**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In The Matter Of The Application Of Duke Energy Ohio For The Establishment Of A Charge Pursuant To Revised Code Section 4909.18.In The Matter Of The Application Of Duke Energy Ohio For Approval To Change Accounting Methods.In The Matter Of The Application Of Duke Energy Ohio For The Approval Of A Tariff For A New Service. | :::::::::: | Case No. 12-2400-EL-UNC Case No. 12-2401-EL-AAMCase No. 12-2402-EL-ATA |

**COMMENTS**

**OF**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

**AND**

**THE OHIO ENERGY GROUP**

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**TABLE OF CONTENTS**

 **PAGE**

[I. Duke’s PROPOSED RATE INCREASE Should Be Rejected
Because The Commission Expressly Limited Its Holdings
In The AEP Ohio Capacity Case To AEP Ohio And THE COMMISSION SHOULD ENFORCE THE ESP STIPULATION WHERE Duke Agreed To Be Compensated At Market-Based RPM Capacity Rates plus an essc of $330 million. 2](#_Toc344902253)

[II. Duke’s Request To Increase Rates By $776 Million Should
Be Rejected Because Duke Failed To Present A Lawful
And Reasonable Basis For The PUCO To Set New Rates. 4](#_Toc344902254)

[III. Duke’s Allegation Of Low Financial Performance Is Not
A Basis For Increasing Its Capacity Charge. Duke’s Legacy Generation Assets Are Already Effectively Unregulated And Can Be Transferred To Its Affiliate At Any Time Since Both Commission And FERC Approval Have Been Granted.
In Addition, Duke Has Enjoyed A History Of High returns,
Is Currently Viewed Favorably By Rating Agencies, And Has A Distribution Rate Case Pending. 6](#_Toc344902255)

[A. Any Temporary Reduction In The Utility’s Generation Related Earnings Resulting From Retaining Its Legacy Generation Assets Is Self-Inflicted And Cannot Justify Requiring Retail Customers To Pay Anything More
to Duke and Especially Not An Additional $776 Million (Plus Interest). 9](#_Toc344902256)

[B. Any Generation-Related Earnings Decline is Temporary. 13](#_Toc344902257)

[C. Service Provided By The Auction Suppliers To SSO Customers Or Service Provided By CRES Providers To Shopping Load Will Not Be Impaired If The ESP Stipulation Is Upheld. 18](#_Toc344902258)

[IV. The Commission Should Reject Duke’s Request for the Reasons Set Forth in the Joint Motion to Dismiss and
Joint Reply. 19](#_Toc344902259)

[V. CONCLUSION 23](#_Toc344902260)

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**COMMENTS**

**OF**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

**AND**

**THE OHIO ENERGY GROUP**

The Office of the Ohio Consumers’ Counsel (“OCC”) and Ohio Energy Group (“OEG”) hereby submit Comments in this proceeding in order to protect the interests of customers who are now being asked to pay an additional $776 million plus interest—or $150-$200 more per year for residential consumers—for capacity services over the next three years.OCC is the state’s utility consumer advocate and is filing on behalf of all the approximately 611,000 residential electric customers of Duke Energy Ohio, Inc. (“Duke” or “Company”).OEG is a non-profit entity organized to represent the interests of large industrial customers in electric and gas regulatory proceedings before the Public Utilities Commission of Ohio (“Commission” or “PUCO”). OEG’s members who are participating in this proceeding are: AK Steel Corporation, Air Products & Chemicals, Inc., BP-Husky Refining, LLC, E.I. DuPont de Nemours & Co., Ford Motor Company, GE Aviation, General Motors LLC and Worthington Industries. These companies take electric service from Duke.

The PUCO invited comments on Duke’s application, by Entry dated October 3, 2012. OCC/OEG’s Comments are set forth below.

**COMMENTS**

# I. Duke’s PROPOSED RATE INCREASE Should Be Rejected Because The Commission Expressly Limited Its Holdings In The AEP Ohio Capacity Case To AEP Ohio And THE COMMISSION SHOULD ENFORCE THE ESP STIPULATION WHERE Duke Agreed To Be Compensated At Market-Based RPM Capacity Rates plus an essc of $330 million.

 Duke argues that the Commission should establish the proposed capacity charge to compensate it for its obligations as a PJM Fixed Resource Requirement (“FRR”) entity.[[1]](#footnote-2) As authority for its request, Duke cites the “newly adopted state compensation mechanism” -- referring to the mechanism adopted for Ohio Power in Case No. 10-2929-EL-UNC (“AEP Ohio Capacity Case”).[[2]](#footnote-3) But the AEP Ohio Capacity Case decision was not a generic PUCO decision that applies to all electric distribution utilities, including Duke. Instead, that case was initiated specifically in response to AEP Ohio’s application at the Federal Energy Regulatory Commission (“FERC”) requesting changes to *its* FRR capacity charges.[[3]](#footnote-4) And unlike AEP Ohio, Duke has already committed not to file such an application at the FERC prior to May 31, 2016.[[4]](#footnote-5)

 The Commission recently confirmed that its decision in the AEP Ohio Capacity Case applied only to AEP Ohio. Specifically, its Entry on Rehearing in the AEP Ohio Capacity Case the Commission held that it:

initiated this proceeding *solely to review AEP-Ohio’s capacity costs* and determine an appropriate capacity charge for *its FRR obligations. We have not considered the costs of any other capacity supplier subject to our jurisdiction nor do we find it appropriate to do so in this proceeding.[[5]](#footnote-6)*

 Hence, the Commission clarified that the AEP Ohio Capacity Case holding is limited to AEP Ohio. Accordingly, that case cannot serve as the basis for permitting Duke to obtain a rate increase of even one dollar more, much less the $776,000,000 (plus interest) that it is seeking from Ohio customers. This is especially true given that Duke chose to be compensated for its capacity obligations a year ago as part of its Electric Security Plan (“ESP”) Stipulation and Recommendation (“Stipulation”). There, Duke agreed to provide capacity for all load (both shopping and SSO) at market-based Reliability Pricing Model (“RPM”) rates, supplemented by a non-bypassable Electric Service Stability Charge (“ESSC”) of $330 million over three years.[[6]](#footnote-7)

 Duke, OCC, OEG and others agreed to the ESP Stipulation. And the Commission approved that Stipulation. The Commission should now enforce that Stipulation and deny Duke’s Application.

# II. Duke’s Request To Increase Rates By $776 Million Should Be Rejected Because Duke Failed To Present A Lawful And Reasonable Basis For The PUCO To Set New Rates.

Duke has asked the PUCO to establish, inter alia, a new rate for its capacity services based on the PUCO’s decision in AEP Ohio’s Capacity Case. Duke describes the application as being made under R.C. 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18. But those provisions of the code do not permit a utility to change rates. Regulated rates, apart from ESP rates, can only be changed in one of two ways –through the filing of a rate case under R.C. 4909.18, or through the filing of a complaint case under R.C. 4905.26. Duke though has not properly presented either approach to the PUCO.

Under R.C. 4909.18 (and Ohio Admin. Code 4901-7-01 (Appendix A) that amplifies the statute with standard filing requirements), a utility seeking to increase rates must file a written application that contains exhibits with information specified under subsections (A) through (E) of the statute. Additionally, the utility must provide public notice of its application. Duke has done neither. Because Duke has failed to comply with the requirements of R.C. 4909.18, the Commission cannot exercise jurisdiction under that statute to increase the capacity rates as Duke requests.

Additionally, Duke has not presented a basis under R.C. 4905.26, for the Commission to increase its capacity rates. Under R.C. 4905.26, a utility’s rates may be changed, but only if due process is followed. R.C. 4905.26 states in pertinent part:

Upon complaint in writing against any public utility by any person \* \* \*, or upon the initiative or complaint of the public utilities commission, that *any rate* \* \* \* is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, \* \* \* if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. \* \* \*[[7]](#footnote-8)

Thus, in order to effectuate a change in rates under R.C. 4905.26, the Commission must find that reasonable groundsfor complaint are stated. Only after such a finding can the Commission fix a time for hearing and prescribe public notification requirements.[[8]](#footnote-9) And the Supreme Court of Ohio has held that reasonable grounds for the complaint must be found: “R.C. 4905.26 requires that reasonable grounds for complaint be stated. \*\*\*This prerequisite should apply whether the Commission begins such a proceeding on its own initiative or on the complaint of another party.”[[9]](#footnote-10)

But Duke did not set forth reasonable grounds for a complaint. Instead, Duke filed an application to unilaterally improve on its 2011 settlement after seeing the outcome of the AEP Ohio Capacity proceeding. Duke has not shown that its capacity rate is “unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.”[[10]](#footnote-11)

The Ohio Supreme Court has found that “the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by the utility are unjust and unreasonable.”[[11]](#footnote-12) So, in order for the PUCO to exercise authority to change Duke’s capacity charge under R.C. 4905.26, there must be reasonable grounds stated by Duke that its capacity rate is unjust and unreasonable. Duke bears the burden of proving that its market based capacity rate (plus ESSC) is unjust and unreasonable. But Duke has not shown that the Commission-approved capacity rate it stipulated to less than one year ago is unjust and unreasonable.

Under current Ohio law, the justness and reasonableness of a competitive generation rate is not measured against traditional cost of service principles. On the contrary, except where a supplier possesses undue market power, the Commission now presumes that market based generation rates are per se just and reasonable.

And Duke has not set-forth reasonable grounds for a complaint. Instead, Duke cites to the AEP Ohio Capacity Case decision (a decision that is not applicable to Duke) as justification for its request for a rate increase of $776,000,000 (plus interest). Because Duke erroneously assumes that under current Ohio law and Commission policy a just and reasonable generation rate must be cost based, the Commission should not investigate this matter further.

# III. Duke’s Allegation Of Low Financial Performance Is Not A Basis For Increasing Its Capacity Charge. Duke’s Legacy Generation Assets Are Already Effectively Unregulated And Can Be Transferred To Its Affiliate At Any Time Since Both Commission And FERC Approval Have Been Granted. In Addition, Duke Has Enjoyed A History Of High returns, Is Currently Viewed Favorably By Rating Agencies, And Has A Distribution Rate Case Pending.

In its application, Duke alleges that “absent sufficient capacity compensation for rendering service as an FRR entity, Duke Energy Ohio will be operating at a significant loss, with an estimated average annualized ROE of negative 8.90 percent [on its generation investment], for the period August 1, 2012, through May 31, 2015.”[[12]](#footnote-13) Duke also claims that, on top of the ESSC charge, it requires at least $122 million on an annualized basis through May 31, 2015, to earn even 0 percent on its equity investment in the generating assets that may be transferred to its unregulated affiliate at any time.[[13]](#footnote-14)

But Duke’s claims in this regard are inconsistent with its agreement under the Stipulation approved by the PUCO in the ESP Order. In that Stipulation Duke agreed that during the term of the ESP the ESSC charge would provide it economic stability and, when combined with RPM pricing, would compensate it for its FRR commitment. In the ESP Order, the Commission highlights this fact when it cites to Duke witness Don Wathen’s testimony that Rider ESSC “is a means of providing economic stability and certainty during the term of the ESP, while recognizing the value of Duke's commitment of its capacity and the separation of the generation assets.”[[14]](#footnote-15)

 Even though Duke’s capacity charges are already settled, Duke now claims that its financial circumstances warrant a traditional cost-of-service capacity rate increase to SSO consumers served via auction pricing and to consumers served by CRES providers from now until May 31, 2015. The answer to that claim should be no. Both SSO and shopping customers will continue to receive reliable generation service as mandated by PJM requirements and Ohio law,[[15]](#footnote-16) even if the utility temporarily loses money on its generation investment.

 Since Duke has alleged financial challenges that supposedly warrant a traditional cost-of-service capacity rate increase, the Commission’s standard for resolving utility claims of financial emergency should be noted, under R.C. 4909.16:

In reviewing applications for emergency rate relief, the Commission has set out several standards by which it is guided in exercising the discretion conferred by the statute. First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, applicant’s evidence will be reviewed with the strictest scrutiny and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation. Next, emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency. The ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired. If the applicant utility fails to sustain its burden of proof on this issue, the Commission’s inquiry is at an end.[[16]](#footnote-17)

The Supreme Court of Ohio has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature.[[17]](#footnote-18)

 While Duke’s filing does not qualify as an application for an emergency rate increase, the Commission’s precedent in emergency cases highlights why Duke’s reliance on its alleged financial circumstances fails to warrant rate relief. As discussed below, any temporary reduction in generation earnings as a result of it retaining its legacy generation assets is self-inflicted since the regulated utility’s earnings problem can be cured by simply transferring the assets to its unregulated affiliate. While a generation transfer will not fix Duke’s corporate earnings problem, it will fix the earnings problem of the only entity which is regulated by this Commission. There is no legal or equitable basis to force captive Ohio consumers to bail out the shareholders of America’s largest electric utility holding company. Moreover, there is no reason to believe that service to SSO customers via the auction suppliers or service to shopping customers via CRES providers will be impaired in the slightest absent Commission action in this proceeding. Therefore, the Commission should reject Duke’s request in this proceeding since Duke’s financial circumstances do not warrant rate relief, either now or in the future.

## A. Any Temporary Reduction In The Utility’s Generation Related Earnings Resulting From Retaining Its Legacy Generation Assets Is Self-Inflicted And Cannot Justify Requiring Retail Customers To Pay Anything More to Duke and Especially Not An Additional $776 Million (Plus Interest).

This Commission approved Duke’s request to transfer its legacy generation assets when it approved the ESP Stipulation in November of 2011.[[18]](#footnote-19) On September 5, 2012, the FERC approved Duke’s request to transfer its legacy generation assets.[[19]](#footnote-20) Accordingly, Duke already has secured the approvals necessary to divest those generation assets to its unregulated affiliate, with the generating assets to transfer at book value. And Duke informed FERC that it intended to close the transfer of its legacy generation facilities to its unregulated affiliate on or after October 1, 2012.

Yet rather than immediately divesting those assets, the Duke Corporation chooses to retain them for now in its Ohio utility and allow any losses resulting from retaining those assets to impact the earnings of the utility. This imprudent decision cannot serve as the basis for a traditional cost-of-service generation rate increase.

In the meantime, Duke asks this Commission to force captive Ohio retail customers, both shoppers and non-shoppers alike, to pay an additional $776 million (plus interest) to it to compensate it for any earnings losses caused by it retaining its legacy generating assets.[[20]](#footnote-21) Hence, Duke’s request in this proceeding is not aimed at protecting the financial integrity of the regulated utility so that it can continue to provide reliable electric service to retail customers. Rather, Duke’s request is aimed at protecting the profitability of its unregulated affiliate.

The thrust of Duke’s claims is that it is entitled to massive additional compensation from consumers to bolster its generation earnings for the remainder of its ESP term. During this same time, it has voluntarily elected to retain ownership of those assets, rather than curing its earnings problem by transferring the generation assets to its unregulated affiliate. Duke has already secured approvals for the generation assets transfer from this Commission and the FERC.[[21]](#footnote-22) In fact, Duke asked FERC for expedited approval of its application so that it could close the transfer of Duke’s legacy generation facilities to its unregulated affiliate on or after October 1, 2012.[[22]](#footnote-23) Thus, it appears that the only reason that Duke did not transfer its generation assets on October 1, 2012 is that it continues to hold out hope that the Commission will “bail out” its generation assets by providing an additional $776 million (plus interest) for those assets. But if there is any temporary threat to the financial integrity of the regulated Ohio utility in this proceeding, it is of Duke’s own creation.

The policy of ensuring a utility’s financial integrity is generally meant to serve the public interest. The theory is that if a Commission takes steps to ensure that a utility’s financial integrity is maintained, the utility will be able to access capital required for long-term investments, particularly generation-related investments, at a reasonable cost, which benefits customers of the regulated utility in the long run. In other words, under the traditional regulatory compact there is a long term quid pro quo. Rates sufficient to maintain the financial integrity of a regulated utility supplying capital intensive monopoly service to the public are in exchange for a corresponding benefit to consumers. That corresponding benefit is lower utility borrowing costs and lower rates in the long run.

But there no longer is a traditional regulatory compact. Generation has been deregulated. And Duke offers no such quid pro quo here. Instead, Duke wants more money to maintain its financial integrity in the short term but offers consumers nothing in return.

Since Duke is already able to transfer its generating assets to its unregulated affiliate, there is no benefit to its retail customers that corresponds to Duke’s proposed $776 million (plus interest) capacity charge. Long-term generation investments are now in the purview of Duke’s unregulated affiliate, which will be the entity benefitted by those investments. Consequently, it is unreasonable to make retail customers pay substantial amounts of money to ensure that Duke’s unregulated affiliate has sufficient access to capital for long-term generation-related investments. And it is unlawful to do so under R.C. 4928.02(H), which prohibits subsidies between and among competitive and non-competitive retail electric service.

Moreover, under the Commission-approved ESP, Duke’s legacy generating units are already effectively unregulated. Thus, the cost-based ratemaking Duke seeks – under the guise of ensuring financial stability-- is no longer an option for Duke. The Stipulation requires Duke to acquire all of the capacity and energy necessary to serve its SSO obligation through the competitive bid process. Specifically, Section II.A of the Stipulation states:

Duke Energy Ohio agrees to procure all of its energy, capacity, market-based transmission service, and market-based transmission ancillary services requirements for its SSO load, for the duration of the ESP, through the CBP outlined in Duke Energy Ohio's Application in these proceedings and testimony filed in support thereof, except as modified in this Stipulation and the Attachments hereto. The auction schedule shall proceed consistent with Attachment A, hereto.

The Stipulation also provides that Duke will not participate in those SSO auctions.[[23]](#footnote-24) Hence, Duke’s legacy generating assets are already “unregulated” since they are no longer dedicated to providing SSO service.

 Should consumers pay a rate increase to cover the costs of power plants that are not serving them? No. Duke cannot now seek to unilaterally modify its ESP to recover the costs of its legacy generating assets as if they were re-regulated and dedicated to native load. They are not, and thus, regulatory mechanisms, such as a return to cost based ratemaking, are not an option for Duke.

 Duke’s proposed deferral and subsequent recovery of the costs of its legacy generating assets from retail customers constitutes impermissible cross-subsidization, which is precluded under R.C. 4928.02(H). The capacity charge Duke now requests will be applied to and retained for the benefit of Duke’s shareholders, regardless of whether the owner of the legacy generating units is Duke, an affiliate, or an unaffiliated third party.[[24]](#footnote-25) The proposed capacity charge, if granted, will increase the fair market value of the legacy generating assets because the additional revenue will follow the assets.[[25]](#footnote-26)

 Therefore, even if Duke does not immediately transfer its legacy generating assets to its affiliate, Duke’s should not be permitted to seek cost-based recovery of costs associated with those assets. Any temporary earnings decline resulting from retaining its legacy generation assets is of Duke’s own creation. Therefore, the Commission should reject Duke’s request in this proceeding.

## B. Any Generation-Related Earnings Decline is Temporary.

 Assuming arguendo that the Commission deems it necessary to review generation related earnings which have been deregulated under S.B.221 (and its predecessor), the Commission should reject the Company’s application for the reasons that follow.

 Since the Company’s legacy generation assets were deregulated for ratemaking purposes in 2001 pursuant to S.B. 3, Duke has earned returns on a total company basis that are much higher than what it could have expected to generate under traditional cost-based ratemaking. Through 2011, Duke has earned over $800 million more than if its legacy generating units had been regulated under traditional cost-based regulation.

 Duke’s request seeks compensation for a temporary shortfall in revenues and rate of return that it expects to experience over the term of its ESP. But Duke fails to recognize that what it seeks is the best of both worlds. In the time frame where its earnings were quite healthy, it did not seek authority from the PUCO to reduce rates. But now when its earnings are temporarily depressed it seeks authority to increase rates. And Duke has not provided the PUCO with authority to support its position. The PUCO should not condone such asymmetry.

 On a total company basis, Duke earned returns on equity in excess of a regulated rate of return for the years 2001 through 2011. The data and calculations are provided in Attachment A. In general, the earned returns were computed on a total Company basis (generation, transmission and distribution) using per-books amounts from the Company’s FERC Form 1 for each year, and then adjusted to remove the effects of the Company’s gas business; the merger-related costs, including those that were “pushed-down” on to Duke’s accounting books; the transfer to Duke of the Duke Energy North America (“DENA”) gas-fired generating assets that previously had not been included in Duke’s

regulated rates and are precluded from ratemaking recovery;[[26]](#footnote-27) and mark-to-market gains and losses. The following chart portrays the excess compared to the average of authorized returns for electric regulated utilities in each year:

The following chart portrays the $800 million total Company cumulative earnings in excess of a regulated rate of return for the years 2001 through 2011. The data and calculations for this chart are also provided in Attachment A.

Duke’s present claim that it will under-earn on the generating units from August 1, 2012 through May 31, 2015, should be given little weight. The Company earned excess returns on a total Company basis and even greater excess returns on a generation-only basis over the past ten years. The Commission is not obligated to provide Duke compensation at the greater of market or cost any more than Duke was obligated to reduce rates or limit its revenues in prior years.

Further, the decline in Duke’s profits resulting from low PJM capacity prices is only temporary, as capacity prices begin to rise again in the 2014/15 PJM delivery year.[[27]](#footnote-28) Cyclical declines in profitability are simply part of the competitive market, especially in the volatile commodity market for electricity.

Additionally, Duke’s capacity rates cannot collect retroactive costs. Ohio law prohibits retroactive ratemaking.[[28]](#footnote-29) The Commission recently acknowledged this principle in its July order in the AEP Capacity case[[29]](#footnote-30) as well as in its Order in AEP’s ESP.[[30]](#footnote-31) There it refused to allow the new capacity-pricing mechanism to take effect until after it had issued its order in August. Duke’s request to establish a cost based rate and permit deferrals from the “date of filing” of its application—August 29, 2012[[31]](#footnote-32)—amounts to a request for retroactive ratemaking. Duke is requesting that it be compensated for dollars lost during the pendency of this proceeding. This unlawful approach has been rejected by the Ohio Supreme Court at least twice—in *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997),[[32]](#footnote-33) and most recently in *In re: Application of Columbus Southern Power Co. et al*.[[33]](#footnote-34) Duke’s application in this regard must be rejected.

## C. Service Provided By The Auction Suppliers To SSO Customers Or Service Provided By CRES Providers To Shopping Load Will Not Be Impaired If The ESP Stipulation Is Upheld.

 Duke continues to be viewed favorably by rating agencies. Duke maintained high investment grade credit ratings from S&P, Moody’s & Fitch.[[34]](#footnote-35) The outlook from both Fitch and Moody’s were stable and Duke’s ratings are A (Fitch), A2 (Moody’s) and A (S&P).[[35]](#footnote-36) Duke also presently has $650 million in credit available through the Duke Energy Corp. master credit facility. In addition, the Company has issued no debt and plans to issue no debt this year. Thus, there is no threat to Duke’s financial integrity that would justify collecting from retail customers any or all of Duke’s proposed additional $776 million charge.

 The reliability of Duke’s retail electric service will not be enhanced as a result of forcing customers to pay a substantial new charge to offset claimed earnings losses associated with Duke’s legacy generation assets. Since January 1, 2012, SSO customers have been supplied via a competitive bid auction in which Duke’s legacy generation assets cannot participate. Well before the competitive bid auctions there has been a vibrant competitive generation market in Duke’s service territory. PJM, which compensates Duke for its capacity obligations, will assist in ensuring reliability within the RTO region. This will continue to be true whether the utility’s legacy generation assets earn excessive returns as was the case from 2001-2011, or negative returns as forecasted by Duke. Paying Duke an additional $776 million will provide absolutely no service enhancement or other benefit to consumers. Duke wants more money from customers, but offers them nothing in return.

And if the reliability of Duke’s regulated service -- distribution service -- is at issue, Duke currently has a distribution rate case pending in which it can seek funds necessary to support the reliability of that service.[[36]](#footnote-37) And, the Company’s pending application to increase its distribution rates, if granted in full or in part, will increase its earned return on equity on a total Company basis, all else equal.

# IV. The Commission Should Reject Duke’s Request for the Reasons Set Forth in the Joint Motion to Dismiss and Joint Reply.

OCC and OEG, along with a number of other parties to this proceeding, filed a Joint Motion to Dismiss on October 4, 2012 and a Reply to Duke’s Memorandum Contra the Motion to Dismiss on October 26, 2012. Those pleadings explained that the Duke ESP Stipulation explicitly established that Duke’s capacity charges, at both the wholesale and retail level, would be based upon PJM RPM-based capacity prices. The Stipulation also supplemented Duke’s ESP revenues by allowing for the establishment of a non-bypassable and so-called stability charge (the Electric Service Stability Charge) allowing Duke to recover $330 million over three years in order to protect its financial integrity.

Because the Stipulation conclusively resolved the issue of Duke’s capacity charges, Duke’s current request to establish a new charge for its capacity is barred and should be dismissed, as explained in the Joint Motion and Reply. To briefly summarize the arguments set forth in those pleadings:

* The Stipulation not only establishes that wholesale suppliers will pay PJM RPM-based capacity prices under sections I.B., II.B, and IV.A,[[37]](#footnote-38) ***but it******also explicitly links retail SSO rates to those wholesale capacity prices***. Specifically, Section II.C of the Stipulation permits Duke to implement Rider RC (Retail Capacity) and Rider RE (Retail Energy) to recover the costs of serving SSO load. These riders were designed so that the revenues collected would equal the auction clearing prices, as converted into

retail rates.[[38]](#footnote-39) Rider RC covers the capacity portion of the auction price. Attachment B to the Stipulation makes clear that the capacity portion of that auction price recovered through Rider RC is based upon PJM RPM prices, not Duke’s embedded cost of capacity.[[39]](#footnote-40)

* The testimony of Duke witnesses Wathen and Jansen in support of the ESP Stipulation reflects that capacity charges to Duke’s SSO customers would be market-based, not cost-

based.[[40]](#footnote-41) That testimony also indicates that Duke will

receive just and reasonable compensation for its PJM FRR obligations as a result of the Stipulation and the approval to recover $330 million through the non-bypassable ESSC.[[41]](#footnote-42)

* When it approved the Stipulation, the Commission recognized that it was establishing market-based capacity charges for retail SSO Customers through Rider RC and providing Duke sufficient compensation for its retail services.[[42]](#footnote-43)
* The Commission-approved tariff sheet for Rider RC provides that retail SSO capacity rates will be calculated based upon the wholesale FZCP, a PJM RPM-based capacity price, for the duration of the ESP.[[43]](#footnote-44) This tariff has been effective since January 1, 2012, collecting rates and charges from Duke’s SSO customers accordingly.
* Duke failed to file a timely application for rehearing of the Commission’s Order approving the Stipulation pursuant to R.C. 4903.10 or an appeal of that Order. Yet Duke now asks the Commission to rehear one specific provision of the Stipulation—the pricing of capacity service to retail consumers. Duke’s request is an untimely application for rehearing and therefore, must be rejected.
* Duke’s request is precluded under the doctrines of res judicata and collateral estoppel. Duke was afforded one fair opportunity to litigate how its capacity should be priced when it filed its ESP application. In fact, the very same legal authority that it relies on here—Section 8.1 of the PJM RAA—was part of the legal authority Duke relied on to initially seek a cost-based rate for capacity as part of its ESP application. Duke should not get a second bite at the regulatory process by seeking the “higher of” the result reached in its two Stipulations or the litigated result in the AEP Ohio Capacity Case.
* Duke’s request would require customers to pay an additional $776 million (plus interest). With the revenues now requested by Duke, the average residential customer will have to pay an additional $150-$200 per year for three years, depending on the allocation methodology.[[44]](#footnote-45) The increase to business customers of southwestern Ohio would be approximately $500 million collectively over the three-year term. Hence, approving Duke’s modifications to its ESP would impede or hinder the Commission’s ability under R.C. 4928.02(A) to ensure reasonably priced electric service is made available to all consumers in this State.
* The Commission should respect the precedential value of all its decisions, including its decision to adopt the Stipulation. Doing so would provide regulatory certainty, which benefits not only customers, but investors and shareholders as well. It is essential that the Commission respect its previous decisions and not depart from them without a clear need.

For the reasons set forth in the pending Joint Motion to Dismiss, the Commission should enforce the Stipulation by either dismissing or denying Duke’s request in this proceeding.

# V. CONCLUSION

For the reasons discussed above, the Commission should enforce Ohio law and the ESP Stipulation by dismissing or denying Duke’s request for a rate increase in this proceeding. Otherwise, customers will be forced to pay up to $776 million to Duke, equating to an additional $150-$200 per year for three years for residential consumers. Such a result is unjust and unreasonable under law and rule for utility rate increases. Such a result is inconsistent with the policy of the State to ensure reasonably priced retail electric service is made available to consumers in Ohio. And such a result violates the Stipulation that Duke, OCC, OEG, and others signed in Duke’s electric security plan proceeding.

Respectfully submitted,

BRUCE J. WESTON

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission this 2nd day of January 2013.

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1. Application at 6. [↑](#footnote-ref-2)
2. Application at 5. [↑](#footnote-ref-3)
3. See *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at ¶5 (Dec. 8, 2010). [↑](#footnote-ref-4)
4. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs*, Case No. 11-2641, et al., Stipulation and Recommendation at ¶20 (Apr. 26, 2012). [↑](#footnote-ref-5)
5. Entry on Rehearing at ¶77 at 32 (emphasis added). See also id. at 58 (“This proceeding was initiated by the Commission for the purpose of reviewing AEP Ohio’s capacity charge for its FRR obligations.”) [↑](#footnote-ref-6)
6. *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., (“Duke ESP”), Stipulation and Recommendation (Oct. 24, 2011), approved, Opinion and Order (Nov. 22, 2011). [↑](#footnote-ref-7)
7. Note that in the Commission’s October 17, 2012 Entry on Rehearing in the AEP Ohio Capacity Case, the Commission cited to R.C. 4905.26 as authority for its actions. (See Case No. 10-2929-EL-UNC at ¶125). [↑](#footnote-ref-8)
8. 1989 Ohio PUC LEXIS 104 (Ohio PUC 1989) at \*15. [↑](#footnote-ref-9)
9. *Ohio Utilities Co. v. Pub. Util. Comm.,* 58 Ohio St. 2d 154 (1979). [↑](#footnote-ref-10)
10. See R.C. 4905.26. [↑](#footnote-ref-11)
11. *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350. [↑](#footnote-ref-12)
12. Application at 8-9. [↑](#footnote-ref-13)
13. Application at 9. [↑](#footnote-ref-14)
14. Duke ESP proceeding, Opinion and Order at 17 (Nov. 22, 2011). Further note that the ESP Order states: “[f]or calendar years 2012, 2013, and 2014, of the ESP, Duke shall recover annually, via an unavoidable generation charge. Rider ESSC, an amount intended to provide stability and certainty regarding Duke's provision of retail electric service as an FRR entity while continuing to operate under an ESP 2.” See ESP Order at 21. [↑](#footnote-ref-15)
15. See R.C. 4928.02; 4928.11. [↑](#footnote-ref-16)
16. *In re Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (Aug. 23, 1988). [↑](#footnote-ref-17)
17. *In re Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (Aug. 23, 1988)(citing *Cincinnati v. Pub. Util. Comm’n*, 149 Ohio St. 570 (1948)).

. [↑](#footnote-ref-18)
18. Stipulation at 25. [↑](#footnote-ref-19)
19. Order Authorizing Disposition of Jurisdictional Facilities, 140 FERC ¶ 61180 (2012). [↑](#footnote-ref-20)
20. *See* Application at 9. [↑](#footnote-ref-21)
21. Stipulation at 25; Order Authorizing Disposition of Jurisdictional Facilities, 140 FERC ¶ 61180 (2012). [↑](#footnote-ref-22)
22. Duke Application, FERC Docket No. EC12-90 (April 2, 2012) at 4-5. Duke reiterated it intends to close the proposed transfer on or after October 1, 2012 in its June 22, 2012 Amendment to its Application at the FERC. Amendment at 10. [↑](#footnote-ref-23)
23. Stipulation at 9. [↑](#footnote-ref-24)
24. See Application at ¶18. [↑](#footnote-ref-25)
25. Application at ¶18. [↑](#footnote-ref-26)
26. See *In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER, et al., Opinion and Order at 15 (Dec. 121, 2005); Entry on Rehearing at 8 (Feb. 6, 2006) (where Commission ruled that costs associated with the transfer of DENA assets will not be passed onto Ohio customers without the PUCO approval, which to date has not occurred). The DENA equity investment has been removed from common equity in these calculations; however, the related income or losses have not been removed due to the unavailability of this data without discovery. The DENA assets appear to have related losses, at least through 2009, based on the information available in the Company’s FERC Form 1. If the DENA losses are removed from the income in the numerator used to compute the earned return on a total Company basis, then the earned returns and cumulative excess earnings would be even greater than those shown on the following charts. [↑](#footnote-ref-27)
27. 2014/2015 RPM Base Residual Auction Results, PJM, *available at* http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2014-2015-rpm-bra-results-report-addendum.ashx. [↑](#footnote-ref-28)
28. See, e.g., *In re: Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011 –Ohio-4276, ¶¶ 8-14. [↑](#footnote-ref-29)
29. See *In the Matter of the Commission review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 24 (July 2, 2012) [↑](#footnote-ref-30)
30. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 51. [↑](#footnote-ref-31)
31. 32 See *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company,* Case No. 10-2929-EL-UNC, Opinion and Order at 24 (July 2, 2012). [↑](#footnote-ref-32)
32. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 51. [↑](#footnote-ref-33)
33. *In re: Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011–Ohio-4276, ¶¶ 8-14. [↑](#footnote-ref-34)
34. Duke Third Quarter 2012 Earnings Review and Business Update (November 8, 2012) at 42. [↑](#footnote-ref-35)
35. Id. [↑](#footnote-ref-36)
36. *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR. [↑](#footnote-ref-37)
37. Stipulation at 6-7 and 12. [↑](#footnote-ref-38)
38. Stipulation at 7-8. (“Duke Energy Ohio will implement Rider RC (Retail Capacity) and Rider RE (Retail Energy) to recover the costs associated with servicing its SSO load, with the aggregate sum of the revenues under said riders equal to the auction clearing prices, as converted into retail rates. Rider RC shall recover the cost of capacity consistent with paragraph B above\*\*\*Rider RC and Rider RE are unconditionally bypassable by all non-SSO customers. Rider RC and Rider RE will be put into effect through updated rates for each of the PJM planning years for which all tranches for the delivery period have been approved by the Commission”). [↑](#footnote-ref-39)
39. Stipulation, Attachment B, Ex. 1B at 2. A review of this attachment shows that the underlying capacity price for calculating Rider RC is based upon PJM’s Final Zone Capacity Price. Thus, the Stipulation explicitly provides for Duke’s retail SSO capacity to be priced based upon RPM prices, not Duke’s embedded costs. [↑](#footnote-ref-40)
40. Duke ESP, Supplemental Testimony of William Don Wathen Jr. (Oct. 28, 2011) at 8:19-21 (“Rider RC is the mechanism to establish the capacity component of Duke Energy Ohio’s ESP. As described above, ***the total cost of capacity included in the SSO supply procured in the CBP auction is a product of the FZCP....*”)** (emphasis added); *See also* Id. at 10:9-21 (“As originally proposed and as described in my Direct Testimony, the Rider RC was to be predicated upon a formula rate for developing the fixed costs, including a reasonable rate of return, associated with the Company’s Legacy Generating Assets that, under the Company’s proposal, would have been effectively dedicated to Ohio customers. Essentially, Rider RC would have been a ‘cost based’ charge for the capacity needed to serve all customers…***rather than customers paying for capacity at Duke Energy Ohio’s embedded cost of service for the nine-year and five-month period proposed in the Application, they will now be paying market-based prices for capacity in perpetuity.”)*** (Emphasis added); *See also* Id. at 13:5-11 (“During the settlement discussions of this case, the Parties made it clear that a market price for the SSO service was preferred. This necessitated a change to the Company’s proposed Rider RC. ***The change to Rider RC in the ESP means that customers will pay a market price for capacity at the FZCP for the FRR duration and will pay a market price for capacity established by competitive auction following that term.* *In either case, the price for capacity will be without reference to Duke Energy Ohio’s cost of service***.”)(Emphasis added). [↑](#footnote-ref-41)
41. Duke ESP, Supplemental Testimony of Witness Jansen (Oct. 28, 2011) at 4:20-5:6 (“In the Stipulation and Recommendation, the parties recognized Duke Energy Ohio’s obligations as an FRR entity and, for the term of the ESP, Duke Energy Ohio will supply capacity resources to PJM, which, in turn, will charge wholesale suppliers for capacity. But the charge applicable to these wholesale suppliers will not reflect Duke Energy Ohio’s costs of service as defined above. Rather, the charge will be predicated upon PJM’s capacity market pricing structure. ***To clarify, Duke Energy Ohio bears the obligation to provide the capacity resources necessary to serve all customers in our footprint for the term of the ESP and the Company will be compensated for capacity resources based upon competitive PJM prices***.”) (Emphasis added); Supplemental Testimony of Witness Wathen at 18:9-19:4 (“***From the Company’s perspective, the need for Rider ESSC is simple. Duke Energy Ohio is required to supply capacity for the Company’s entire footprint until at least the 2015/2016 PJM planning year.*** And Duke Energy Ohio will satisfy this obligation, in part with its Legacy Generation Assets…Although the ESP contained in this Stipulation will result in a full competitive bid for Duke Energy Ohio’s SSO price, and Duke Energy Ohio is committing to transfer its generating assets to an affiliate or subsidiary, that transfer will take time and the Company must continue to meet its PJM capacity obligation. Moreover, as part of the negotiation in the settlement of this ESP, the Company has agreed not to participate in auctions for its own SSO load with the Legacy Generating Assets as a resource. Accordingly, the Company has agreed that its Legacy Generation Assets will only participate in the wholesale PJM day-ahead and real-time energy markets for the first three calendar years of the ESP. ***Rider ESSC is a means of providing economic stability and certainty during the term of the ESP, while recognizing the value of Duke Energy Ohio’s commitment of its capacity and its commitment to legally separate its Legacy Generation Assets so that an unfettered and fully competitive market will exist in its service territory.”***)(Emphasis added). [↑](#footnote-ref-42)
42. Duke ESP, Opinion and Order (Nov. 22, 2011) at 11-12 and 47. [↑](#footnote-ref-43)
43. See Duke Tariff Sheet No. 111. [↑](#footnote-ref-44)
44. $258,747,429/20,500,000 MWh retail sales = $12.6/MWh. Average residential sales 1,000 kwh/month. Average residential increase based on energy allocation of $12.6, or $151.2 per year. [↑](#footnote-ref-45)