) pursuant to R.C. 4928.143. *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard*

Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service, Case Nos. 14-841-EL-SSO, *et. al.*, (ESP 3 Case) (Opinion and Order) (Apr. 2, 2015), OCC App. at 9; *ESP 3 Case* (Second Entry on Rehearing) (Mar. 21, 2018), OCC App. at 112; (Third Entry on Rehearing) (May 16, 2018), OCC App. at 170.[1] Among other matters, Duke asked the Commission to approve a price stability rider (Zero Placeholder Rider or Rider PSR) that would allow Duke Ohio to recover future costs for its obligations relating to a contractual entitlement with the Ohio Valley Electric Corporation (OVEC) Kyger Creek and Clifty Creek generating stations. The Commission concluded that Duke Ohio's proposed PSR rider satisfies the requirements of R.C. 4928.143(B)(2)(d) and, therefore, is a permissible provision of an ESP. *ESP 3 Case* (Opinion and Order at 42-48) (Apr. 2, 2015), OCC App. at 50-56. The Commission was not persuaded that Duke Ohio's Rider PSR proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism. The Commission authorized Duke Ohio to establish a zero placeholder PSR rider, at an initial rate of zero, with the Company being required to justify any future request for cost recovery in a separate case. *ESP 3 Case* (Opinion and Order at 47) (Apr. 2, 2015), OCC App. at 55.

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[1] References to Appellee's appendix attached to this brief are denoted "App. at ___"; references to Appellee's supplement are denoted "Supp. at ___"; references to the appendix of Appellant, The Ohio Consumers' Counsel (filed October 15, 2018), are denoted "OCC App. at ___"; and references to the supplemental appendix submitted by Appellant are denoted "OCC Supp. at ___."

On May 1, 2015, applications for rehearing of the ESP 3 Order were filed by several intervenors and Duke Ohio. On May 28, 2015, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing. On March 21, 2018, and corrected on March 28, 2018, in a Second Entry on Rehearing, the Commission granted the application for rehearing on a narrow issue not related to this appeal. All other applications for rehearing were denied in their entirety. In its Third Entry on Rehearing, the Commission reviewed, considered, and rejected all of the remaining arguments raised in the applications for rehearing. This appeal by the OCC ensued.

STANDARD OF REVIEW

A Commission order shall be reversed, vacated, or modified by this Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. The Court will not reverse or modify a Commission decision as to questions of fact if the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. "The appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Id.*

Although the Court has "complete and independent power of review as to all questions of law" in appeals from the Commission, *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997), the Court may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶¶ 12-13. The Commission's discretionary decisions receive deferential review. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 11.

ARGUMENT

Proposition of Law No. I:

Appellant has failed to demonstrate prejudice or harm caused by the Zero Placeholder Rider in the Commission's ESP Order.

It is well settled that this Court will not reverse an order of the commission unless the party seeking reversal shows that it has been harmed or prejudiced by the order. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980), syllabus. OCC has not shown harm or prejudice caused by the ESP Order that is the subject of this appeal. The Court recently dismissed a similar OCC appeal finding "no harm or prejudice" regarding the Commission's approval of the OVEC-only Zero Placeholder Rider for Ohio Power Company d/b/a AEP Ohio (AEP Ohio). *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4697. The Court should do

the same here. The Zero Placeholder Rider for Duke Ohio, here, functions exactly the same as AEP Ohio's Zero Placeholder Rider. Duke Ohio's Zero Placeholder Rider was approved at zero until such time as the Commission might order otherwise in some subsequent proceeding. The primary goal of this appeal by OCC is to avoid that possible future approval by the Commission. This appeal has nothing to do with any actual charges or credits, as it was set at zero. Appellant has failed to demonstrate prejudice or harm caused by the Commission's order and this appeal is only an inappropriate request for an advisory opinion regarding the legality of the rider.

OCC's claims of harm are without merit. According to OCC, the Commission acted unlawfully and unreasonably when it approved the ESP without properly analyzing all the terms and conditions of the plan as required by R.C. 4928.143(C)(1). OCC Brief at 28. But the Commission did analyze all the terms and conditions of the plan. Under R.C. 4928.143(C)(1), the Commission shall approve an ESP if it is "more favorable in the aggregate" than an expected market-rate offer. The Commission did conduct the statutory test under R.C. 4928.143(C)(1) in the ESP proceeding. The Commission reasonably found that it was not necessary to quantify the impact of the placeholder rider in its analysis given that the rider was approved with a rate of zero. Any future costs associated with the rider were then unknown, and any rate would be imposed only after additional proceedings. *ESP 3 Case* (Opinion and Order at 53) (Apr. 2, 2015), OCC App. at 61. This was appropriate and does not cause harm or prejudice to OCC.

OCC further asserts that the Commission's failure to consider the costs and benefits of the Zero Placeholder Rider as required under the statutory ESP test has

resulted in ratepayers having to pay unlawful ESP rates. OCC Brief at 29. There is no merit to this argument. OCC never explains how the Commission was supposed to evaluate the costs and benefits of the Zero Placeholder Rider when those benefits and costs were not known at that time. OCC did not cite any supporting evidence or otherwise explain how the Commission's consideration of the unknown costs and benefits of the Zero Placeholder Rider would have compelled the Commission to reject the ESP under the statutory test. Moreover, OCC was free to assert claims of actual harm or prejudice in the Commission's subsequent case that is currently pending, subject to rehearing, before the Commission, which analyzes the costs of the rider. *See, In the Matter of the Application Seeking Approval of Duke Energy Ohio, Inc. Proposal for Approval to Amend Rider PSR*, Case No. 17-872-EL-RDR, *et. al.*

OCC has also not demonstrated harm from regulatory delay. OCC argues that ratepayers were harmed by the establishment of the Zero Placeholder Rider in the ESP Order because the Commission took years to issue a final, appealable order in the ESP case. OCC Brief at 7. OCC is misguided. As discussed, the Zero Placeholder Rider approved did not allow Duke to recover any costs from customers. So OCC's claim that its customers have suffered harm from unlawful rates due to the delay is not supported by the record. This argument should be rejected.

The party seeking reversal of the commission's order must demonstrate prejudice or harm from the order on appeal. *Hollady Corp.*, 61 Ohio St.2d 335, 402 N.E.2d 1175, at syllabus; *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 765 N.E.2d 862 (2002). OCC has not shown any harm or prejudice to ratepayers caused by the

Commission's approval of the Zero Placeholder Rider in the ESP Order. Because Appellant has failed to carry its burden, the Court should, as it did in the recent AEP Ohio appeal, dismiss this appeal.

Proposition of Law No. II:

> **The Zero Placeholder Rider is a lawful rate stability charge related to limitations on customer shopping for retail electric generation service under R.C. 4928.143(B)(2)(d).**

Markets can be volatile. Market volatility obviously affects customer shopping decisions. Upward or downward pricing trends in the market caused by volatility will surely encourage customers to consider their competitive options. Consequently, hedges against market volatility can constitute limitations on customer shopping. The Commission's action approving the Zero Placeholder Rider as a means to potentially minimize market volatility thereby relates to limitations on customer shopping, and the General Assembly has expressly confirmed that ESPs properly include terms relating to such limitations. R.C. 4928.143(B)(2)(d), allows an ESP to include charges that relate to financial limitations on customer shopping that have the effect of stabilizing or providing certainty regarding retail electric service. R.C. 4928.143(B)(2)(d), OCC App. at 281. The Commission found, based on evidence of record, that the Zero Placeholder Rider could act as such a financial limitation, and its decision should be affirmed.

A. The Commission reasonably and lawfully found that the Zero Placeholder Rider serves as a financial limitation on customer shopping for retail electric generation service under R.C. 4928.143(B)(2)(d).

The Zero Placeholder Rider mechanism meets the three statutory requirements of R.C. 4928.143(B)(2)(d). *ESP 3 Case* (Opinion and Order at 42-45) (Apr. 2, 2015), OCC App. at 50-53. First, to satisfy the statute, a component of an ESP must be "a term, condition, or charge relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service." R.C. 4928.143(B)(2)(d), OCC App. at 281. The Zero Placeholder Rider is a credit or charge that would appear on customers' bills. *ESP 3 Case* (Opinion and Order at 43-46) (Apr. 2, 2015), OCC App. at 51-54; *ESP 3 Case* (Second Entry on Rehearing at 10-12) (Mar. 21, 2018), OCC App. at 121-123. Duke projected that the proposed PSR would provide a net charge over the course of the ESP term, but also estimated that the rider would result in a net credit to customers by the beginning of 2019. *ESP 3 Case* (Opinion and Order at 43) (Apr. 2, 2015), OCC App. at 51. The Commission found that the Zero Placeholder Rider would appear as a charge on customer bills, and there was no dispute among the parties on this point. *Id.* Thus, the record indicates that the PSR would consist of a charge to customers and the first requirement of R.C. 4928.143(B)(2)(d) is met.

Second, under R.C. 4928.143(B)(2)(d) the Zero Placeholder Rider must relate to, among other things, limitations on customer shopping for retail electric generation service or bypassability. R.C. 4928.143(B)(2)(d), OCC App. at 281. The Zero Placeholder Rider functions as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. *ESP 3 Case* (Opinion and Order at 43-46) (Apr. 2, 2015), OCC App. at 51-54; *ESP 3 Case* (Second Entry on Rehearing at 11) (Mar. 21, 2018), OCC App. at 122. Contrary to Appellant's claims that the netting of potential credits or charges is not a financial limitation, the rider is a limitation in the sense that it decreases the advantage or disadvantage of shopping by either imposing a charge or credit that partially offsets the impact that would otherwise occur based on unmitigated market prices. Specifically, in times of high market prices, the rider *limits* the customer from being fully exposed to higher market-based prices through a partially offsetting credit; conversely, in times of low market prices, the rider also *limits* the customer from fully taking advantage of lower market prices through a partially-offsetting charge. Either way, the rider is a limitation on shopping for generation service at market prices because the customer has limited exposure to the shopping market (during periods of higher market prices) and limited opportunity to take advantage of the shopping market (during periods of lower market prices). Although the rider would have no impact on customers' physical generation supply, the effect of the rider is that the bills of all customers would reflect a price for retail electric generation service that is approximately 3 percent based on the cost of service of the OVEC units and 97 percent based on the retail market. *ESP 3 Case* (Opinion and Order at 45) (Apr.

2, 2015), OCC App. at 53. The rider would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. *Id.*

In finding that the PSR is a financial limitation on customer shopping, the Commission relied on, among other evidence, the testimony of Ohio Energy Group (OEG) witness Taylor. *ESP 3 Case* (Opinion and Order at 45) (Apr. 2, 2015), OCC App. at 53. Any argument that Duke did not meet its burden of proof because Mr. Taylor was not a Duke witness has no merit. All evidence in the record may be used to satisfy a statutory burden, just as the Commission may rely on all evidence in the record to reach its decision. *ESP 3 Case* (Second Entry on Rehearing at 11) (Mar. 21, 2018), OCC App. at 122.

Further, R.C. 4928.143(B)(2)(d), passed by the Ohio General Assembly, does not specify the scope or particular type of limitation on customer shopping permitted under the statute. The statute thus permits various types of limitations on customer shopping, which gives the Commission the discretion to determine the types of limitations that meet the criteria set forth in the statute. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ("Any lack of statutory guidance on that point should be read as a grant of discretion."). The statute specifically allows a limitation on customer shopping and the Commission approved one. The nonbypassable Zero Placeholder Rider here acts as a financial limitation on customer shopping by providing all customers a financial hedge against fluctuations in electricity prices. *ESP 3 Case* (Opinion and Order at 44) (Apr. 2, 2015), OCC App. at 53; *ESP 3 Case* (Second Entry on Rehearing at 11) (March 21, 2018), OCC App. at 122. Thus, the rider is a

financial limitation on customer shopping and the second requirement of R.C. 4928.143(B)(2)(d) is met.

Finally, R.C. 4928.143(B)(2)(d) requires that the charge have the effect of stabilizing or providing certainty regarding retail electric service. This is entirely the point of the mechanism. The Zero Placeholder Rider would operate as a financial hedging mechanism, with the effect of stabilizing or providing certainty regarding retail electric service. *ESP 3 Case* (Opinion and Order at 44) (Apr. 2, 2015), OCC App. at 53; *ESP 3 Case* (Second Entry on Rehearing at 11) (Mar. 21, 2018), OCC App. at 122. This hedging mechanism provides stability and certainty in addition to the already-existing laddering and staggering of SSO auction products and the availability of fixed-price contracts. The rider would smooth out fluctuations in market prices, because the rider would rise or fall in a way that is countercyclical to the wholesale market. *Id.* The Zero Placeholder Rider, therefore, is intended to mitigate, by design, the effects of market volatility, providing customers with more stable retail pricing and a measure of protection against substantial increases in market prices. *Id.* In the event that prices rise, the rider, as designed, will offset a portion of the costs of retail electric service. *Id.* The rider's impact will be a charge or credit for a generation-related hedging service that stabilizes rates for retail electric service by moving in the opposite direction of market prices. *Id*. Thus, the Zero Placeholder Rider is capable of stabilizing retail electric rates and the third requirement of R.C. 4928(B)(2)(d) is met.

In *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698, this Court recently held that AEP Ohio's PPA Rider for OVEC – which functions the same as

Duke Ohio's Zero Placeholder Rider – was appropriate under R.C. 4928.143(B)(2)(d) as a financial limitation on customer shopping. In rejecting OCC's arguments that only "physical" limitations on customer shopping are allowed and the commission distorted the General Assembly's intent by adding the word "financial" to R.C. 4928.143(B)(2)(d), the Court held:

> Because OCC raises an issue of statutory interpretation, our analysis must begin with the language of the statute. *See In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, at ¶ 20. R.C. 4928.143(B)(2)(d) allows the commission to approve a charge "relating to limitations on customer shopping for retail electric generation service." The statute does not speak to the type of limitations on customer shopping that are allowed. Nor does it otherwise restrict the commission's determination. The plain language of the statute simply permits the commission to approve "limitations on customer shopping." Because a financial limitation is a type of limitation on customer shopping, we reject this argument.

In re Application of Ohio Power Co., Slip Opinion No. 2018-Ohio-4698 at ¶ 22. Also, in rejecting OCC's argument that the phrase "limitations on customer shopping" allows only a provision that limits customers from physically switching to competitive generation suppliers, the Court stated:

> We need not decide whether that interpretation is correct, however, because even if OCC is correct, this would not preclude the use of a financial limitation as a means to restrict customers from physically switching. As discussed, the plain language of R.C. 4928.143(B)(2)(d) does not forbid a "financial" limitation.

Id. at ¶ 31. In the end, the Court recognized that the Commission had discretion in interpreting the phrase "limitation on customer shopping" and held that AEP Ohio's PPA

Rider for OVEC was appropriate under R.C. 4928.143(B)(2)(d) as a financial limitation on customer shopping. The Court should apply the same reasoning here and find that the Zero Placeholder Rider for Duke Ohio meets the three statutory requirements of R.C. 4928.143(B)(2)(d). In matters involving the agency's special expertise and the exercise of discretion, the Court will generally defer to the judgment of the agency. *Constellation New Energy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 541, 2004-Ohio-6767, 820 N.E.2d 885, 895, ¶ 50; *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St.3d 177, 180, 749 N.E.2d 262 (2001), 264; *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288, 292 (1990).

The Court has consistently refused to substitute its judgment for that of the agency on evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 765 N.E.2d 866 (2002). It should refuse to do so here, and should affirm the Commission's findings.

B. The Commission properly found, citing to record evidence, that the Zero Placeholder Rider will have the effect of stabilizing or providing certainty regarding retail electric generation service.

Appellant alleges that the Commission's decision lacks evidentiary support to show that the Zero Placeholder Rider will have the effect of stabilizing or providing certainty regarding retail electric generation service. OCC Brief at 12-16. This argument is without merit. R.C. 4928.143(B)(2)(d) requires that the charge have the effect of stabilizing or providing certainty regarding retail electric service. Relying on the expert testimony of OEG witness Taylor, the Commission found, as a matter of fact, that a Zero

Placeholder Rider would constitute "a financial limitation on shopping that would help to stabilize rates." *ESP 3 Case* (Opinion and Order at 43-46) (Apr. 2, 2015), OCC App. at 51-54; *ESP 3 Case* (Second Entry on Rehearing at 11) (Mar. 21, 2018), OCC App. at 122. Any argument that Duke did not meet its burden of proof because Mr. Taylor was not a Duke witness has no merit. All evidence in the record may be used to satisfy a statutory burden, just as the Commission may rely on all evidence in the record to reach its decision. *ESP 3 Case* (Second Entry on Rehearing at 11) (March 21, 2018), OCC App. at 122.

The Commission found that "there is no question that the rider would produce a credit or charge based on the difference between wholesale market prices and OVEC's costs, offsetting, to some extent, the volatility in the wholesale market." *ESP 3 Case* (Opinion and Order at 44) (Apr. 2, 2015), OCC App. at 52. The impact of the rider would be reflected as a charge or credit for a generation-related hedging service that stabilizes retail electric service, by smoothing out the market-based rates paid by shopping customers to their CRES providers, as well as the market-based rates paid by SSO customers, which are determined by a series of auctions that reflect the prevailing wholesale prices for energy and capacity in the PJM markets. *Id*. at 52. This hedging mechanism provides stability and certainty in addition to the already-existing laddering and staggering of SSO auction products and the availability of fixed-price contracts.

Any lack of statutory guidance on that point should be read as a grant of discretion to the Commission. See, e.g., *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 25 ("When a statute does not prescribe a particular

formula, the PUCO is vested with broad discretion"). This Court has repeatedly recognized the Commission's broad discretion to regulate its proceedings and manage its docket. *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19, 734 N.E.2d 775 (2000); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 384 N.E.2d 264 (1978). As the Court has stated, "[i]t is well settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). The Court will only interfere with that discretion in extreme cases where the discretion is abused. *Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St.2d 21, 387 N.E.2d 1370 (1979). No such extreme circumstances are present here.

The Commission's approval in this case also delineated facts and factors to be addressed by a later filing. *ESP 3 Case* (Opinion and Order at 47) (Apr. 2, 2015), OCC App. at 55. The Company did file a plan in a separate docket to comply with the factors set forth in the Commission's order. *In the Matter of the Application Seeking Approval of Duke Energy Ohio, Inc. Proposal for Approval to Amend Rider PSR*, Case No. 17-872-EL-RDR. In the end, because the record, through OEG Witness Taylor, has demonstrated that the proposed Zero Placeholder Rider would have the effect of stabilizing or providing certainty regarding retail electric service, the Commission properly found, citing to the record, that the Zero Placeholder Rider will have the effect of stabilizing or providing certainty regarding retail electric generation service.

C. The Commission's decision follows state policy.

The Commission properly found that the Zero Placeholder Rider comports with important state policies in R.C. 4928.02. *ESP 3 Case* (Opinion and Order at 47-48) (Apr. 2, 2015), OCC App. at 55-56. Pursuant to R.C. 4928.02(A), it is the policy of the state of Ohio to ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service. R.C. 4928.02(A); (OCC App. at 256) The Zero Placeholder Rider is another mechanism that may be used to stabilize retail electric rates and ensure reasonably priced retail electric service. R.C. 4928.02(H) requires the Commission to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies. R.C. 4928.02(H); OCC App. at 256. The Zero Placeholder Rider, here, will avoid Ohio retail customers' total reliance on market fluctuations and weather extremes. Adoption of the rider also continues to be consistent with the obligation under R.C. 4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service. R.C. 4928.02(A); OCC App. at 256.

Contrary to the arguments of OCC (OCC Brief at 20-23), the Zero Placeholder Rider does not violate R.C. 4928.02(H). The rider does not facilitate the recovery of generation-related costs through distribution or transmission rates. *ESP 3 Case* (Opinion and Order at 48) (Apr. 2, 2015), OCC App. at 56. Nor is the rider anticompetitive as alleged. OCC Brief at 22. Wholesale competition and retail competition are different. Wholesale competition involves generators of power selling energy, capacity, and ancillary services into the PJM market. Retail competition involves competitive retail

electric suppliers (CRES) reselling power purchased from the wholesale market to retail consumers. While the Zero Placeholder Rider's hedging mechanism does create a financial limitation on shopping as stated above, the rider will be non-bypassable and, thus, will have the same impact on shopping customers' bills as on SSO customers' bills. The Zero Placeholder Rider creates no advantage to shopping and no disadvantage to shopping. Likewise, the rider has the same impact on a shopping customer irrespective of which CRES provider serves the customer and irrespective of whether the customer is part of an aggregation or served individually by a CRES provider. Duke Ohio will also continue to source all of the SSO load through competitive auctions. Accordingly, the Commission found that the Zero Placeholder Rider is consistent with the state policy to "ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies." R.C. 4928.02(H), OCC App. at 256; *ESP 3 Case* (Opinion and Order at 48) (Apr. 2, 2015), OCC App. at 56. Furthermore, there are imposed safeguards in the annual prudency review process to protect against anticompetitive behavior by Duke Ohio that are more than sufficient to protect against anticompetitive subsidies under R.C. 4928.02(H). *Id.* at 47, OCC App. at 55.

As this Court has recently noted, the relevant provisions of R.C. 4928.02 do not impose strict conditions on the commission. *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698 at ¶ 49. By its terms, R.C. 4928.02 does not require anything but merely explains "the policy of this state." *Id.* The Court has held that "such policy statements are 'guideline[s] for the commission to weigh' in evaluating utility proposals to further state policy goals, and it has been 'left * * * to the commission to

determine how best to carry [them] out.'" (Ellipsis and brackets added in Columbus S. Power Co.) *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 62, quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261, ¶ 39-40. The Commission weighed these policy considerations in its order below. That alone is grounds to reject OCC's policy argument.

The Commission's decision is also consistent with the decision in the *Sporn* case. *ESP 3 Case* (Opinion and Order at 48) (Apr. 2, 2015), OCC App. at 56; *See also, In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider* (Sporn), PUCO Case No. 10-1454-EL-RDR, (Finding and Order at 19) (Jan. 11, 2012); OCC App. 364. In that case, the Commission specifically determined that the plant closure costs in question were not authorized under R.C. 4928.143. In this case, the Commission distinctively noted that a PSR is permissible under R.C. 4928.143(B)(2)(d), which permits rate stability mechanisms. *ESP 3 Case* (Opinion and Order at 48) (Apr. 2, 2015), OCC App. at 56. The Commission also found that a PSR could provide significant customer benefits. *Id.*

Therefore, there is no conflict with R.C. 4928.02(A), R.C. 4928.02(H) or the *Sporn* case.

Proposition of Law No. III:

The Zero Placeholder Rider does not recover transition costs or equivelent revenues.

Even if the costs of the Zero Placeholder Rider were considered to be transition costs or their recovery by Duke Ohio were considered to be the equivalent to the receipt of transition revenues, the rider would still not conflict with R.C. 4928.38, OCC App. at 272. R.C. 4928.143(B) specifically provides up front that the provisions that it allows to be included in an ESP are permissible "*notwithstanding any other provisions of Title XLIX of the Revised Code to the contrary*." *In re Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, ¶ 37, n. 3 (emphasis in original). The terms, conditions and charges approved under R.C. 4928.143(B)(2)(d) are expressly exempt from the prohibition in R.C. 4928.38, OCC App. at 272. Because the Zero Placeholder Rider is lawful under R.C. 4928.143(B)(2)(d), R.C. 4928.38 simply does not apply here.

This Court has recently held that R.C. 4928.143(B) exempts utilities from prohibitions on charges in an ESP contained in other provisions of R.C. Title 49. *See, In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698. The Court found that the "notwithstanding" clause allows a utility to include charges in an ESP that may otherwise be prohibited by other sections of R.C. Title 49. *Id* at ¶ 17. The analysis must begin with the language of the statute. *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 20. Like Duke Ohio's Zero Placeholder Rider below, AEP Ohio's rider was approved under R.C. 4928.143(B)(2), which provides:

> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> * * *
> (2) The plan may provide for or include, without limitation, [nine different provisions, as set out in subparagraphs (a) through (i).]

R.C. 4928.143(B)(2); *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698 at ¶ 18. The Court read the "notwithstanding" clause of R.C. 4928.143(B) as allowing an ESP to include items that R.C. Title 49 would otherwise prohibit. This provision expressly states that with certain listed exceptions, any contrary provision of R.C. Title 49 does not apply to an ESP. So even though R.C. 4928.38 bars transition revenue, the "notwithstanding" clause renders R.C. 4928.38 inapplicable if the revenues are recoverable as one of the nine types of provisions listed in R.C. 4928.143(B)(2). Because the PPA Rider constitutes one of those types of provisions – specifically, a limitation on customer shopping under R.C. 4928.143(B)(2)(d) – it is permissible even if it otherwise could be deemed to constitute transition revenue. Under the same reasoning, the Court should find, here, that R.C. 4928.143(B) exempts Duke Ohio from prohibitions on charges in its ESP contained in other provisions of R.C. Title 49 and that that the "notwithstanding" clause allows Duke Ohio to include charges in its ESP that may otherwise be prohibited by other sections of R.C. Title 49.

Any argument that the "notwithstanding" clause conflicts with R.C. 4928.141(A) should be rejected. OCC Brief at 18-20. According to OCC, the General Assembly

enacted R.C. 4928.141(A) to continue to prohibit the collection of transition revenues in a standard service offer beyond the market-development period. OCC, however, misreads R.C. 4928.141(A). As this Court stated:

R.C. 4928.141(A), enacted as part of 2008 Am.Sub.S.B. No. 221 ("S.B. 221"), requires electric-distribution utilities to make a standard service offer of generation service to consumers in one of two ways: through a "market rate offer" under R.C. 4928.142 or an ESP under R.C. 4928.143. R.C. 4928.141(A) also provides that if a new standard service offer was not approved by January 1, 2009, the prior rate plan would remain in effect "until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code" and in the event a "rate plan extends beyond December 31, 2008, * * * for the duration of the [rate] plan's term." See R.C. 4928.01(A)(33) (defining "rate plan" as "the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008"). Finally, R.C. 4928.141(A) provides that a standard service offer made through an ESP "shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan."

In re Application of Ohio Power Co., Slip Opinion No. 2018-Ohio-4698 at ¶ 22. OCC relies on this last sentence to assert that R.C. 4928.141(A) prohibits the recovery of transition revenues in a standard service offer made through an ESP. OCC Brief at 19. That reliance is misplaced. This provision is limited to "previously authorized" transition costs, i.e., transition costs that had been approved under the rate plan in effect when S.B.

221 became effective. *See* R.C. 4928.01(A)(33), App. at 4. Because the costs at issue here do not fall under the category of "previously authorized allowances for transition costs," the provision is inapplicable.

The Commission also rejected the notion that the Zero Placeholder Rider is a transition charge at all. *ESP 3 Case* (Opinion and Order at 48) (Apr. 2, 2015), OCC App. at 56. There is no "transition" in Duke Ohio's current ESP. Duke Ohio does not own any generation assets and the OVEC entitlement has never been used to provide retail electric generation service to Duke Ohio's customers. The purpose of transition revenue, as authorized by S.B. 3, 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 electric service and rates if such costs could not be recovered through the market. *See*, R.C 4928.39, OCC App. at 273. The Zero Placeholder Rider does not meet the definition of a transition charge.

Under R.C. 4928.39 transition costs must be: (A) prudently incurred; (B) legitimate, net, verifiable, and *directly assignable or allocable to retail electric generation service provided to electric consumers in this state*; (C) unrecoverable in a competitive market; and (D) *the utility would otherwise be entitled an opportunity to recover the costs.* R.C. 4928.39, OCC App. at 273. The OVEC contract was used to provide generation service to the U.S. Department of Energy and its predecessors prior to January 1, 2001. OVEC generation was never included in Duke Ohio's rate base. When S.B. 3 was enacted and at the time of the transition to a competitive market occurred on January 1, 2001, OVEC generation assets were used to serve only OVEC's United States

government customer. *ESP 3 Case* (Opinion and Order at 15) (Apr. 2, 2015), OCC App. at 23. Therefore, the OVEC contract, which was a wholesale transaction, has never been *directly assignable or allocable to retail electric generation service provided to electric consumers in this state* and Duke Ohio was *not entitled to an opportunity to recover [OVEC] costs,* within the meaning of the statute. R.C. 4928.39(B), App. at 12. This being the case, the OVEC contract does not meet the criteria for transition costs under R.C. 4928.39(B) or (D).

R.C. 4928.143(B)(2)(a) also establishes that capacity and energy costs incurred through the Zero Placeholder Rider are neither transition costs nor is their recovery through a provision in an ESP the improper receipt of transition revenues or their equivalent under R.C. 4928.38, OCC App. at 272. R.C. 4928.143(B)(2)(a), OCC App. at 280. R.C. 4928.143(B)(2)(a) expressly permits an electric distribution utility (EDU) to recover the prudently incurred "cost of purchase power supplied under [an ESP], including the cost of energy and capacity, and including purchased power acquired from an affiliate." *Id.* The General Assembly specifically contemplated that EDUs could recover purchased power costs through provisions in their ESPs. In this Order the Commission has approved the Zero Placeholder Rider, provided Duke Ohio meets the minimum standards mentioned above, of the OVEC costs, net of wholesale revenues, pursuant to a different ESP provision authorized by R.C. 4928.143(B)(2)(d), which permits recovery of certain charges that would have the effect of providing rate stability to customers.

The Zero Placeholder Rider is distinguishable from the rate stability rider (RSR) that was the subject of the Court's recent decision regarding AEP Ohio's *ESP 2 Case*, not

only because R.C. 4928.143(B)(2) expressly authorizes the recovery of purchased power costs, as set forth above, but also for other reasons. *See*, *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608. The nature of the Zero Placeholder Rider and the costs, if any, that would be recovered through it are fundamentally different from the non-deferral portion of AEP Ohio's Rate Stability Rider (AEP RSR) from AEP Ohio's *ESP 2* case. As the Court recently noted, that component of the AEP RSR was intended, among other things, to "provide AEP [Ohio] with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP [II]." *See* 147 Ohio St.3d 439, 2016-Ohio-1608, ¶ 8. The Zero Placeholder Rider is designed not for that purpose, but rather as a hedge that stabilizes rates, particularly during periods of extreme weather. *ESP 3 Case* (Opinion and Order at 47) (Apr. 2, 2015), OCC App. at 55. Moreover, the Court concluded that only revenues that exceed the Company's costs were unlawfully recovered. *See In re Application of Columbus Southern Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, ¶¶ 34, 40. The Zero Placeholder Rider will never recover revenues greater than Duke Ohio's actual costs. Again, the Zero Placeholder Rider is distinguishable from the AEP Ohio's RSR and is not a transition cost.

Proposition of Law No. IV:

The Commission's authority to approve the Zero Placeholder Rider is not preempted by the Federal Power Act.

The Commission had the authority to approve the Zero Placeholder Rider in this case. That authority was not preempted by federal law. Appellant's arguments to the

contrary (OCC Brief at 23-28) are not supported either by the language of the federal statutory scheme or by decisions of the federal courts.

Congress did not preempt the states from regulating retail rates. The Federal Power Act (FPA), 16 U.S.C. § 824, *et seq.*, asserts federal jurisdiction over the wholesale sale of electric energy but reserves to the States jurisdiction over "any other sale of electric energy." *FERC v. Electric Power Supply Assn.*, 136 S. Ct. 760, 577 U.S. ___, 2016 U.S. LEXIS 853 (2016). Specifically, it "leaves to the States alone, the regulation of [retail electricity sales]." *Id.*

The significant distinction for purposes of preemption is between state "'measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 575 U.S. __, (2015) (emphasis in original) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 94 (1963). If the state action is aimed directly at wholesale sales or rates, it is preempted by the FPA. If, as here, the state action in question is aimed directly at retail sales or rates, it is not preempted.

The Commission took no action here to set or affect wholesale sales or rates. The Commission merely approved a zero placeholder in this case. It is simply not possible for the Commission's action to have any effect on wholesale rates or FERC's jurisdiction. The Commission specifically reserved that determination for a future proceeding.[2]

[2] The subsequent proceeding considering recovery of OVEC costs is currently pending, subject to rehearing, before the Commission. *In the Matter of the Application Seeking Approval*

Moreover, the Zero Placeholder Rider pertains solely to retail rates. It does not impose any obligation or restriction whatsoever on the sale of wholesale capacity or energy. The Commission's order would have no effect on the rates that any generator would receive for its wholesale sales or upon the revenue that Duke Ohio would receive when that power is resold to PJM.

A purchase power agreement, as its name implies, is a bilateral agreement to purchase power. Such contracts transfer title to power from one entity to another. State review of utility power purchases – even those in interstate commerce – is not preempted by federal law. In *Pike Co. Light & Power Co.-Elec. Div. v. Pa. Pub. Util. Comm'n*, 77 Pa. Commw. 268, 465 A.2d 735 (Pa. Commw. Ct. 1983), the court distinguished between FERC's exclusive jurisdiction in regulating interstate rates and a state commission's jurisdiction to review the prudence of a utility's power purchase for determining retail rate recovery. The court stated that "[t]he regulatory functions of the FERC and the state commission thus do not overlap, and there is *nothing in the federal legislation which preempts the PUC's authority* to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority." *Id*. at 275 (emphasis added). The *Pike Co.* doctrine stands for the proposition that state commissions can exercise their jurisdiction by regulating a buyer's actions and examining the buyer's exercise of any rights it had under a wholesale

of Duke Energy Ohio, Inc. Proposal for Approval to Amend Rider PSR, Case No. 17-872-EL-RDR, *et al.*

agreement to ensure that the rates charged were consistent with the terms of the agreement – so long as the state commission does not "prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986).

Such voluntary bilateral contracts are one of the means by which wholesale sales of electricity in the interstate market occur:

> [In] States that have deregulated their energy markets, "load serving entities" (LSEs) purchase electricity at wholesale from independent power generators for delivery to retail consumers. Interstate wholesale transactions in deregulated markets typically occur through (1) bilateral contracting, where LSEs agree to purchase a certain amount of electricity from generators at a certain rate over a certain period of time; and (2) competitive wholesale auctions administered by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), nonprofit entities that manage certain segments of the electricity grid.

Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 2016 U.S. LEXIS 2797 (2016), syllabus.

The Zero Placeholder Rider approved by the Commission here is intended to permit recovery of costs associated with a bilateral purchase power agreement. FERC has granted sellers of electricity at wholesale the authority to "enter into freely negotiated contracts with purchasers." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of 10 Snohomish Cty*., 554 U.S. 527, 537 (2008). Authorized sellers may make wholesale sales at rates determined by bilateral agreement, and FERC will presume that those rates are just and reasonable. *Id*. at 545-546. An LSE, such as Duke Ohio, is not typically compelled to enter into any such agreement. There is no state action in either the

negotiation or the voluntary creation of a private power purchase agreement, and, therefore, no state action to be preempted by federal law.

Such was not the case, however, in the cases relied upon by Appellant, where state action was found to be preempted. In those cases, the state did compel LSEs to enter into purchase agreements, and on specified terms. It was that state action, unlike the one taken by the Commission here that the courts found to be preempted.

OCC relies on *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 2016 U.S. LEXIS 2797 (2016) for its proposition that a state commission's order guaranteeing a cost-based wholesale price is preempted by the FPA. *Talen*, however, cannot be read to support any such sweeping holding. The *Talen* court found that the state action there was preempted because it "adjust[ed] an interstate wholesale rate." *Talen*, paragraph four of the syllabus. The nature of the program disapproved in *Talen* is pivotal. The Maryland Public Service Commission (Maryland PSC) enacted a program that provided subsidies, through *state-mandated contracts*, to a new generator. That is, the Maryland PSC required its load-serving entities, its electric distribution utilities, to enter into 20-year pricing contracts, so-called "contracts for differences," with a generator. By contrast, the Ohio Commission has not compelled, in this or in any case, any utility to enter into such a contract with any generator.

The Supreme Court defined the problem with the Maryland program as guaranteeing a generator a certain rate for capacity sales to PJM regardless of the clearing price. *Id*. at 1298-1299. It forced local electric distribution companies to enter into a so called "contract for difference" with a generator. It required that generator to sell its

energy and capacity into the PJM market. And it commanded the generator and distribution companies to make payments to each other, depending on the difference between the price set in the contract for difference and the price obtained in the PJM market. By these actions, the State of Maryland dictated a wholesale rate – the amount of compensation that the generator receives from selling its power into the PJM markets. *Id.* at 1297.

OCC's argument that the purchase power agreements that Duke Ohio sought to recover are "[l]ike the *Talen* 'contract for differences' that the United States Supreme Court held was preempted by the FPA" (OCC Brief at 27) is completely erroneous. The obvious reason is that the Commission did not approve the recovery of any costs of any agreements. Moreover, OCC can point to no evidence that Duke Ohio was seeking to recover the costs of any contract that the state compelled it to enter into. No such evidence exists because the Commission did not order this. *Talen* simply does not apply.

In a typical power purchase agreement, the parties are private actors who enter into the agreement voluntarily. The Ohio Commission does not decide who will be the seller, nor does it force anyone to be the buyer. The parties choose each other; they are not chosen by the State. Similarly, the parties to the typical power purchase agreement establish their own terms, including the price. The seller receives that price regardless of what the buyer (e.g., Duke Ohio) ultimately does with the power it purchases. Private power purchase agreements are voluntary agreements, while the "contract for differences" in *Talen* was not. That distinction matters, because only state action is subject to preemption.

The *Talen* decision was limited to those impermissible state-dictated contracts for differences. In fact, the decision expressly noted that other types of state action might be permissible. Specifically, the Court said:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or reregulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation."

Talen, 1299. Moreover, the *Talen* court found that "States may regulate within their assigned domain even when their laws incidentally affect areas within FERC's domain." *Talen*, paragraph five of the syllabus.

Notably, the court said that "[o]ur opinion does not call into question whether generators and LSEs may enter into long-term financial hedging contracts based on the auction clearing price. Such contracts, also frequently termed contracts for differences, do not involve state action to the same degree as Maryland's program, which compels private actors (LSEs) to enter into contracts for differences – like it or not – with a generator that must sell its capacity to PJM through the auction." *Talen*, fn. 12.

The proposal advanced by Duke Ohio in this case is precisely the type of arrangement that the Talen court did not call into question. The PSR Rider mechanism was intended as a long-term financial hedging contract based on the auction-clearing

price, one that did not compel a load-serving entity such as Duke Ohio to enter into a contract, like it or not.

Federal courts have since recognized this important distinction. The U.S. Court of Appeals for the Second Circuit recently rejected challenges to Connecticut's renewable energy procurement process and renewable energy credit program. *Allco Fin. Ltd. v. Robert J. Klee*, 861 F.3d 82 (2nd Cir. 2017). In doing so, the Second Circuit became the first federal court to apply the Supreme Court's limited ruling in *Talen*.

Allco sought to overturn Connecticut's renewable program on preemption grounds. Under Connecticut's renewable energy procurement process, utilities were to enter into power purchase agreements for energy, capacity and environmental attributes. The utilities in *Allco* were to engage in an RFP process that did not obligate any utility to accept any bid. Winning bidders were to enter into separate contracts with utilities at the discretion of the utilities, which were explicitly responsible for negotiation and execution of any final power purchase agreement. *Allco* at 98. Unlike *Talen*, utilities were not compelled to enter into contracts.

The *Allco* court held that Connecticut's renewable energy solicitation process was a permissible exercise of state power to regulate utilities. Specifically, the court found that, even if Connecticut's actions had an "incidental effect on wholesale prices," such an effect does not constitute a regulation of the interstate wholesale electricity market infringing on FERC's jurisdiction, and was therefore not preempted by the FPA. *Allco* at 101. The Second Circuit distinguished *Talen*, finding that Connecticut's process did not "compel" utilities to enter into contracts in violation of the FPA.

In addition, while the Maryland program in *Talen* sought to override the terms established by the FERC-approved capacity auction and to require transfer of ownership of the generator's capacity through the auction process, the Connecticut program transferred ownership of electricity through a bilateral contract, independent of any FERC-regulated auction. *Allco* held that traditional bilateral contracts between utilities and generators that are subject to FERC review for justness and reasonableness are "precisely what the *Talen* court placed outside its limited holding." *Allco* at 99. That is precisely the situation before the Court in this appeal.

The U.S. Court of Appeals for the Seventh Circuit also similarly rejected preemption challenges to Illinois' "zero-emission credits" legislation where the state did not "compel" the utility by state action to dictate a wholesale rate. *Elec. Power Supply Assn. v. Star*, 904 F.3d 518 (7th Cir. 2018). In *Star,* Illinois enacted legislation subsidizing some of the state's nuclear generation facilities, which the state fears will close. *Id.* at 521. The nuclear generation facilities receive what the state calls "zero-emission credits". *Id.* Generators that use coal or gas to produce power must purchase these credits from the recipients at a price set by the state. *Id.* The Seventh Circuit, like the Second Circuit in the *Allco* case, distinguished *Talen* and recognized that where the utility is not "compelled" by state action to dictate a wholesale rate, the action is not preempted.

The Seventh Circuit explained that in order to receive a zero-emission credit, a firm must generate power, but how it sells that power is up to it. *Id.* at 523. It can sell the power in an interstate auction but need not do so. *Id.* It may choose instead to sell

power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences. *Id.* Furthermore, the owner of a zero-emission credit receives the market-clearing price, with none of the adjustments that Maryland law required in *Talen*.

The zero-emissions credit system can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close and by raising the costs that carbon-releasing producers incur to do business. But because 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. "So long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable." *Talen* at 1299. Again, Duke Ohio, here, is not compelled to enter into anything. There is no state action to dictate the wholesale rate in either the negotiation or the voluntary creation of a private power purchase agreement, and, therefore, no state action to be preempted by federal law.

In the cases relied upon by Appellant, where state action was found to be preempted, the state did compel LSEs to enter into purchase agreements, and on specified terms. Unlike the cases relied on by OCC, no contracts were created by state action here; no LSE is compelled to do anything. Duke Ohio's proposed PSR Rider was intended to recover costs associated with existing bilateral purchase power agreements, contracts that it voluntarily entered into. These agreements transfer ownership of the electricity and capacity from a generator to Duke Ohio pursuant to a contract approved by FERC.

Because FERC has the ability to approve the contracts, and Duke Ohio is not compelled to enter into any such agreement, the Company's proposal, as modified by the Commission, is not preempted by the FPA. As a voluntary contract for the sale of electricity at wholesale, the typical power purchase agreement is subject to FERC's regulation. Nothing in the Commission's order infringes on FERC's jurisdiction. OCC's preemption argument should be rejected.

Proposition of Law No. V:

The Commission treated the MRO v. ESP test properly.

In an ESP proceeding, the Commission must determine if the ESP is more favorable in the aggregate as compared to the market rate offer (MRO) under section 4928.142 of the Revised Code. R.C. 4928.143(C)(1), OCC App. at 281. The Commission determined that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, as modified by the Commission, is more favorable in the aggregate than the expected outcome under R.C. 4928.142. *ESP 3 Case* (Opinion and Order at 96-97) (Apr. 2, 2015), OCC App. at 104-105.

When considering whether an ESP is more favorable than an MRO, the Commission is not bound to a "strict price comparison" and "must consider more than price" in determining whether the ESP should be approved. *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218; *In re Columbus Southern Power Co.*, 128 Ohio St.3d 402,

2011-Ohio-958, 945 N.E.2d 501. The statute, however, "does not bind the commission to a strict price comparison." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 27. In evaluating the favorability of a plan, the statute instructs the commission to consider "pricing and all other terms and conditions." *Id.*, quoting R.C. 4928.143(C)(1). The Commission thoroughly evaluated all aspects of the pricing, terms and conditions of Duke Ohio's ESP in the case below. It is the Commission's responsibility to ensure that the ESP, as a total package, is considered, including both a quantitative and qualitative analysis. *ESP 3 Case* (Second Entry on Rehearing at 53) (Mar. 21, 2018), OCC App. at 164.

Under the approved ESP, the rates to be charged customers will be established through a fully auction-based process; therefore, it will be quantitatively equivalent to the results that would be obtained under R.C. 4928.142. The Commission did not attempt to quantify the impact of the Zero Placeholder Rider on the MRO/ESP analysis. This is perfectly reasonable, given that the rider had been set at zero, and that any future costs associated with it were unknown and subject to future proceedings. *ESP 3 Case* (Second Entry on Rehearing at 53) (Mar. 21, 2018), OCC App. at 164. Regarding the approved distribution-related riders, the Distribution Storm Rider and Distribution Capital Investment Rider, the revenue requirements associated with the recovery of incremental distribution investments should be considered to be the same whether recovered through the ESP or through a distribution rate case conducted in conjunction with an MRO. *ESP 3 Case* (Opinion and Order at 96) (Apr. 2, 2015), OCC App. at 204. The Distribution Capital Investment Rider specifically provides an economic and efficient process for

Duke to make investments in its distribution system; thus, improving the system's safety and reliability. Moreover, the Commission found the modification to the rate designs to better reflect what the competitive market provides for customers. *Id.* However, under an MRO, the generation rates charged to customers would be market rates and there would be no ability to phase-out the current rate design, which could result in substantial rate impacts for customers. *Id.* citing Staff Ex. 2 at 3-4, Supp. at 1. Therefore, the Commission found that, quantitatively, the modified ESP is better in the aggregate than an MRO.

The evidence also reflects qualitative benefits that make the ESP, as modified by the Commission, more favorable in the aggregate than the expected results under R.C. 4928.142, OCC App. at 277. The Commission noted that many of the provisions of the ESP advance the state policy enumerated in R.C. 4928.02 and allow a more rapid implementation of market-based rates consistent with R.C. 4928.02. R.C. 4928.02, OCC App. at 256. Additionally, the Commission's approval of the distribution-related riders should enable Duke Ohio to hold base distribution rates constant over the ESP period, while making significant investments in distribution infrastructure and improving service reliability.

Finally, the Commission noted that the ESP included $2 million of Duke shareholder funds be directed to economic development. Therefore, the Commission properly determined that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, as modified by the Commission, is more favorable in the aggregate as compared than the expected outcome

under R.C. 4928.142. *ESP 3 Case* (Opinion and Order at 97) (Apr. 2, 2015), OCC App. at 105.

Proposition of Law VI:

The exceptions to the mootness doctrine do not apply.

The Court should reject OCC's argument that exceptions to the mootness doctrine apply. OCC Brief at 31-37. OCC argues that this case is capable of repetition, yet evading review and also that this case is of great public or general interest. Neither of these exceptions to the mootness doctrine applies to this case.

The first exception – capable of repetition yet evading review – only applies in exceptional circumstances and when the "following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same actions again." *State ex. rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 729 N.E.2d 1182 (2000), citing *Spencer v. Kemma*, 523 U.S. 1, 17-18, 118 S.Ct. 978, 140 L. Ed.2d 43 (1998).

The time period in question must *always* be so short as to evade review. *Calvary*, 89 Ohio St. 3d 299, 729 N.E.2d 182. The question, then, is if there is another appeal of an electric security plan, is the time for judicial review always going to be short. The answer is no. Duke's latest ESP (currently pending, subject to rehearing, before the Commission) is set to run until May 31, 2025. That time period (more than six years) is

more than sufficient for appeal and judicial review. Thus, the first exception argued by OCC does not apply.

OCC also contends that the Court should decide the case, even if moot, because it presents an issue of great public or general interest. This is another recognized exception to the mootness doctrine. *Tschantz v. Ferguson,* 57 Ohio St. 3d 131, 133, 566 N.E.2d 655 (1991). OCC suggest that this case is of great importance because of the amount of money involved and the number of customers affected. These factors are present in the vast majority of utilities cases, however, and do not make this an extraordinary case. Under OCC's argument, virtually every appeal from the Commission would rise to the level of great public interests. The exception then would swallow the rule. OCC has not shown that this case meets either exception to the mootness doctrine. OCC's argument must be rejected.

OCC also argues that the Court should decide this even if it becomes moot because of the length of time it took for the Commission to issue a final, appealable order. This argument also must fail. The Court has recognized that while an unreasonable delay by the Commission may be grounds for a writ of mandamus, "there is no basis *** to invalidate a Public Utilities Commission's decision due to a delay in its issuance." *County Comm'rs Assoc. v. Pub. Util. Comm.,* 63 Ohio St. 2d 243, 248, 407 N.E.2d 534 (1980). While the Commission has a duty to hear and decide matters without *unreasonable* delay, the Commission also must act with due regard to the rights and interests of all litigants, taking into consideration the state of its docket and the volume of business pending before it. *State ex rel. Columbus Gas and Fuel Co. v. Pub. Util.*

Comm., 122 Ohio St. 473, 475, 172 N.E.2d 284 (1930). The Commission is invested with a wide latitude of discretion as to its order of business. *Id. See also Immke Circle Leasing v. Ohio BMV*, 2006-Ohio-4227 (10th Dist. 2006) ("courts have held long delays to be unlawful when the delay is completely unexplained").

In this case, the Commission's lengthy consideration may be readily explained. This was a contested case involving a lengthy hearing and the parties raised many complex issues. Following the Commission's initial decision, there were multiple rounds of rehearing requests, again raising numerous complex issues. The Commission acted with due regard for the rights of all parties and rendered its decision as expeditiously as possible. There was no unreasonable or unexplained delay on the part of the Commission.

CONCLUSION

Because this appeal has nothing to do with any actual charges or credits as the rider was set at zero, Appellant has failed to demonstrate prejudice or harm caused by the Commission's order and this appeal is only an inappropriate request for an advisory opinion regarding the legality of the rider. In its order, the Commission reasonably and lawfully found that Duke Ohio's Zero Placeholder Rider serves as a financial limitation on customer shopping for retail electric generation service under R.C. 4928.143(B)(2)(d). The Zero Placeholder Rider is not a transition charge; it is not preempted by federal law; and it follows state policy. The Commission also properly applied the MRO v. ESP test.

The Commission's decision was lawful, reasonable, and supported by evidence of record.

The Commission's decision should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served via electronic mail upon the following parties of record, this 21st day of December, 2018.

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APPENDIX

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4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only

a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from

customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Power produced by a small hydroelectric facility, which is a facility that operates, or is rated to operate, at an aggregate capacity of less than six megawatts;

(v) Power produced by a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts;

(vi) Geothermal energy;

(vii) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(viii) Biomass energy;

(ix) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(x) Biologically derived methane gas;

(xi) Heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas;

(xii) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, September 10, 2012, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource; or distributed generation system used by a customer to generate electricity from any such energy.

Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(c) The standards in divisions (A)(37)(b)(i) to (viii) of this section do not apply to a small hydroelectric facility under division (A)(37)(a)(iv) of this section.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion

turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

Amended by 132nd General Assembly File No. TBD, HB 49, §101.01, eff. 9/29/2017.

Amended by 130th General Assembly File No. TBD, SB 310, §1, eff. 9/12/2014.

Amended by 129th General AssemblyFile No.125, SB 315, §101.01, eff. 9/10/2012.

Amended by 128th General AssemblyFile No.47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General AssemblyFile No.48, SB 232, §1, eff. 6/17/2010.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

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