

**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
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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Certain Accounting Methods.	:	Case No. 12-2401-EL-AAM
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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
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**INITIAL BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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Date Submitted: June 28, 2013

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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 IEU Ex. 5, *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.* (“*Duke ESP Proceeding*”) (Stipulation and Recommendation) (Oct. 24, 2011).

Duke was permitted to collect \$330 million from customers for its Electric Stability Service Charge (“ESSC”) settling the issue of Duke’s capacity revenues.² Duke further agreed to provide capacity and agreed to be compensated for its Fixed Resource Requirement (“FRR”) obligation based on the PJM Reliability Pricing Model (“RPM”).³ In other words, the issue of compensation for Duke’s capacity services was addressed and fully resolved in Duke’s ESP proceeding.

Despite this, in August 2012, Duke filed an application in this case seeking to modify the ESP Stipulation by charging an additional \$729 million in capacity revenues from its retail customers.⁴ 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. DUKE’S CURRENT APPLICATION AND RELATED CASES

A. Duke’s Current Application

Duke’s current Application asks to collect from customers an additional \$729 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

² *Duke ESP Proceeding* (Stipulation and Recommendation at 15-16) (Oct. 24, 2011).

³ *Id.* at 7, 12.

⁴ Duke Ex. 1 (Application).

revenues currently being charged and its cost of capacity; and (3) approves a new placeholder tariff to allow future recovery of the deferred amounts.⁵

Duke states that it will request approval to begin collecting the deferred amounts, plus carrying charges, in a subsequent proceeding. Comments opposing Duke's application were filed in this docket and a hearing was held from April 15, 2013 to May 21, 2013.

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").⁶ 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.⁷ Duke proposed that the cost of its capacity would be based on its election to provide capacity in PJM as a cost-based FRR entity who self-supplies all of its capacity, as opposed to the market-based 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

⁵ Duke Ex. 1 (Application at ¶ 2).

⁶ Kroger Ex. 5, *Duke ESP Proceeding* (Application) (Jun. 20, 2011).

⁷ *Id.* at 26; Vol. 1 at 10.

state compensation mechanism.⁸ Duke witness Trent explained in his testimony that Duke's proposal for a cost-based capacity charge was authorized by the PJM RAA.⁹

The ESP Plan Duke proposed had an actual term of 9 years and 5 months.¹⁰ Duke's proposed plan limited the scope of retail competition to energy, while charging customers a cost-based price for capacity (its embedded cost of supply¹¹) through a non-bypassable rider ("Rider RC").¹² Duke recognized, at the time, that the wholesale capacity market was both unpredictable and volatile.¹³ Duke acknowledged through testimony in support of its application that it had alternative capacity pricing options available under the RAA that Duke could pursue as an FRR entity.¹⁴

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 Duke and 30 of the 34 parties in the proceeding.¹⁵ A major ESP settlement term, as it

⁸ Kroger Ex. 5, *Duke ESP Proceeding* (Application at 25-26) (Jun. 20, 2011).

⁹ Kroger Ex. 4, *Duke ESP Proceeding* (Direct Testimony in Support of Application of Duke Witness Trent at 5-6) (Jun. 20, 2011).

¹⁰ Kroger Ex. 5, fn. 9, *Duke ESP Proceeding* (Application at 10) (Jun. 20, 2011).

¹¹ *Id.* at 10.

¹² *Id.* at 12, 26.

¹³ *Id.* at 8-9.

¹⁴ Kroger Ex. 4, *Duke ESP Proceeding* (Direct Testimony in Support of the Application of Keith Trent at 18) (Jun. 20, 2011).

¹⁵ AEP Ohio and Dominion Retail, Inc. took no position with regard to the Stipulation. Eagle Energy LLC also did not sign the Stipulation.

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.¹⁶ Duke witness Janson, in her testimony in support of the Stipulation, confirmed that Duke agreed to be compensated for capacity based on RPM prices.¹⁷ Likewise, Staff witness Turkenton, in her testimony in support of the Stipulation, also confirmed that Duke agreed to be compensated for capacity based on RPM prices.¹⁸ The Stipulation language coupled with Duke and Staff testimony from the ESP proceeding confirm that Duke agreed to provide capacity and agreed to be compensated 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.¹⁹ Duke testified that the ESSC was intended to protect the Company's financial integrity and ensure that the overall revenues under the ESP are

¹⁶ Kroger Ex. 4, *Duke ESP Proceeding* (Direct Testimony in Support of Application of Keith Trent at 6-7) (Jun. 20, 2011).

¹⁷ IEU Ex. 6, *Duke ESP Proceeding* (Supplemental Testimony of Duke Witness Janson at 4-5) (Oct. 28, 2011).

¹⁸ FES Ex. 23, *Duke ESP Proceeding* (Supplemental Testimony of Staff Witness Turkenton at 3-4) (Oct. 28, 2011).

¹⁹ The Office of the Ohio Consumers' Counsel (OCC), FirstEnergy Solutions, and the Ohio Manufacturer's Association (OMA) took no position regarding Section VII.A. of the ESP Stipulation.

adequate to compensate Duke for providing its SSO.²⁰ In other words, Duke gave up its right to collect wholesale capacity revenues from CRES providers for shopping load based on its embedded costs of capacity in exchange for RPM capacity revenues plus the \$330 million ESSC. The ESSC was compensation to Duke for generation service and not distribution or transmission service.²¹ In Duke witness Don Wathen's supplemental testimony in support of the ESP Stipulation, he explained why Rider ESSC was necessary in terms of Duke's FRR capacity obligations.²²

Duke's position that it is not receiving just and reasonable compensation for its capacity services, as an FRR entity, did not materialize until after the Commission decided the AEP-Ohio capacity case in July 2012.²³ At the time Duke entered into the ESP Stipulation it did not know if they had made a determination that Duke was receiving just and reasonable compensation for its capacity services.²⁴ It is hard to believe that any fortune 500 company, like Duke, would not have considered this question when Duke signed the ESP Stipulation.

²⁰ FES Ex. 23, *Duke ESP Proceeding* (Supplemental Testimony of Staff Witness Turkenton at 14) (Oct. 28, 2011).

²¹ Tr. II at 387-389, 400-401.

²² Tr. VI at 1431.

²³ Tr. II at 397-398, 407.

²⁴ *Id.* at 399.

The Commission adopted the Duke Stipulation with minor revisions and found that the stipulated ESP was more favorable in the aggregate than an MRO.²⁵ Duke did not file an application for rehearing. The Commission has already approved an SSO auction schedule and issued orders accepting the results of four SSO auctions—December 2011, May 2012, November 2012, and May 2013.²⁶ 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, 2016.²⁷ The Commission approved the Stipulation.²⁸ Like the ESP Stipulation, Duke cannot modify this approved Stipulation either.

²⁵ *Duke ESP Proceeding* (Opinion and Order at 47-48) (Nov. 22, 2011).

²⁶ *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.

²⁷ Duke Ex. 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-EL-RDR, *et al.* (“Duke’s MISO/PJM Transfer Case”) (Stipulation at ¶ 20) (Apr. 26, 2012).

²⁸ *Duke’s MISO/PJM Transfer Case* (Opinion and Order at 14-16) (May 25, 2011).

D. AEP's Capacity and ESP Cases

Duke was well aware of the capacity pricing issue all along. 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.²⁹ 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.³⁰

In December 2010, the Commission opened up an investigation to review the impact of AEP Ohio's capacity charges.³¹ Duke Energy Retail Sales, L.L.C., filed a motion to intervene in that case before the Commission.³²

In January 2011, the FERC rejected AEPSC's rate application,³³ AEPSC sought rehearing,³⁴ and in April 2011, AEPSC filed a Section 206 Complaint with the FERC to clarify the circumstances under which AEPSC may request a cost-based capacity rate

²⁹ *American Electric Power Service Corporation*, FERC Docket No. ER11-2183 (Application) (Nov. 24, 2010).

³⁰ *Id.* (Duke Motion to Intervene) (Dec. 10, 2010).

³¹ *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) ("AEP Capacity Proceeding").

³² *American Electric Power Service Corporation*, FERC Docket No. ER11-2183 (Duke Motion to Intervene) (Jan. 11, 2011).

³³ *Id.* (Order Rejecting Formula Rate Proposal), 134 FERC ¶61,039 (2011).

³⁴ *Id.* (Request for Rehearing of AEPSC) (Feb. 22, 2011).

from FERC that would be charged to CRES providers in its service territory.³⁵ 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.³⁶ The Commission determined that AEP Ohio's embedded cost of capacity is \$188.88/MW-day;³⁷ AEP Ohio will provide capacity to CRES providers at RPM;³⁸ and AEP Ohio may defer the difference between \$188.88/MW-day and the RPM-based cost of capacity for subsequent collection.³⁹ In AEP-Ohio's capacity case, the ordering clause of the Commission says "[o]rdered, that the state compensation mechanism for AEP-Ohio be adopted as set forth herein."⁴⁰ In other words, the ordering clause is limited in scope to AEP-Ohio and does not say the general state compensation mechanism for all Ohio FRR entities. In August 2012, the Commission issued its decision in AEP Ohio's

³⁵ *American Electric Power Service Corporation v. PJM Interconnection*, FERC Docket No. EL11-32-000 (Complaint) (Apr. 4, 2011).

³⁶ OCC Ex. 1, *AEP Capacity Case* (Opinion and Order) (Jul. 2, 2012).

³⁷ *Id.* at 35.

³⁸ *Id.* at 23.

³⁹ *Id.* at 23-24.

⁴⁰ Tr. II at 373.

electric security plan proceeding approving a Retail Stability Rider that will generate approximately \$508 million over three years for AEP Ohio.⁴¹

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.⁴² 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 and should be denied.

⁴¹ *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).

⁴² *Duke's MISO/PJM Transfer Case* (Opinion and Order) (May 25, 2011).

II. ARGUMENT

A. Duke's Application should be rejected because it improperly ignores the ESP Stipulation by asking the Commission to disregard the capacity pricing terms of the Stipulation in favor of a cost-based capacity charge.

1. The terms of the ESP Stipulation fully resolved Duke's capacity pricing.

The Company's request for additional compensation for capacity services in this case violates the terms of the stipulation approved by the Commission that resolved Duke's ESP case. The issue of compensation for capacity services was addressed and fully resolved in the ESP proceeding. Duke agreed to provide capacity and agreed to be compensated for its FRR obligation based on the PJM RPM. The Duke ESP Stipulation states:

[a]cknowledging Duke Energy Ohio's status as an FRR entity in PJM, the Parties agree that Duke Energy Ohio shall supply capacity to PJM, which, in turn, will charge for capacity to all wholesale supply auction winners for the applicable time periods of Duke Energy Ohio's ESP with the charge for said capacity determined by the PJM RTO, which is the FZCP in the unconstrained RTO region.⁴³

The ESP stipulation further states that:

***the Parties agree that Duke Energy Ohio shall supply capacity resources to PJM, which, in turn, will charge for capacity resources to all CRES providers in its service territory for the term of the ESP, with the exception of those CRES providers that have opted out of Duke Energy Ohio's FRR plan, for the period during which they opted out. The Parties farther agree that, during the term of the ESP, Duke

⁴³ IEU Ex. 5, *Duke ESP Proceeding*, (Stipulation and Recommendation at 7) (Oct. 24, 2011).

~~Energy Ohio~~ PJM shall charge CRES providers for capacity as determined by the PJM RTO, which is the FZCP in the unconstrained RTO region, for the applicable time periods of its ESP. When computing the capacity allocations for PJM, Duke Energy Ohio shall use an allocation formula in common use in PJM.⁴⁴

Duke witness Janson, in her testimony in support of the ESP Stipulation, confirmed that Duke agreed to be compensated for capacity based on RPM prices. Duke witness Janson stated that:

[i]n 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.⁴⁵

After being quoted this testimony on cross examination, Duke witness Trent conceded that Ms. Janson was talking about the price of capacity and Duke being compensated for its resources based upon competitive pricing.⁴⁶ Likewise, Staff witness Turkenton, in

⁴⁴ IEU Ex. 5, *Duke ESP Proceeding*, (Stipulation and Recommendation at 12) (Oct. 24, 2011) (as amended).

⁴⁵ IEU Ex. 6, *Duke ESP Proceeding* (Supplemental Testimony of Duke Witness Janson at 4-5) (Oct. 28, 2011); Tr. II at 304.

⁴⁶ Tr. II at 305, 330-331.

her testimony in support of the ESP Stipulation, also confirmed that Duke agreed to be compensated for capacity based on RPM prices.

Staff witness Turkenton stated that:

[t]he Stipulation enhances the development of competition for generation service in the Duke service areas as Duke has committed to charging the prevailing market price for capacity. Although Duke will be operating under a Fixed Resource Requirements (FRR) capacity construct in PJM starting January 1, 2012, it has committed to charge the prevailing Reliability Pricing Model (RPM) Final Zonal Capacity Price (FZCP) in the unconstrained region of PJM to all CRES providers in its service territory and to all winning CBP suppliers of its SSO load during the period it is under the FRR construct.⁴⁷

Duke did not cross-examine Staff witness Turkenton on her testimony in support of the ESP Stipulation.⁴⁸ Duke agreed to provide capacity and agreed to be compensated for its FRR obligation based on the RPM.

Throughout its Application and testimony, Duke references AEP Ohio's capacity pricing mechanism adopted by the Commission that requires the capacity price provided to CRES providers to be set at market prices, but also provides for a deferral and recovery of the difference between the market price and AEP-Ohio's cost of providing capacity. Seeking AEP Ohio's deal, Duke now argues that it is entitled to the same pricing and compensation terms authorized for AEP Ohio. However, the ESP Stipulation entered

⁴⁷ FES Ex. 23, *Duke ESP Proceeding* (Supplemental Testimony of Staff Witness Turkenton at 3-4) (Oct. 28, 2011).

⁴⁸ GCHC Ex. 1 (Administrative Notice taken at Tr. VI at 1339), *Duke ESP Proceeding*, Tr. I at 6 (Nov. 11, 2011).

into by Duke and other parties, including Staff, does not include an “out clause” for buyer's remorse for any signatory party.⁴⁹

Duke attempts to differentiate between its commitments under the ESP Stipulation and its claim in this case by asserting that the Company agreed to the *pricing* of capacity services in the ESP Stipulation, but somehow did not agree to its *compensation* for capacity services in that same ESP Stipulation.⁵⁰ Duke witness B. Keith Trent states:

[a]nd while the ESP Stipulation, as approved by the Commission, identifies the price that PJM would charge wholesale and competitive retail suppliers for capacity, the ESP Stipulation did not address what Duke Energy Ohio would receive, in the form of compensation, for its provision of noncompetitive wholesale capacity service.⁵¹

Duke's compensation for capacity was a key issue in the ESP Stipulation – it was not left unresolved. The ESP Stipulation resolved all issues in the ESP case. Duke witness Trent's new distinction – that PJM charges capacity to CRES providers, rather than Duke – is improper. Kroger witness Higgins, in his direct testimony, sums it up nicely:

I find Mr. Trent's distinction between price and compensation to be disingenuous at best. If Duke truly believed it was agreeing to “pricing” but not “compensation,” the Company had an obligation to disclose, in writing, that critical distinction to the Commission and to the other signatory parties to the ESP Stipulation as a matter of fair dealing, particularly in accepting the compensation provided by Rider ESSC as a bargained-for exchange. I am aware of no such disclosure. Mr. Trent's choice of words in the passage quoted above might have the reader believe the ESP Stipulation established

⁴⁹ Kroger Ex. 1 at 9 *Direct Testimony of Kevin C. Higgins* (Mar. 26, 2013).

⁵⁰ *Id.*

⁵¹ Duke Ex. 2 at 5, *Direct Testimony of B. Keith Trent* (Mar. 1, 2013).

a price that PJM would charge for capacity, as distinct from compensation that Duke would receive. However, it is incontrovertible that Duke receives compensation for the capacity it is committed to supply under the terms of the ESP Stipulation.⁵²

Again, the ESP Stipulation plainly established a rate that was to be charged by Duke for capacity.

In support of this new distinction, Duke further relies on a motion to amend the ESP Stipulation's capacity provisions by substituting "PJM" for "Duke Energy Ohio."⁵³ In the motion, Duke explained that the change was needed to correct "an inadvertent typographical error" and represented that no party opposed the correction.⁵⁴ The change is meaningless – Duke still receives compensation for the capacity it is committed to supply under the terms of the ESP Stipulation. Kroger witness Higgins, in his direct testimony, also discredits this change and states:

Mr. Trent now appears to be reading more into this change than a mere correction of a typographical error. He is now attempting to color the nature of the bargain struck by the parties as one which sidestepped the question of Duke's compensation for capacity. In fact, the opposite is true: the agreement actually signed by the parties stated what Duke would charge and thus, how the Company would be compensated. The substitution of "PJM" into this provision under the guise of correcting a typographical error does not change the

⁵² Kroger Ex. 1 at 9-10, *Direct Testimony of Kevin C. Higgins* (Mar. 26, 2013).

⁴¹ *Duke ESP Proceeding* (Motion of Duke Energy Ohio, Inc. to Admit an Amendment to the Stipulation as Joint Exhibit 1.1 and Request for Expedited Treatment at 4) (Nov. 16, 2011).

⁵⁴ *Id.*

fact that the ESP Stipulation addresses the compensation that Duke would receive for capacity.⁵⁵

Duke's new assertion that PJM charges capacity to CRES providers, rather than Duke, is without merit. It is a distinction without a difference and should be rejected. Under cross examination, Duke witness Keith Trent agreed that in the capacity market PJM is basically a clearing market where they collect from people who use it, as far as money changing hands.⁵⁶ As an FRR entity, under the ESP Stipulation, Duke receives market-based payments for its capacity from PJM.⁵⁷ Duke's capacity application here seeks to increase Duke's wholesale capacity rate.⁵⁸

Furthermore, contrary to Duke's new distinction, Duke witness Wathen, in his testimony in support of the ESP Stipulation, stated:

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. The Company is agreeing to implement a full CBP to determine the retail price for its SSO. This allows customers in Duke Energy Ohio's service territory to receive the benefit of the current lower-

⁵⁵ Kroger Ex. 1 at 10-11, *Direct Testimony of Kevin C. Higgins* (Mar. 26, 2013).

⁵⁶ Tr. II at 347-348, 390-391.

⁵⁷ *Id.* at 348-349.

⁵⁸ *Id.* at 356-357.

priced capacity market and puts Ohio firmly on the path towards a full competition.⁵⁹

Duke witness Wathen further stated in his testimony in support of the ESP Stipulation:

[f]rom the Company' 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 because the BRAs to procure capacity in PJM have already occurred through the 2014/2015 planning year, which extends to the end of the ESP as provided for the Stipulation. 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.⁶⁰

Mr. Wathen's testimony further supports Staff's position that the issue of compensation for capacity services was addressed and fully resolved in the ESP proceeding.

Ultimately, Duke's request for additional compensation for capacity services in this case violates the terms of the ESP Stipulation. Duke agreed that the ESP Stipulation resolved all issues raised in the ESP proceedings; it was an entire agreement; and there was not to be an isolated provision of the stipulation used or interpreted in a future proceeding before the Commission.⁶¹ The issue of compensation for capacity services was addressed and fully resolved in the ESP proceeding. Duke agreed to provide capacity and agreed to

⁵⁹ FES Ex. 22, *Duke ESP Proceeding* (Supplemental Testimony of Duke Witness Wathen at 12) (Oct. 28, 2011).

⁶⁰ *Id.* at 18.

⁶¹ Tr. II at 290-291.

be compensated for its FRR obligation based on the PJM RPM. Duke's application should be denied.

2. The Commission should uphold the integrity of the settlement process.

As previously argued in the Staff's Initial Comments filed in this case, 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.⁶² Duke ignores a term of the ESP Stipulation by asking the Commission to disregard the capacity 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 18 months ago. As the Commission has recognized, parties must keep their commitments made in stipulations.⁶³ The Duke 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***.”⁶⁴

The Stipulation also states that:

⁶² Staff Ex. 2 at 9, *Staff's Initial Comments* (Jan. 2, 2013).

⁶³ See, e.g., *In the Matter of the 1995 Electric Long Term Forecast Report of the Cincinnati Gas & Electric Co.*, Case Nos. 95-203-EL-FOR, *et al.* (Opinion and Order at 49-50) (Dec. 19, 1996).

⁶⁴ IEU Ex. 5, *Duke ESP Proceeding* (Stipulation and Recommendation at 41) (Oct. 24, 2011).

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.”⁶⁵

Duke’s current capacity filing 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 contrary to a stipulation.⁶⁶ The Commission values stipulations and has acted to preserve the integrity of stipulations on many occasions.⁶⁷ 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

⁶⁵ IEU Ex. 5, *Duke ESP Proceeding* (Stipulation and Recommendation at 41) (Oct. 24, 2011).

⁶⁶ *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).

⁶⁷ *In the Matter of the Application of The Cincinnati Gas & Electric Co. 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).

within the Stipulation.”⁶⁸ 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.

3. Public Policy supports the preservation of the ESP Stipulation.

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 \$729 million despite the fact that Duke negotiated a settlement with all customer classes for much less concerning the same issues. The drastic ESP modifications 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, November 2012, and May 2013.⁶⁹ With the auctions well underway, Duke should not now, over 18 months later, modify the capacity pricing mechanism in the Stipulation. The Commission considered Duke’s cost of capacity and the spin-off of

⁶⁸ *In the Matter of the Application of The Cincinnati Gas & Electric Co. for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR (Opinion and Order at 2-3) (Dec. 12, 1996).

⁶⁹ *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.

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.⁷⁰

Sound regulation should not discourage dispute-resolution through settlement. Settlement may also bring about regulatory certainty that may otherwise be delayed until the termination of all litigation. Overall, because there is the potential for cost savings and regulatory certainty, the Commission should encourage settlement.

B. The Commission should reject Duke's application because Duke failed to timely apply for rehearing of the Commission order approving the ESP Stipulation and failed to timely file an appeal.

As previously noted in Staff's Initial Comments filed in this docket, the Commission should treat the application as a late-filed application for rehearing.⁷¹ The Commis-

⁷⁰ *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49; 461 N.E.2d 303 (1984).

⁷¹ Staff Ex. 2 at 13, *Staff's Initial Comments* (Jan. 2, 2013).

sion, 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.⁷²

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.⁷³

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

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

⁷² R.C. 4903.10.

⁷³ *Id.*

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.⁷⁴ 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.⁷⁵ 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.

Again, as Staff mentioned in its Initial Comments in this case, Duke is precluded from re-litigating the ESP capacity pricing.⁷⁶ 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.

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

⁷⁴ 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).

⁷⁵ *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 176 N.E.2d 416 (1961).

⁷⁶ Staff Ex. 2 at 14, *Staff's Initial Comments* (Jan. 2, 2013).

transaction or occurrence that was the subject matter of the previous action.”⁷⁷ 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.⁷⁸

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.”⁷⁹ “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.”⁸⁰

Res judicata and collateral estoppel both apply to Commission proceedings.⁸¹ The Supreme Court of Ohio has stated that:

⁷⁷ *Grava v. Parkman Tshp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus.

⁷⁸ *Covington and Cincinnati Bridge Co. v. Sargent*, 27 Ohio St. 233, 237-38 (1875).

⁷⁹ *New Winchester Gardens, Ltd. v. Franklin Cty. Brd. Of Revision*, 80 Ohio St.3d 36, 41, 684 N.E.2d 312 (1997).

⁸⁰ Restatement of the Law, Second, Judgments, Section 27.

⁸¹ *Superior’s Brand Meats, Inc. v Lindle*, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus.

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.”⁸²

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.⁸³ 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.⁸⁴

To apply the doctrine of *res judicata* and collateral estoppel, both the parties and issues in the two proceedings have to be the same.⁸⁵ 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 under the PJM RPM process;⁸⁶ the Commission adopted that Stipulation in November

⁸² *Superior's Brand Meats, Inc. v Lindle*, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus.

⁸³ *Scott v. East Cleveland*, 16 Ohio App. 3d 429, 476 (Ct. App.) (1984).

⁸⁴ *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d at 135.

⁸⁵ *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 112 (1969).

⁸⁶ IEU Ex. 5, *Duke ESP Proceeding* (Stipulation and Recommendation at Sections I.B, II.B.)

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.⁸⁷

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 briefs. The Settlement gave Duke \$330 million in revenues for the ESSC and Duke's

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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).

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 Commission orders. The application, if approved, will unreasonably cost Ohio customers \$729 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,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Brief** 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 28th day of June, 2013.

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This foregoing document was electronically filed with the Public Utilities

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6/28/2013 2:39:25 PM

in

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

Summary: Brief Initial Brief submitted by Assistant Attorney General Steven L. Beeler on behalf of the Staff of the Public Utilities Commission of Ohio. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio