BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter 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 Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	))	Case No. 12-2401-EL-AAM
In the Matter of Duke Energy Ohio, Inc., for the Approval of a Tariff for a New Service.	))	Case No. 12-2402-EL-ATA

MERIT BRIEF
OF
THE CITY OF CINCINNATI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

I. JOINT MOTION TO DISMISS 1

A. The Commission Should Grant the Joint Motion to Dismiss and Enforce the Duke ESP Stipulation 1

II. ARGUMENT ON THE MERITS 2

A. Introduction 2

B. That Duke promised to charge the BRA rate for its FRR capacity obligations is beyond question. 2

C. The Commission, in Case No. 10-2929 clearly indicated that it was not setting a statewide policy with respect to rates for all Ohio FRR entities, but only AEP given the peculiar situation faced by that EDU. 4

III. CONCLUSION 5

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INITIAL BRIEF
OF
THE CITY OF CINCINNATI

I. JOINT MOTION TO DISMISS

A. The Commission Should Grant the Joint Motion to Dismiss and Enforce the Duke ESP Stipulation.

The City of Cincinnati (the "City") stands by its position taken in the Joint Motion to Dismiss filed October 4, 2012 ("Joint Motion"), by and among the City and nine other parties participating in this case. This position is reflected in the Comments submitted by the City herein on January 2, 2013, and admitted into the record as Cincinnati Exhibit 1. Tr. Vol. IX, p. 2172. Nothing in the voluminous record developed in this proceeding contradicts the points raised in the Joint Motion, as will be explained below.

II. ARGUMENT ON THE MERITS

A. Introduction

The determination now facing the Commission in this case is straightforward. Either the Commission has set a statewide policy in Case No. 10-2929-EL-UNC that supersedes the prior determinations of the Commission that approved and adopted agreements between Duke and intervening stakeholders, or it has not set such policy. Duke's entire case rests upon the proposition that the Commission's July 2, 2012, Opinion & Order in Case No. 10-2929-EL-UNC (OCC Ex. 1, hereinafter, the "10-2929 Order") set such a statewide policy for all Ohio FRR entities, meaning AEP *and* Duke. Refreshingly, Duke has made it perfectly clear that it filed this case as a direct consequence of the 10-2929 Order. Duke Ex. 2, pp. 10, 17, Tr. Vol. 1, p. 138. Duke really offers no other support for its decision to renege on its prior agreements and request that the Commission overturn its prior determinations with respect to the price Duke would charge for its FRR capacity obligations. For this reason, if the Commission intended the operation of the 10-2929 Order to be limited exclusively to AEP, then there is no support for Duke's request that the Commission reverse its acceptance of Dukes prior agreements and representations concerning the compensation that it was willing to accept for its FRR obligations.

B. That Duke promised to charge the BRA rate for its FRR capacity obligations is beyond question.

Duke witness Trent was put in the unenviable position of testifying that neither its ESP approved in Case No. 11-3549-EL-SSO, nor the stipulations and other representations to this Commission or to the FERC as part of Duke's migration from MISO to PJM binds Duke to the BRA rate for FRR capacity obligations. Duke Ex. 2 pp. 5-6. However, in taking such a position, Mr. Trent was forced to simply ignore the portions of the stipulations, public statements and sworn testimony in those proceedings and elsewhere wherein Duke expressed its agreement to

charge the BRA rate (see generally, cross-examination by Mr. Kutik, Tr. Vol. 1, pp. 38-102, 112-119)[1] and instead take the twisted position that what Duke *really* agreed to in those cases was limited to "how capacity payments would funnel through Rider RC." Tr. Vol. 1, p. 135. The relevant stipulations do not indicate any such limitation, but rather they are unequivocal. The specific language in Duke's ESP Stipulation is clear enough, referring to Duke's agreement with respect to its SSO load:

> Acknowledging 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 such capacity determined by the PJM RTO, which is the FZCP in the unconstrained RTO region. [IEU Ex. 5, at p. 7]

There is little point in belaboring the fact that Duke agreed to charge and/or collect the average BRA rate of $66.06/MW-Day for its FRR supply obligations through at least May 31, 2015 – Duke's agreement is beyond reasonable question. That $66.06/MW-Day composite price was known to Duke at the time it entered into the ESP Stipulation and *presumably* the management of Duke was capable of making the financial projections necessary to judge whether the revenues it would receive pursuant to the stipulation would be adequate to support Duke's Ohio operations.

[1] Such blanket citations are generally inappropriate as a briefing practice. However, in this instance, the point that Duke intended to collect the BRA rate for its FRR capacity obligation for the duration of its SSO and that the return provided by that rate, in tandem with the revenues produced by Rider ESSC, was satisfactory to Duke's management is so overwhelmingly demonstrated by the entirety of this cross examination, the City believes an exception to the general rule should be made.

C. The Commission, in Case No. 10-2929 clearly indicated that it was <u>not</u> setting a statewide policy with respect to rates for all Ohio FRR entities, but <u>only</u> AEP given the peculiar situation faced by that EDU.

The *only* change in circumstance since the date that the ESP Stipulation was filed has been the Commission's issuance of the 10-2929 Order. Hence, the Commission's intention expressed in that order are of paramount relevance to the outcome of this case.

A reasonable reader can discern no intention on the part of the Commission to set a state-wide policy for FRR capacity compensation in the 10-2929 Order. The discussion, the findings and the ordering paragraphs all specifically indicate that the Commission was addressing AEP's FRR capacity obligations. OCC Ex. 1, pp. 22, 38. Duke Witness Trent was essentially forced to concede this point. Tr. Vol. 1, pp. 138, 140-141. That the 10-2929 Order was limited in operation only to AEP is bolstered by the Commission's acknowledgement of an intricate relationship between the 10-2929 case and AEP's then-pending ESP proceeding. *Id.*, p. 24. Duke's situation is the polar opposite—not only did it agree to the BRA rate through its ESP period and beyond, it did so in exchange for a specific quid pro quo, Rider ESSC. AEP, on the other hand, cast its financial fate to the outcome of litigation based on multiple records.

A fair characterization of Duke's interpretation of the effect of the 10-2929 Order may be put thus: "If cost based recovery for capacity is fair for AEP, then it should be fair for us, too - never mind all that jazz about our Stipulation providing adequate financial security." Of course, by now the Commission is aware that the contagion posed by the 10-2929 Order is not limited to Duke. DP&L, even though it is not an FRR entity is still requesting traditional ratemaking treatment in Case No. 12-426-EL-SSO, based on DP&L's perception of the Commission beneficence towards AEP.

Here again, the essence of Duke's position brings this case back to the Commission's intentions as expressed in the 10-2929 Order. The City urges the Commission to stop the spread of the contagion posed by the 10-2929 Order here and now. Duke's current ESP was negotiated at arms' length among the parties who agreed to allow Duke $330 million for the duration of the ESP for the purposes of providing "stability and certainty." OCC Ex. 1, at p. 16. To allow Duke to now collect an additional $800 million (ignoring carrying charges) certainly cannot be squared with any notion of rate "stability and certainty." The City was not a party to the 10-2929 proceeding, nor does it have a direct stake in the rate collected by AEP for its FRR capacity obligations. But the City understands that it would be a very severe blow to the City's interests, the interests of its citizens, and perhaps more importantly, to utility regulation in Ohio if the Commission were to abrogate its decisions in both Case No. 11-3549-EL-SSO, as well as Case No. 11-2641-EL-RDR, and allow Duke to renege on its agreements in both of those cases.

III. CONCLUSION

If the Commission has determined that it is the policy of this state to set generation rates[2] based on a targeted rate of return for the incumbent utility using historical, embedded costs that bear no relationship to either the market price of electricity, or the forward-looking economic cost of that commodity, then Duke's position in this case may have some merit. If not, then the Commission should summarily dismiss Duke's petition in this case and hold Duke to its prior commitments and preserve the integrity of the Commission's prior decisions with respect to Duke's FRR capacity rates, as well as the integrity of the regulatory process in Ohio generally.

If the Commission does determine that the Stipulation that it approved in Case No. 11-3549-EL-SSO has no effect in light of its new state policy expressed in the 10-2929 Order, the

[2] This case actually does involve retail rates because any notion that wholesale price inputs can be divorced from retail pricing is a novel economic concept indeed.

Commission should, at minimum, make a determination that, notwithstanding this new statewide policy, Duke's abrogation of its obligations to the signatory parties to the Stipulation in Case Nos. 11-3549-EL-SSO and 11-2641-EL-RDR, et al., nevertheless violates the Commission's prior determinations in those cases and hence violates R.C. 4905.22. By this finding, the Commission can reconcile the interests of Duke in seeking embedded cost ratemaking for its FRR capacity changes with the equitable interests of the parties that gave up valuable rights in exchange for Duke's pledge to charge the BRA rate. Those parties may, if they wish, seek their civil damages for Duke's abrogation of that Stipulation. This is a matter of basic fairness.

For the reasons stated above, the City of Cincinnati requests that the Commission grant the Joint Motion to Dismiss and reject Duke's Application.

Respectfully submitted on behalf of,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF was served upon the following parties via electronic mail this 28th day of July 2013.

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Summary: Brief of The City of Cincinnati electronically filed by Teresa Orahood on behalf of Thomas O'Brien