

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Revised Code Section 4909.18.	:	Case No. 12-2400-EL-UNC
	:	
	:	
	:	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Certain Accounting Methods.	:	Case No. 12-2401-EL-AAM
	:	
	:	
In the Matter of the Application of Duke Energy Ohio, Inc., for the Approval of a Tariff for New Service.	:	Case No. 12-2402-EL-ATA
	:	
	:	
	:	

**INITIAL COMMENTS
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Michael DeWine
Ohio Attorney General

William L. Wright
Section Chief

Steven L. Beeler
John H. Jones
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Fl.
Columbus, OH 43215
614.466.4395 (telephone)
614.644.8764 (fax)
steven.beeler@puc.state.oh.us
john.jones@puc.state.oh.us

Date Submitted: January 2, 2013

TABLE OF CONTENTS

Page

I.	INTRODUCTION	2
II.	BACKGROUND AND RELATED CASES	3
A.	Duke's Current Application	3
B.	Duke's 2011 ESP Stipulation	4
C.	Duke's 2011 Transmission Case Stipulation	6
D.	AEP's Capacity and ESP Cases	7
E.	Summary	9
II.	ARGUMENT	9
A.	Duke's Application ignores to the ESP Stipulation by asking the Commission to ignore the capacity pricing terms of the Stipulation in favor of a cost-based capacity charge.....	9
1.	Settlement Process Integrity	9
2.	Public Policy	11
B.	Duke failed to timely apply for rehearing of the Commission order approving the Stipulation and failed to timely file an appeal.....	13
C.	The doctrines of <i>res judicata</i> and collateral estoppel preclude Duke from re-litigating the ESP where it agreed to RPM- based capacity pricing for CRES suppliers.	14
III.	CONCLUSION	18
	CERTIFICATE OF SERVICE	19

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke :
Energy Ohio, Inc., for the Establishment : Case No. 12-2400-EL-UNC
of a Charge Pursuant to Revised Code :
Section 4909.18. :

In the Matter of the Application of Duke :
Energy Ohio, Inc., for Approval to : Case No. 12-2401-EL-AAM
Change Certain Accounting Methods. :

In the Matter of the Application of Duke :
Energy Ohio, Inc., for the Approval of a :
Tariff for New Service. : Case No. 12-2402-EL-ATA
: :
:

**INITIAL COMMENTS
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

I. INTRODUCTION

In October 2011, Duke Energy Ohio Inc. (“Duke”) and 30 parties, including Staff and members of each customer class, signed a Stipulation resolving Duke’s electric security plan case (“ESP”).¹ The stipulated ESP established the rates for residential, commercial, and industrial customers in Duke’s service area to be paid over a three year period ending in May 2015. As part of the ESP Stipulation terms, the parties agreed that

¹ *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 Nos. 11-3549-EL-SSO, et al., (Stipulation and Recommendation) (Oct. 24, 2011) (“Duke ESP Proceeding”).*

Duke was permitted to collect \$330 million from customers for its Electric Stability Service Charge (“ESSC”) settling the issue of Duke’s capacity revenues.

In August 2012, however, Duke filed an application in this case seeking to modify the ESP Stipulation by charging an additional \$776 million in capacity revenues from its retail customers. Duke’s new proposal ignores prior settlement agreements, defies state policies supporting settlements, and undermines the finality of the Public Utilities Commission of Ohio’s (“Commission’s”) orders. Duke’s application should be denied.

II. BACKGROUND AND RELATED CASES

A. Duke’s Current Application

Duke’s current Application asks to collect from customers an additional \$776 million of capacity revenues. Duke seeks a Commission Order that: (1) establishes a cost-based charge for its capacity; (2) authorizes a deferral for the difference between the revenues currently being charged and its cost of capacity; and (3) approves a new placeholder tariff to allow future recovery of the deferred amounts.²

Duke states that it will request approval to begin collecting the deferred amounts, plus carrying charges, in a subsequent proceeding, with the application being filed no later than March 1, 2013.³ Duke asks that its Application should be approved without a hearing.⁴

2 Application at ¶2.

3 *Id.* at ¶17.

4 *Id.* at ¶12.

B. Duke's 2011 ESP Stipulation

In June 2011, Duke filed an application for authority to establish a standard service offer (“SSO”) in the form of an electric security plan (“ESP”).⁵ In that ESP Application, Duke proposed to collect its costs of providing capacity to all customers in its territory, plus a reasonable rate of return, on a non-bypassable basis.⁶ Duke proposed that the cost of its capacity would be based on its election to provide capacity in PJM as a cost-based Fixed Resource Requirement (“FRR”) entity who self-supplies all of its capacity, as opposed to the market-based Reliability Pricing Model (“RPM”) auction rate for capacity provided to CRES providers to serve its shopping load.

In its ESP Application, Duke relied upon the PJM Reliability Assurance Agreement (“RAA”) as legal authority for the Commission to establish a cost-based rate as the state compensation mechanism.⁷ Duke witness Trent explained in his testimony that Duke’s proposal for a cost-based capacity charge was authorized by the PJM RAA.⁸

Lengthy settlement negotiations significantly modified Duke’s original ESP proposal, including its plan to charge Competitive Retail Electric Service (“CRES”) providers for capacity needed to serve shopping customers. The Stipulation was supported by

⁵ *Duke ESP Proceeding* (Application) (June 20, 2011).

⁶ *Id.* at 26; Volume 1 at 10.

⁷ *Id.* at 25-26.

⁸ *Duke ESP Proceeding* (Direct Testimony of Keith Trent at 5-6) (June 20, 2011).

Duke and 30 of the 34 parties in the proceeding.⁹ A major ESP settlement term, as it relates to this current proceeding, established the wholesale capacity charge for Duke to charge CRES providers. Instead of the cost-based capacity charge that had been proposed in Duke's ESP Application, the Stipulation expressly adopted capacity priced at RPM prices.¹⁰ Duke Witness Janson, in her testimony in support of the Stipulation, confirmed that Duke agreed to be compensated for capacity based on RPM prices.¹¹ The Stipulation language and Duke Testimony establish that Duke agreed to provide capacity for its FRR obligation based on the PJM reliability pricing model.

To balance low RPM pricing, the Signatory Parties agreed to pay Duke \$110 million per year for three years to provide stability and certainty regarding Duke's provision of retail electric service as an FRR entity while continuing to operate under an ESP. The Stipulation created a non-bypassable Electric Service Stability Charge Rider ("ESSC") to collect this \$330 million. Duke testified that the ESSC was intended to protect the Company's financial integrity and ensure that the overall revenues under the ESP are adequate to compensate Duke for providing its SSO.¹² In other words, Duke gave up its right to collect wholesale capacity revenues from CRES providers for shopping load based on its

⁹ AEP Ohio and Dominion Retail, Inc. took no position with regard to the Stipulation. Eagle Energy LLC also did not sign the Stipulation.

¹⁰ *Duke ESP Proceeding* (Direct Testimony of Keith Trent at 6-7) (June 20, 2011).

¹¹ *Duke ESP Proceeding* (Supplemental Testimony of Witness Janson at 4-5) (Oct. 28, 2011).

¹² *Id.* at 14.

embedded costs of capacity in exchange for RPM capacity revenues plus the \$330 million ESSC.

The Commission adopted the Duke Stipulation with minor revisions and found that the stipulated ESP was more favorable in the aggregate than an MRO.¹³ Duke did not file an application for rehearing. The Commission has already approved an SSO auction schedule and issued orders accepting the results of three SSO auctions—December 2011, May 2012, and November 2012.¹⁴ Duke cannot now modify the capacity pricing mechanism in the Stipulation.

C. Duke’s 2011 Transmission Case Stipulation

In April 2011, Duke filed an application at the Commission seeking approval to establish a base transmission rider and a regional transmission organization rider. In this case, Duke sought approval to transfer from the Midwest Independent System Operator (“MISO”) to PJM. The Signatory Parties in that case—Duke, Staff, OCC, and OEG—filed a Stipulation where Duke agreed not to seek FERC approval of a wholesale capacity charge based upon its costs as a FRR entity for the period between January 1, 2012 and May 31, 2016.¹⁵ The Commission approved the Stipulation.¹⁶ Like the ESP Stipulation, Duke cannot modify this approved Stipulation either.

¹³ *Duke ESP Proceeding* (Opinion and Order at 47-48) (Nov. 22, 2011).

¹⁴ See, *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC.

¹⁵ *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 Nos. 11-2641, et al. (Stipulation at ¶20) (Apr. 26, 2012).

D. AEP's Capacity and ESP Cases

Duke was well aware of the capacity pricing issue. In November 2010, American Electric Power Service Corporation (“AEPSC”) filed an application at the FERC seeking to establish a rate that would compensate AEP Ohio for its cost of providing CRES providers capacity to serve retail customers in AEP Ohio’s service territory.¹⁷ In that case, AEPSC sought an increase from the RAA’s default RPM based pricing to cost-based pricing, using AEP Ohio’s fully embedded cost of capacity. Duke intervened in that case.¹⁸

In December 2010, the Commission opened up an investigation to review the impact of AEP Ohio’s capacity charges.¹⁹ Duke Energy Retail Sales, L.L.C., filed a motion to intervene in that case before the Commission.²⁰

In January 2011, the FERC rejected AEPSC’s rate application,²¹ AEPSC sought rehearing,²² and in April 2011, AEPSC filed a Section 206 Complaint with the FERC to

¹⁶ *Id.* (Opinion and Order at 14-16) (May 25, 2011).

¹⁷ *American Electric Power Service Corporation*, Docket No. ER11-2183, (Application) (Nov. 24, 2010).

¹⁸ *Id.*, Duke Motion to Intervene (Dec. 10, 2010).

¹⁹ *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 (Dec. 8, 2010).

²⁰ *Id.*, Duke Motion to Intervene (Jan. 11, 2011).

²¹ *American Electric Power Service Corporation*, Docket No. ER11-2183, Order Rejecting Formula Rate Proposal, 134 FERC ¶61,039 (2011).

²² *Id.*, Request for Rehearing of AEPSC (Feb. 22, 2011).

clarify the circumstances under which AEPSC may request a cost-based capacity rate from FERC that would be charged to CRES providers in its service territory.²³ Duke Energy Corporation intervened in the complaint dockets, which currently remain pending at the FERC.

In July 2012, the Commission issued an Order in AEP Ohio's Capacity Charge case.²⁴ The Commission determined that AEP Ohio's embedded cost of capacity is \$188.88/MW-day;²⁵ AEP Ohio will provide capacity to CRES providers at RPM;²⁶ and AEP Ohio may defer the difference between \$188.88/MW-day and the RPM-based cost of capacity for subsequent collection.²⁷ In August 2012, the Commission issued its decision in AEP Ohio's electric security plan proceeding approving a Retail Stability Rider that will generate approximately \$508 million over three years for AEP Ohio.²⁸

²³ *American Electric Power Service Corporation v. PJM Interconnection*, Docket No. EL-32 (Complaint) (Apr. 4, 2011).

²⁴ *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) (July 2, 2012).

²⁵ *Id.* at 35.

²⁶ *Id.* at 23.

²⁷ *Id.* at 23-24.

²⁸ *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 Nos. 11-346-EL-SSO, et al. (Opinion and Order at 36) (Aug. 8, 2012).

E. Summary

Rather than pursuing a claim for cost-based pricing for capacity as the state compensation mechanism, Duke settled its ESP case agreeing to RPM pricing plus the \$330 million ESSC rider and settled its MISO/PJM transfer case agreeing not to seek FERC approval of cost-based pricing for its FRR obligations under the PJM RAA.²⁹ Yet Duke now wants AEP Ohio's deal. Unlike AEP Ohio who continued to take the risk of litigation, Duke opted for regulatory certainty in settling the two proceedings. Those two stipulations were reached well after AEP Ohio filed proceedings at the state and federal levels regarding the exact same issues. Through those Stipulations Duke chose to resolve the wholesale capacity pricing issue by accepting RPM priced capacity plus the \$330 million ESSC, foregoing any challenges to the wholesale capacity pricing at the state and federal level. Duke's current application is improper should be denied.

II. ARGUMENT

A. Duke's Application ignores to the ESP Stipulation by asking the Commission to ignore the capacity pricing terms of the Stipulation in favor of a cost-based capacity charge.

1. Settlement Process Integrity

The Commission should enforce the terms of the Duke ESP Stipulation that priced capacity at RPM and provided Duke with an ESSC Rider worth \$330 Million. Duke is ignoring a term of the ESP Stipulation by asking the Commission to ignore the capacity

²⁹

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 Nos. 11-2641, et al.

pricing terms of the ESP Stipulation in favor of a cost-based capacity charge. Duke improperly undermines the negotiated Stipulation. The Commission must affirm the integrity of the settlement process and Parties are entitled to rely on the Commission to enforce the provisions of the ESP Stipulation that it approved less than a year ago. As the Commission has recognized, parties must keep their commitments made in stipulations.³⁰

The ESP Stipulation states:

[a]t any hearing and in any documents or briefs filed with the Commission in respect of the Stipulation, each Signatory Party agrees to support the Stipulation and do nothing, directly or indirectly, to undermine the Stipulation***.”³¹

The Stipulation also states that:

each Signatory Party agrees to support the reasonableness of the Stipulation, and “take no position contrary to the support for the reasonableness of the ESP and this Stipulation in any appeal from the Commission’s adoption and/or enforcement of this ESP and this Stipulation.”³²

Duke’s current filing regarding cost-based pricing of capacity is contrary to the Stipulation, and seeks to ignore the Stipulation. The ESP Stipulation should be enforced, not ignored. The Commission has enforced Stipulations when parties, including Duke, have disregarded the terms of a stipulation and instead sought remedies or relief that is con-

³⁰ See, e.g., *In the Matter of the 1995 Electric Long Term Forecast Report of the Cincinnati Gas & Electric Company*, Case Nos. 95-203-EL-FOR, *et al.* (Opinion and Order at 49-50) (Dec. 19, 1996).

³¹ *Duke ESP Proceeding*, Stipulation at 41.

³² *Id.*

trary to a stipulation.³³ The Commission values stipulations and has acted to preserve the integrity of stipulations on many occasions.³⁴ To allow Duke to modify the ESP Stipulation now invites the reopening of every settled case when any party is dissatisfied.

The Signatory Parties to the Duke ESP Stipulation seek to enforce the entire ESP Stipulation, including the term providing for RPM based capacity pricing. The Stipulation is a settlement package and states that it represents “an agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions within the Stipulation.”³⁵ It is improper for Duke to separate the capacity price provision of the Stipulation from the rest of the settlement package. And Duke ignores the ESP Stipulation by asking the Commission to ignore the capacity pricing terms of the Stipulation in favor of a cost-based capacity charge.

2. Public Policy

Strong public policy reasons support upholding the Stipulation reached in Duke’s ESP proceeding. First, Duke’s current Application would require customers to pay an additional \$776 million despite the fact that Duke negotiated a settlement with all customer classes for much less concerning the same issues. The drastic ESP modifications

³³ *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Energy Efficiency and Peak Demand Reduction Programs and Portfolio Plan*, Case No. 09-1999-EL-FOR (Opinion and Order at 15) (Dec. 15, 2010); *Id.* (Entry on Rehearing at ¶9) (Feb. 9, 2011).

³⁴ *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR (Opinion and Order at 33-38) (Dec. 12, 1996).

³⁵ *Id.* at 2-3.

affect 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.

Second, the Commission has already approved an SSO auction schedule the current Duke ESP and issued orders accepting the results of three SSO auctions—December 2011, May 2012, and November 2012.³⁶ With the auctions well underway, Duke should not now, over a year later, modify the capacity pricing mechanism in the Stipulation. The Commission considered Duke's cost of capacity and the spin-off of generation *in total* before issuing the Order in Duke's ESP. It makes no sense for Duke to come back a year later and ask for capacity compensation modification.

Third, the Commission should respect the precedential value of all its decisions. Upholding stipulations provides regulatory certainty for Ohio customers and investors. The Commission should not depart from previous decisions without a clear need. The Ohio Supreme Court has stated:

Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.³⁷

Sound regulation should not discourage dispute-resolution through settlement. Settlement may also bring about regulatory certainty that may otherwise be delayed until the

36 See, *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC.

37 *Ohio Consumers' Counsel v. Public Util. Comm.* (1984), 10 Ohio St.3d 49; 461 N.E.2d 303.

termination of all litigation. Overall, because there is the potential for cost savings and regulatory certainty, the Commission should encourage settlement.

B. Duke failed to timely apply for rehearing of the Commission order approving the Stipulation and failed to timely file an appeal.

The Commission should treat the application as a late-filed application for rehearing. The Commission, therefore, lacks jurisdiction to entertain Duke's belated request for rehearing. R.C. 4903.10 states that:

***any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.³⁸

Duke did not file an application for rehearing at all in the Duke ESP proceeding. Thus, Duke did not apply for rehearing within the thirty-day period of the statute. The statute further states that:

[n]o cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for rehearing.³⁹

A proper application meets the thirty-day deadline for rehearing. Duke failed to meet this deadline requirement.

It seems that Duke is now seeking rehearing of the Commission's ESP Order through this new Application. Duke is asking the Commission to reconsider capacity

38 R.C. 4903.10.

39 *Id.*

pricing—a significant term of the ESP Stipulation. The Stipulation adopted a capacity pricing methodology based on RPM pricing. Duke now seeks rehearing on the basis that the capacity should instead be priced on an embedded cost basis when it had negotiated a different result with full knowledge of the alternatives. Duke was well aware that AEP Ohio was contesting identical issues before this Commission and the FERC the same time that Duke entered into the ESP Stipulation. Again, Duke opted for regulatory certainty by settling its proceedings.

Duke cannot avoid the requirements of the law by calling its filing an Application to establish a new service.⁴⁰ Duke's Application is an untimely application for rehearing. Where no application for rehearing is filed within thirty days as required, the Commission has no power to entertain it.⁴¹ Thus, the Commission fundamentally lacks jurisdiction on this matter and must deny or dismiss Duke's Application.

C. The doctrines of *res judicata* and collateral estoppel preclude Duke from re-litigating the ESP where it agreed to RPM-based capacity pricing for CRES suppliers.

Duke is precluded from re-litigating the ESP capacity pricing. The Commission should reject cases when parties try to re-litigate final judgments under the judicial doctrines of *res judicata* and collateral estoppel. As such, the Commission should reject Duke's application here.

⁴⁰ See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, (Entry at ¶ 15) (Dec. 22, 2012).

⁴¹ *Greer v. Pub. Util. Comm.* (1961), 172 Ohio St. 361, 176 N.E.2d 416.

Under the doctrine of *res judicata*, the Commission’s “valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.”⁴² The Supreme Court of Ohio has stated that:

A party can not re-litigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies, in reference to the same subject matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so.⁴³

While *res judicata* pertains to re-litigating a cause of action, collateral estoppel pertains to re-litigating *issues* in a later case involving a different cause of action. The Supreme Court of Ohio characterized collateral estoppel as precluding the re-litigation of an issue that has been “actually and necessarily litigated and determined in a prior action.”⁴⁴ “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”⁴⁵

⁴² *Grava v. Parkman Tshp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus.

⁴³ *Covington and Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, 237-38.

⁴⁴ *New Winchester Gardens, Ltd. v. Franklin Cty. Brd. Of Revision* (1997), 80 Ohio St.3d 36, 41, 684 N.E.2d 312.

⁴⁵ Restatement of the Law, Second, Judgments, Section 27.

Res judicata and collateral estoppel both apply to Commission proceedings.⁴⁶ The Supreme Court of Ohio has stated that:

where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.”⁴⁷

The Court has also held that the doctrine of *res judicata* may be used to bar litigation of issues in a second administrative proceeding. The doctrine can also be applied in cases concluded by settlement.⁴⁸ The Duke ESP Proceeding was judicial in nature and provided parties with notice of hearing and ample opportunity to introduce evidence. The Commission then acted in its judicial capacity in resolving the ESP Proceeding. Therefore, collateral estoppel and *res judicata* bar litigation of these same issues in a second administrative proceeding.⁴⁹

To apply the doctrine of *res judicata* and collateral estoppel, both the parties and issues in the two proceedings have to be the same.⁵⁰ In present proceeding, each requirement is satisfied. Duke is the same party (the applicant) in both proceedings and the issue (capacity compensation) is also the same as it was in the ESP proceeding. Duke agreed to accept pricing for its FRR capacity based on the fixed zonal capacity price set

⁴⁶ *Superior’s Brand Meats, Inc. v Lindle* (1980), 62 Ohio St.2d 133, 403 N.E.2d 996, syllabus.

⁴⁷ *Id.*

⁴⁸ *Scott v. East Cleveland* (1984), 16 Ohio App. 3d 429, 476 (Ct. App.).

⁴⁹ *Superior’s Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d at 135.

⁵⁰ *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 112.

under the PJM RPM process;⁵¹ the Commission adopted that Stipulation in November 2011; and now Duke is attempting to re-litigate the FRR capacity pricing portion of its ESP by asking the Commission to set a cost based charge for capacity for an overlapping time period of Aug. 29, 2012 through May 31, 2015. The Commission should reject Duke's Application.

When considering these judicial doctrines, the Commission has generally focused on whether parties have been afforded one fair opportunity to litigate a claim or issue. The Commission has noted that it is guided by the following general policy considerations: (1) fairness to the prevailing party requires that it not be subjected to the expense and potential harassment associated with re-litigating matters which were, or should have been, litigated in an earlier action, and (2) judicial economy requires that litigation arising from a particular controversy not be continued indefinitely.⁵²

Duke had a fair opportunity to litigate how its capacity should be priced when it filed its ESP application. Duke relied on the legal authority of Section 8.1 of the PJM RAA as part of its ESP; and it relies on that same legal authority here. The facts are the same, the law is the same, and the parties are the same. Duke was fully aware of the capacity pricing issue because AEP Ohio was litigating the issue at both the federal and state levels. Duke fully exercised its rights by agreeing to an ESP Settlement and urged the Commission to adopt the Settlement through supporting testimony and supporting

⁵¹ *Duke ESP Proceeding* (Stipulation at Sections I.B, II.B.)

⁵² See, e.g., *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC (Entry at ¶5) (Nov. 10, 1986).

briefs. The Settlement gave Duke \$330 million in revenues for the ESSC and Duke's customers have been paying this ESSC rider. It was a fair settlement. The other signatory parties to the ESP should not have to re-litigate matters which were litigated and settled previously. Judicial economy requires Duke's ESP not be re-litigated. Duke's current application should be denied.

III. CONCLUSION

Duke's application ignores prior settlement agreements, defies state policies supporting settlements, and undermines the finality of the Public Utilities orders. The application, if approved, will unreasonably cost Ohio customers \$776 million dollars when parties had negotiated a lower amount be paid for the same capacity that is the subject of Duke's Application. The Commission should reject Duke's Application and preserve the integrity of the ESP Stipulation.

Respectfully Submitted,

Michael DeWine
Ohio Attorney General

William L. Wright
Section Chief

/s/ Steven L. Beeler

Steven L. Beeler
John H. Jones
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Fl.
Columbus, OH 43215
614.466.4395 (telephone)
steven.beeler@puc.state.oh.us
john.jones@puc.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Comments** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by electronic mail upon the following parties of record, this 2nd day of January, 2013.

/s/ Steven L. Beeler

Steven L. Beeler

Assistant Attorney General

PARTIES OF RECORD:

sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com
cmooney2@columbus.rr.com
dhart@douglasshart.com
grady@occ.state.oh.us
kern@occ.state.oh.us
haydenm@firstenergycorp.com
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
bojko@carpenterlipps.com
dakutik@jonesday.com
aehaedt@jonesday.com
jbentine@amppartners.org
jouett.brenzel@cinbell.com
mjsatterwhite@aep.com
kosterkamp@ralaw.com
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com
wmassey@cov.com
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com
wmassey@cov.com
BarthRoyer@aol.com

Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Elizabeth.watts@duke-energy.com
Rocco.DAscenzo@duke-energy.com
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com
tobrien@bricker.com
tsiwo@bricker.com
mwarnock@bricker.com
Gary.A.Jeffries@dom.com
aaragona@eimerstahl.com
dstahl@eimerstahl.com
ssolberg@eimerstahl.com
Rdc_law@swbell.net
jejadwin@aep.com
yalami@aep.com

AEs: Christine.pirik@puc.state.oh.us
Katie.stenman@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/2/2013 4:08:30 PM

in

Case No(s). 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ATA

Summary: Comments electronically filed by Mrs. Tonnetta Y Scott on behalf of PUCO