**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter 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 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 a New Service | ) ) ) | Case No. 12-2402-EL-ATA |

# REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO


Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com


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**Attorneys for Industrial Energy Users-Ohio**

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# REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

## I. INTRODUCTION

In this Application,[1] Duke Energy Ohio, Inc. ("Duke") seeks to increase by $729 million its total compensation for supplying generation-related capacity service ("Capacity Service") to PJM Interconnection, LLC ("PJM"). In support of this claim, Duke maintains that the Public Utilities Commission of Ohio ("Commission") has the authority to approve its Application and is constitutionally required to do so. Further it asserts that the settlement of its last electric security plan ("ESP") case ("ESP Stipulation") does not preclude the Commission from approving its Application. Finally, it asserts that the Commission can increase retroactively its total compensation back to August 1, 2012.

[1] Application of Duke Energy Ohio, Inc. (Aug. 29, 2012) ("Application").

As demonstrated in the Joint Motion to Dismiss, Comments, Reply Comments, and Initial Briefs, however, the Application seeks relief the Commission cannot grant. The Commission is not authorized to permit Duke to violate prior agreements or to invent and apply a cost-based ratemaking methodology to uniquely increase Duke's total compensation for Capacity Service.[2] Further, the Commission is not authorized to permit Duke to subsidize its competitive generation business or permit it to recover generation-related transition revenue.[3] Additionally, the Commission may not authorize the accounting changes that Duke seeks, nor may the Commission authorize Duke to retroactively increase its compensation for Capacity Service.[4] Accordingly, the Commission must deny Duke's Application.

## II. THE COMMISSION DOES NOT HAVE AUTHORITY TO APPROVE DUKE'S APPLICATION TO INCREASE ITS COMPENSATION FOR WHOLESALE CAPACITY SERVICE

Duke's Initial Brief opens with the broadly stated argument that the Commission has authority to approve the Application to increase its compensation for Capacity Service. Duke's claim is premised on two assertions. First, it states that PJM's Reliability Assurance Agreement ("RAA") "delegates" to the Commission authority to price Capacity Service.[5] Second, it argues that state law requires the Commission to approve its application under traditional regulatory principles.[6] Neither claim is correct.

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[2] Initial Brief of Industrial Energy Users-Ohio at 25-44 (June 28, 2013) ("IEU-Ohio Initial Brief").

[3] *Id*. at 49-56.

[4] *Id*. at 56-59.

[5] Initial Post-Hearing Brief of Duke Energy Ohio, Inc. at 2 (June 28, 2013) ("Duke Initial Brief"). See, also, *id*. at 9 ("the FERC has effectively assigned authority to state commissions to establish a compensation mechanism for FRR capacity service consistent with state principles").

[6] *Id*. at 3.

### A. The Commission does not derive any authority to increase Duke's compensation for Capacity Service from the RAA

Initially, Duke argues that the RAA delegates to the Commission authority to set a state compensation mechanism. In support of that claim, Duke cites a decision of the Michigan Public Service Commission, a decision by the Federal Energy Regulatory Commission ("FERC"), and the Commission's order approving an increase in compensation for Ohio Power Company ("AEP-Ohio"). By its terms, the RAA does not extend the Commission's authority, and the decisions cited by Duke do not support its argument.

The RAA cannot extend the Commission's jurisdiction.[7] The Commission's subject matter jurisdiction is set by statute.[8] The RAA, however, is a contract subject to Delaware law among PJM members and is approved as a tariff by FERC.[9] Thus, the RAA cannot extend the jurisdiction of the Commission to invent and apply a cost-based ratemaking methodology to increase Duke's total compensation for Capacity Service.[10]

Additionally, Duke misreads the RAA to support the result it seeks. By its terms, the RAA provides that a state compensation mechanism is controlling if the State has established one.[11] There is no delegation of authority to a state agency. Duke's

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[7] IEU-Ohio Initial Brief at 39-43.

[8] *City of Washington v. Pub. Util.Comm'n of Ohio*, 99 Ohio St. 70, 72 (1918); *see, also, Federal Deposit Insurance Corp. v. Board of Finance and Revenue*, 84 A.2d 495, 499 (Pa. Sup. Ct. 1951) (an agency cannot confer jurisdiction on itself).

[9] *PJM Interconnection, L.L.C.,* 115 FERC ¶ 61,079 (2006) (finding preexisting pricing model to be unjust and unreasonable); *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331 (2006) (approving, with conditions, the RPM); *PJM Interconnection, L.L.C.,* 119 FERC ¶ 61,318 (2007) (clarifying nature and extent of order approving the RPM).

[10] *Fox v. Eaton Corp.*, 48 Ohio St.2d 236, 238 (1976); *In re Kerry Ford, Inc.*, 106 Ohio App.3d 643, 651 (10th Dist. Ct. App. 1995).

[11] IEU-Ohio Ex. 9 at 122 (Section D.8 of Schedule 8.1 of the RAA).

"reading" of the RAA to include a delegation of FERC's authority to a state commission reads into the RAA a term that does not exist.

Duke's reliance on a Michigan Public Service Commission decision approving a cost-based capacity charge for an AEP-Ohio affiliate is likewise misplaced.[12] The Michigan decision does not address whether the Michigan commission is acting under a delegation from FERC.[13] Further, it does not address the claim presented by Duke that a state commission is authorized to invent and apply a cost-based ratemaking methodology to set a price for Capacity Service for the entire service load of the electric distribution utility ("EDU"); the Michigan case addressed only the prices for capacity assigned to the load supplied by competitive retail electric service ("CRES") providers.

Further, Duke's assertion that FERC "recently reconfirmed" that retail choice states are authorized to establish a state compensation mechanism based on FERC's recent acceptance of a filing by AEPSC misrepresents the outcome of that proceeding.[14] AEPSC filed a proposed appendix to the RAA that stated that the Commission had adopted a state compensation mechanism of $188.88/megawatt-day ("MW-day"). When IEU-Ohio, FirstEnergy Services Corporation, and others protested, AEPSC agreed to a modification that removed a reference to the state compensation mechanism being "cost based" and a reference to the total compensation of $188.88/MW-day. It also agreed to final language in the appendix that expressly provided that the *wholesale rate* shall be equal to the adjusted final zonal PJM Reliability Pricing Model ("RPM") rate for purposes of administering the state

[12] Duke Initial Brief at 9.

[13] *Proceeding to Establish a State Compensation Mechanism for Alternative Electric Supplier Capacity in Indiana Michigan Power Company's Michigan Service Territory*, Case No. U-17032, Order at 26 (Mich. Pub. Serv. Comm'n Sept. 25, 2012).

[14] Duke Initial Brief at 2-3.

compensation mechanism.[15] FERC's order accepting the appendix to the RAA, thus, did nothing more than confirm that the wholesale rate of CRES providers is based on RPM-Based Prices.

Duke also claims that the order approving an increase in compensation for AEP-Ohio[16] supports its claim that FERC delegated authority to the Commission. In the Capacity Order, however, the Commission held only that the Commission's assertion of authority is "consistent" with the RAA.[17] In fact, the Commission went to extreme (and has been argued in the *Capacity Case*, unlawful[18]) lengths to establish the state statutory authority for its decision.[19]

### B. State law does not authorize the Commission to invent and apply a cost-based methodology to increase Duke's total compensation for Capacity Service[20]

To support its assertion that Ohio law requires the Commission to invent and apply a cost-based ratemaking methodology, Duke relies on the Commission's decision in the *Capacity Case* and its finding that the Commission may authorize an increase in compensation under its general supervisory authority.[21] Duke additionally argues that Chapters 4901 to 4909, Revised Code, require the Commission to assure that Duke is

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[15] *PJM Interconnection, LLC*, FERC Docket No ER13-1164-000, Order Accepting Appendix to Reliability Assurance Agreement Subject to Compliance Filing at ¶¶14, 20 & 24 (May 23, 2013).

[16] *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) ("*Capacity Case*" or "Capacity Order" as appropriate).

[17] Capacity Order at 13.

[18] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 2013-0228, *et al*., Merit Brief of Appellant/Cross-Appellee Industrial Energy Users-Ohio (Ohio Sup. Ct. July 15, 2013).

[19] Capacity Order at 12.

[20] IEU-Ohio addressed Duke's claim that the Commission has statutory authority to invent and apply a cost-based ratemaking methodology at length in its initial brief. *See* IEU-Ohio Initial Brief at 25-39.

[21] *See, e.g.,* Duke Initial Brief at 10.

"fairly and reasonably compensated."[22] Duke's claim that it has an entitlement to cost-based compensation for its Capacity Service under state law, however, is without merit.

As Duke makes clear in the opening of its brief, its argument is premised on the claim that the Commission may regulate a wholesale service.[23] That claim, however, is nonsense.[24] The Commission's authority to regulate electric utilities as provided by Chapter 4905, Revised Code, extends to services that are provided to the "consumer," *i.e.*, the retail customer.[25] The Commission's traditional ratemaking authority under Chapter 4909, Revised Code, likewise, applies to only retail services.[26] Accordingly, the Commission is without authority to invent and apply a cost-based ratemaking methodology to increase Duke's compensation for what Duke repeatedly states is a wholesale service.

Ohio law further limits the Commission's traditional regulatory authority in the case of retail electric service under Chapter 4909, Revised Code, to those services that are noncompetitive. Those services declared competitive, including retail electric generation service,[27] "shall not be subject to supervision and regulation … by the public utilities commission under Chapters 4901. to 4909." except as otherwise provided by Section 4928.05(A), Revised Code.[28] As shown in IEU-Ohio's Initial Brief, none of the exceptions applies to Duke's Application.[29]

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[22] *Id*.

[23] *Id*. at 5.

[24] IEU-Ohio Initial Brief at 25-27.

[25] Section 4905.02 & 4905.03, Revised Code.

[26] Section 4909.01, Revised Code, incorporates the definitions of "public utility" and "electric light company" found in Sections 4905.02 and 4905.03, Revised Code.

[27] Section 4928.03, Revised Code.

[28] Section 4928.05(A), Revised Code.

[29] IEU-Ohio Initial Brief at 27-31.

The Commission is under no "obligation" to provide Duke with additional compensation based on Chapters 4901 to 4909, Revised Code, as Duke asserts.[30] In response to a similar claim that the Commission was required to protect an electric utility's rate of return by permitting it to recover cancelled plant costs that were not used and useful within the meaning of Section 4909.15, Revised Code, the Ohio Supreme Court ("Court") stated: "Absent such explicit statutory authorization, … the commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers."[31] The sections of Ohio law creating a traditional ratemaking process "contain no provisions insulating investors."[32] Similarly, there is no provision of Chapters 4901 to 4909, Revised Code, that affords Duke a legitimate basis for increasing its total compensation for wholesale capacity service, as discussed above.

Furthermore, the Commission is statutorily precluded from authorizing the above-market generation-related revenue Duke is seeking. As shown in IEU-Ohio's Initial Brief,[33] Duke is seeking above-market generation-related revenue for its legacy generation assets. This above-market revenue is nothing more or less than transition revenue. Under state law and the settlement Duke entered to resolve its electric transition plan ("ETP") application in 2000, Duke is now precluded from recovering additional transition revenue. Thus, the Commission cannot lawfully increase Duke's provision of wholesale Capacity Service.

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[30] Duke Initial Brief at 10.

[31] *Id*.

[32] *Office of Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.2d 153, 167 (1981).

[33] IEU-Ohio Initial Brief at 49-53.

## III. BECAUSE THE RAA AND ESP STIPULATION ESTABLISHED THE LEVEL OF COMPENSATION THAT DUKE WILL RECEIVE AS A FIXED RESOURCE REQUIREMENT ("FRR") ENTITY, *I.E.,* RPM-BASED PRICING, DUKE MUST DEMONSTRATE THAT RPM-BASED PRICING SERIOUSLY HARMS THE CONSUMING PUBLIC BEFORE THE COMPENSATION ESTABLISHED UNDER THESE AGREEMENTS CAN BE DEEMED UNJUST AND UNREASONABLE[34]

Apart from the fact that the Commission has no statutory basis to approve Duke's Application, the Commission must also reject Duke's Application because Duke has failed to demonstrate that the agreement under which it is compensated for Capacity Service is harming the public interest under the *Mobile-Sierra* doctrine. Under the *Mobile-Sierra* doctrine, an agreed-upon rate established bilaterally between parties is presumed to be just and reasonable.[35] Because the doctrine supports freedom of contract, the parties may agree that the presumption does not apply,[36] but the *Mobile-Sierra* presumption remains the default rule absent other agreement.[37] Because the agreement is presumed reasonable, "[o]nly when the mutually agreed-upon contract rate seriously harms the consuming public may [a commission] declare it not to be just and reasonable."[38]

As demonstrated in IEU-Ohio's Initial Brief, the Joint Motion to Dismiss, as well as the other Intervenors' Comments and Initial Briefs, Duke's compensation is based in contracts, either the RAA or the ESP Stipulation. Neither the RAA nor the ESP Stipulation contains an available provision that allows the Commission to adjust Duke's

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[34] *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008).

[35] *Id.* at 533 (*quoting Federal Power Comm'n v. Sierra Pacific Power Co.,* 350 U.S. 348, 352–353 (1956)).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 545-46. The Commission applies the same standard to agreements it has approved. *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, Case No. 75-161-EL-SLF, Opinion and Order (Aug. 4, 1976)

agreed-upon compensation.[39] Accordingly, the *Mobile-Sierra* presumption applies and the rates charged under the agreement are deemed to be just and reasonable. The Commission may alter Duke's agreed-upon compensation only upon a showing that the agreed-upon compensation, RPM-Based Pricing, "seriously harms the consuming public."[40]

Duke, however, cannot make a showing that the RPM-Based Prices it is receiving for Capacity Service seriously harm the consuming public. FERC has determined that "the RPM program produces just and reasonable rates for capacity in PJM."[41] The Commission has also determined that RPM-Based Prices support state energy policy. As the Commission stated, "RPM-based capacity pricing will stimulate true competition among suppliers in [the EDU's] service territory" and will "incent shopping."[42] The Commission also found that RPM-Based Pricing has "successfully been used throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field."[43] Based on the determinations of FERC and the Commission, there is no lawful basis to determine that RPM-Based Prices seriously harm the consuming public.

## IV. DUKE'S "FACTUAL BACKGROUND" IGNORES KEY FACTS

To support its Application to increase its compensation for Capacity Service, Duke makes several claims in what it calls the "factual background" of its brief. After outlining provisions of the RAA and the Commission's Capacity Order, it asserts Duke

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[39] *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County,* 554 U.S. at 545-46. Duke waived its right to proceed under Section 206 of the Federal Power Act as provided by the RAA.

[40] *Id.*

[41] FirstEnergy Solutions ("FES") Ex. 15 at 1.

[42] Capacity Order at 23.

[43] *Id.*

had no choice but to assume FRR obligations, that state regulatory proceedings determined the length of its FRR obligation, that it is financially harmed because it is not securing sufficient revenue for its legacy generating assets, and that it is similarly situated to AEP-Ohio but not receiving the same compensation.[44] This "background" leaves out significant facts that, once recognized, preclude the conclusions that Duke advances.

Initially, Duke makes the unsupported claim that "Duke Energy Ohio had no choice but to function as an FRR entity."[45] The record in this case, however, demonstrates that Duke considered a delayed move to PJM, but elected to migrate to PJM with an effective date of January 1, 2012 with notice that the Base Residual Auctions ("BRAs") had already occurred for the next three years.[46] Additionally, Duke could have elected to delay its migration.[47] The assertion that Duke "had no choice" is nonsense.

Duke then asserts that state regulatory proceedings locked it into the length of its FRR election, but leaves out several key facts.[48] According to Duke, it sought to establish transmission and capacity charges tied to the move to PJM in its application for a Market Rate Offer ("MRO").[49] When the Commission rejected the MRO application, Duke sought an alternative means to establish transmission rates.[50] It filed

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[44] Duke Initial Brief at 6-17.

[45] *Id*. at 12.

[46] The history of the move is detailed in FES Exs. 4-7. *See* IEU-Ohio Initial Brief at 18-19.

[47] FES Ex. 2 at 12.

[48] Duke Initial Brief at 13-15.

[49] *Id*. at 13.

[50] *Id*. at 13-14.

the BTR case[51] by which transmission cost recovery was addressed (and Duke waived its right to seek an alternative capacity rate other than RPM-Based Prices from FERC, a fact left out of Duke's recitation).[52] Duke then filed its ESP application seeking a cost-based capacity charge (another fact left out of Duke's version of its regulatory history), settled the ESP application with the ESP Stipulation that provided that CRES providers and successful auction bidders would pay the RPM-Based Price for capacity provided by Duke to PJM (a third fact left out of Duke's recitation), and Duke agreed to seek to shorten the FRR election by one year.

Rather than being locked into the term of its FRR election, Duke elected to migrate to PJM and then entered into Commission-approved agreements supporting its move. In fact, Duke identified a business case for moving to PJM on its time schedule[53] and then acted on it. It was "locked" into the length of its FRR election by its business decision to improve its generation revenue by moving to PJM sooner rather than later.

Further, it is not clear what complaint Duke is making when it asserts that it was "locked" into a shorter FRR term. The fact that it was subject to any FRR obligation was the simple result of its business decision to migrate to PJM for periods when it had not participated in the BRAs.

Duke further complains that it is suffering financially as a result of its voluntary decision to become an FRR Entity.[54] Yet Duke again leaves out a critical fact. Duke

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[51] *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.,* Stipulation and Recommendation (Apr. 26, 2011) ("BTR Stipulation").

[52] Duke Initial Brief at 14.

[53] FES Ex. 4.

[54] Duke Initial Brief at 16-17.

has approval to transfer its generation assets.[55] Any injury that Duke, the EDU, is incurring because of the financial performance of its "legacy" generating assets can be resolved: Duke can transfer or sell the assets or otherwise separate (as required by Ohio law) its competitive and noncompetitive business segments.

Finally, Duke asserts that its FRR status "mirrors that of AEP-Ohio."[56] After going through a list of ways that it is similar to AEP-Ohio, it again leaves out several salient facts.

- With a full understanding of the RPM-Based capacity compensation determined in accordance with the BRAs for the years it would be an FRR Entity, Duke elected to migrate to PJM.[57]
- It represented as part of its application to FERC that it would be compensated for load served by CRES providers at RPM-Based Prices.[58]
- It sought a cost-based retail capacity charge in its ESP case,[59] but settled the ESP case with the agreement that Capacity Service would be priced at the RPM-Based Prices.[60]
- It agreed to waive its right to seek an alternative means of securing compensation for Capacity Service at FERC through a Section 205 application.[61]

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[55] OEG Ex. 1 at 20-21.

[56] Duke Initial Brief at 15.

[57] For a discussion of the record on this point, see IEU-Ohio Initial Brief at 44-49.

[58] FES Ex. 7 at 12-13.

[59] Kroger Ex. 5 at 10-11.

[60] IEU-Ohio Ex. 5 at 7 & 12.

Whatever similarities may exist between AEP-Ohio and Duke are simply irrelevant: Duke agreed to the level of its total compensation for the provision of Capacity Service for both its standard service offer ("SSO") and shopping load. The conclusion Duke seeks to draw that the Commission must increase its compensation for Capacity Service because it is like AEP-Ohio is not warranted.

## V. DUKE'S CONSTITUTIONAL ARGUMENTS ARE NOT WITHIN THE COMMISSION'S JURISDICTION TO ADDRESS

In defense of its Application, Duke asserts two constitutional claims. First, it asserts that a failure to approve its Application will result in confiscatory rates.[62] Second, it argues that the Commission must approve its Application under an equal protection theory.[63] Neither constitutional claim is within the jurisdiction of the Commission to address.

As a settled matter of law, the Commission has only that jurisdiction which is provided by the General Assembly.[64] Based on the statutory scope of its powers, the Commission has concluded that constitutional claims are matters for the Court to address.[65] As the Commission recently stated, the Commission must presume the constitutionality of the applicable law governing its actions because "it is the province of the courts, and not the Commission," to judge the constitutionality of the statutory structure under which the Commission acts.[66] Therefore, the Commission does not

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[61] BTR Stipulation at 11-12.

[62] Duke Initial Brief at 17-22.

[63] *Id*. at 22-26.

[64] *Lucas County Comm'rs v. Pub. Util. Comm'n of Ohio,* 80 Ohio St.3d 344, 347 (1997).

[65] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at 9 (Jan. 11, 2011) ("SEET Opinion").

[66] *Id*.

have jurisdiction to address Duke's claims that an order denying it an increase in its total compensation for Capacity Service will result in a constitutional violation. Even if the Commission does address Duke's claim that it is constitutionally entitled to increased compensation for Capacity Service, the Commission should find that the claims are deficient.

## VI. DUKE'S CLAIM THAT ITS CURRENT COMPENSATION FOR CAPACITY SERVICE IS CONFISCATORY IS WITHOUT MERIT

Throughout its Initial Brief, Duke argues that the compensation it is currently receiving is confiscatory in violation of the Takings Clause of both the United States Constitution and the Ohio Constitution. For instance, Duke claims that "[t]he Application in these proceedings derives from [its right] to receive just compensation" and that continued compensation at RPM-Based Pricing would be "unconstitutionally confiscatory."[67] Duke further alleges that it is "constitutionally entitled to a rate that permits it to earn a fair return on the value of the assets it employs for the public convenience."[68]

Duke's claim that it is suffering a taking fails for several reasons. Duke cannot, and has not, demonstrated that a taking has occurred or that its current compensation is not just and reasonable. Further, if as Duke argues throughout its Initial Brief, the Commission did not establish in the ESP Stipulation the compensation Duke would receive as an FRR Entity,[69] then the Commission's actions cannot amount to a taking inasmuch as the Commission has not regulated or taken anything. Further, its recourse is to FERC (but it has given up that option).

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[67] Duke Initial Brief at 1.

[68] *Id*. at 17.

[69] *See, e.g., id*. at 30-37.

### A. Duke has not demonstrated that a taking that qualifies for constitutional protection has occurred nor has Duke demonstrated that RPM-Based Pricing is unjust and unreasonable

To prove an unconstitutional taking has occurred, Duke must demonstrate that the total effect of the rate order is unjust and unreasonable.[70] "Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness."[71] In fact, a regulated utility is not entitled to a profit and a utility "that is unable to survive without charging exploitative rates has no entitlement to such rates."[72] Duke's constitutional claim is further limited by the fact that its generation business has been declared competitive. As FERC has noted, the *Hope* constitutional analysis is no longer applicable since much of the electric industry is now subject to market prices rather than fixed rates based upon a cost-of-service approach.[73]

#### 1. Nothing has been taken from Duke

Duke carries a heavy burden of showing that the RPM-Based compensation that it is currently receiving and that it agreed to receive from January 1, 2012 until May 31, 2015 is unjust and unreasonable.[74] The primary factor to determine if there has been a

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[70] *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 602 (1944) ("It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.").

[71] *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).

[72] *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1181 (D.C. Cir. 1987) (*citing Federal Power Comm'n v. Natural Gas Pipeline Co.,* 315 U.S. 575, 590 (1942) and *Market Street Railway. v. Railroad Comm'n of California,* 324 U.S. 548 (1945)).

[73] *ISO New England, Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n*, 138 FERC ¶61027 at ¶¶138-39 (Jan. 19, 2012).

[74] *Dayton Power & Light Co. v. Pub. Util. Comm'n of Ohio,* 4 Ohio St.3d 91, 97 (1983) ("He who would upset the rate order carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.").

regulatory taking that offends the Constitution is whether regulatory action "has interfered with distinct investment-backed expectations."[75]

> To "expect" can mean to anticipate or look forward to, but it can also mean "to consider probable or certain," and "distinct" means capable of being easily perceived, or characterized by individualizing qualities. Distinct investment-backed expectations" implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. … The idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to protect the property we have, not the property we dream of getting.[76]

Applying this standard to a landlord who purchased rental property that was already subject to maximum rental price controls, the Ninth Circuit Court of Appeals held that the landlord got exactly what he bargained for in his purchase and had no constitutional claim based on "hoped-for" changes that would have allowed the landlord to obtain additional compensation.[77]

Similarly, Duke is receiving what it bargained for when it moved to PJM. As set forth in IEU-Ohio's Initial Brief and repeated in Duke's Initial Brief, Duke initiated a move to PJM in 2010.[78] Ultimately, Duke decided to move to PJM on January 1, 2012.[79] Duke voluntarily decided to move from Midwest Independent Transmission System Operator ("MISO") to PJM based on what it concluded was a favorable business plan.[80] More importantly, by the time Duke made its move to PJM, the BRAs for periods through the 2015-16 PJM delivery year had been conducted. Duke then entered the BTR and ESP Stipulations in which it agreed to be compensated for Capacity Service at

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[75] *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010).

[76] *Id*.

[77] *Id.*

[78] IEU-Ohio Initial Brief at 18.

[79] *Id.*

[80] FES Ex. 4.

the RPM-Based Price. As a result, Duke is receiving exactly what it agreed to in the way of compensation for Capacity Service. It enjoys no constitutional protection for a "hoped-for" change from the default compensation it agreed to when it voluntarily moved to PJM.

Additionally, there is no obligation to ensure that capacity suppliers have a reasonable opportunity to recover their costs, plus a profit.[81] As FERC recently concluded:

> [C]apacity resources in New England ha[ve] no property right to be compensated at a desired level "such that an abrogation of that property right is prohibited by the Fifth Amendment." ... [S]ince the era of *Hope* and *Bluefield*, the "utility regulatory paradigm" ha[s] changed, and that, while in the *Hope* and *Bluefield* era, "[i]t was understood that a utility's ability to provide service to its customers was dependent on its financial health; [and] so as to ensure the provision of service at just and reasonable rates to the utility's customers as required by the Federal Power Act, it was necessary to require that the utility was able to recover its costs and a reasonable profit," in the era of market-based regulation, "each market entrant [i]s aware of the possibility that at some times, it might earn substantially more than a traditional cost-based rate, but that at other times, it might earn less than its costs."[82]

Thus, Duke has no legitimate expectation that its total compensation for Capacity Service, a competitive wholesale generation service, will be based on an invented cost-based ratemaking methodology.

Further, any financial injury that is occurring is the result of Duke's failure to separate its legacy generation assets when it has authority to do so. According to Duke, its legacy generating assets are producing negative returns.[83] If that is true,[84]

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[81] *ISO New England, Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n*, 138 FERC ¶ 61027 at ¶¶138-39 (Jan. 19, 2012).

[82] *Id.* at ¶139 (internal citations omitted).

[83] Duke Initial Brief at 16-17.

[84] According to several intervenors, Duke's claim that it is suffering financial harm as a result of the use of RPM-Based Prices to compensate for Capacity Service is unsupported. *See, e.g.,* Initial Post-Hearing

then the solution is obvious: Duke should exercise its authority to divest the troubled assets. Because there is no government barrier to prevent Duke from avoiding the harm (and apparently the harm is self-inflicted), Duke does not have a legitimate basis for asserting that the failure to increase its compensation will result in confiscatory rates.

**2. RPM-Based Pricing is just and reasonable compensation**

"The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[85] Thus, for Duke to prevail on any confiscation claim it must demonstrate that RPM-Based Pricing is not just and reasonable; the findings of FERC and the Commission on the reasonableness of RPM-Based Prices, however, preclude such a conclusion.

In reviewing the settlement between PJM and stakeholders involving revisions to the RAA that produced the RPM process and the FRR Alternative, FERC held that RPM-Based Pricing is just and reasonable and that competitively determined prices have many advantages over traditional cost of service ratemaking:

> In a competitive market, prices do not differ for new and old plants or for efficient and inefficient plants; commodity markets clear at prices based on location and timing of delivery, not the vintage of the production plants used to produce the commodity. Such competitive market mechanisms provide important economic advantages to electricity customers in comparison with cost of service regulation. For example, a competitive market with a single, market-clearing price [*i.e.* RPM] creates incentives for sellers to minimize their costs, because cost-reductions increase a seller's profits. And when many sellers work to minimize their costs, competition among them keeps prices as low as possible. While an efficient seller may, at times, receive revenues that are above its average total costs, the revenues to an inefficient seller may be below its average total costs and it may be driven out of business. This market result

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Brief by the Office of the Ohio Consumers' Counsel at 62-107(June 28, 2013). To the extent that Duke has misstated its alleged financial problem, its request for additional relief is not compelling.

[85] *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (*citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 297, n.40 (1981)).

> benefits customers, because over time it results in an industry with more efficient sellers and lower prices. By contrast, sellers have far weaker incentives to minimize costs under cost-of-service, because regulation forces a seller to reduce its prices when the seller reduces its cost. The Commission has previously found single clearing price markets to be just and reasonable, and New Jersey Rate Counsel has made no showing as to why the use of a single clearing price here would be unjust and unreasonable.[86]

Similarly, this Commission has approved the use of RPM-Based Prices for Capacity Service[87] and found that "RPM-based capacity pricing will stimulate true competition among suppliers" and will "incent shopping."[88] The Commission also has found that RPM-Based Pricing has "successfully been used throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field."[89] Thus, RPM-Based Pricing is just and reasonable, and Duke has no constitutional right to receive compensation greater than market-based compensation, *i.e.,* RPM-Based Pricing.

### 3. Duke has not demonstrated that a market pricing framework for Capacity Service is unjust and unreasonable

The Court has also held that if a utility is receiving compensation based upon a legislatively set framework, to prevail upon a confiscation claim a utility must demonstrate that the rate order has a confiscatory effect and that the underlying statutory determinations establishing the framework are unreasonable.[90] In a case involving the Commission's exclusion of certain property from the rate base of the Ohio Edison Company ("Ohio Edison"), Ohio Edison argued that "*Hope's* 'end result' test

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[86] *PJM Interconnection, L.L.C.*, 117 FERC ¶61331 at ¶141 (Dec. 22, 2006) (internal citations omitted).

[87] *Capacity Case*, Entry (Dec. 8, 2010).

[88] Capacity Order at 23.

[89] *Id.*

[90] *Ohio Edison Co. v. Pub. Util. Comm'n of Ohio*, 63 Ohio St.3d 555, 564 (1992) (*citing Dayton Power & Light Co. v. Pub. Util. Comm'n of Ohio*, 4 Ohio St.3d 91, 106 (1983)).

requires the commission to consider the effects of its rate order on the company's financial integrity, irrespective of the appropriateness of the underlying statutory determinations."[91] On appeal the Court rejected Ohio Edison's argument and held that the Court "would have to ignore the 'broad public interests' recognized in *Permian Basin* and raise the investor concerns listed in *Hope* to a constitutional level."[92] The Court continued:

> The federal constitutional cases do not support such a result. Rather, these cases recognize investor concerns as only one factor that the commission is to consider in setting just and reasonable *(i.e.,* constitutional) rates. Once these interests are appropriately balanced, the rates' effect on the company's financial integrity *(i.e.,* debt rating and dividend level) is but another of the risks which a utility, as any other unregulated enterprise, must bear.[93]

The Court concluded that the Commission had followed the legislatively mandated formula which appropriately balanced both investor and consumer expectations.[94]

The analysis from *Ohio Edison* is just as applicable to the current regulatory framework regarding Capacity Service as it was to traditional ratemaking. The General Assembly and FERC have both systematically restructured the electric industry and introduced market-based pricing in place of traditional ratemaking. The framework reaches an appropriate balance between investor and consumer expectations and has provided certain protections to investors while transitioning to market prices. For example, Ohio allowed incumbent EDUs such as Duke the opportunity to seek transition

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[91] *Id.*

[92] *Id.* at 564-65.

[93] *Id.* at 565.

[94] *Id.*

revenue for a limited time.[95] Following the transition, which has long since ended, Duke's generation business is solely on its own in the competitive market.[96]

For Duke to now claim that its market-based pricing is unjust and unreasonable, Duke must demonstrate, according to the Court in *Ohio Edison*, the statutory determinations to move to market-based pricing are also unjust and unreasonable. Duke has failed to do so, and the law will not support such an argument. The Constitution does not insulate an EDU's total company earnings from the effects of competition in general or, more specifically, with regard to its competitive or unregulated lines of business.[97] "The due process clause has been applied to prevent governmental destruction of existing economic values. *It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.*"[98] Accordingly, Duke's claim that its current rates are confiscatory must fail.

**B. If the ESP Stipulation did not set Duke's compensation as an FRR Entity, then a confiscation claim must be lodged before FERC**

If Duke is correct that the Commission has not addressed Duke's compensation as an FRR Entity, then any takings claim must be raised at FERC. "A regulatory takings claim is not ripe until the appropriate administrative agency has made a final decision on how the regulation will be applied to the property at issue."[99] If a procedure exists "for seeking just compensation, the property owner cannot claim a violation of the Just

[95] Sections 4928.31 to 4928.40, Revised Code.

[96] Section 4928.38, Revised Code.

[97] *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. at 603.

[98] *Market Street Railway Co. v. Railroad Comm'n of California*, 324 U.S. 548, 567 (1945) (emphasis added).

[99] *Guggenheim v. City of Goleta*, 638 F.3d at 1117 (*citing Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-193 (1985)).

Compensation Clause until it has used the procedure and been denied just compensation."[100]

Multiple methods exist for altering Duke's default compensation, RPM-Based Pricing, that an FRR Entity receives under Section 8 of Schedule 8.1 of the RAA. A state may set a state compensation mechanism, but the RAA does not mandate that states set a state compensation mechanism (nor could it.) In the absence of a state compensation mechanism, Duke could have filed an Application under Section 205 of the Federal Power Act ("FPA") with FERC to change the default compensation from RPM-Based Pricing "to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable."[101] (Of course, Duke represented to FERC that it would charge RPM-Based Pricing and explicitly agreed in the BTR Stipulation that it would not file an application seeking cost-based capacity charges at FERC.) Alternatively, Duke could file a Complaint under Section 206 of the FPA and argue that the RAA and RPM-Based Pricing as applied to Duke is not just and reasonable. In any event, if the Commission has not set Duke's compensation as an FRR Entity (as Duke argues), then the appropriate forum to seek to increase its compensation for Capacity Service would be before FERC.

## VII. DUKE FAILS TO ESTABLISH A VIOLATION OF A RIGHT TO EQUAL PROTECTION OF THE LAW

Duke further argues that "failure to follow the AEP Ohio precedent … would result in unduly discriminatory treatment of similarly situated utilities, in violation of Duke Energy Ohio's equal protection rights under the United States and Ohio

[100] *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. at 195.

[101] IEU-Ohio Ex. 9 at 122.

Constitutions."[102] Because the Commission increased the compensation for AEP-Ohio, Duke argues that it should be permitted to increase its compensation for Capacity Service.[103]

Equal protection of the law requires that the Commission act consistently when presented with similar facts affecting similarly-situated parties.[104]

> Equal protection of the law means the protection of equal laws. … The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.[105]

At the center of Duke's claim is the assertion that it should be afforded similar treatment to that given AEP-Ohio, but it fails to show that the treatment afforded AEP-Ohio was in fact lawful. Under Ohio law, the retail electric generation business has been declared competitive and exempted from Commission supervision and regulation under Chapters 4905 and 4909, Revised Code.[106] As a result, the Commission does not have the authority to increase the compensation either AEP-Ohio or Duke receives for the provision of Capacity Service based on their FRR status by inventing and applying a cost-based ratemaking methodology. Because the Commission cannot lawfully order the relief AEP-Ohio received that Duke claims it seeks, it cannot complain that a rejection of the Application is a denial of its right to equal protection.

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[102] Duke Initial Brief at 23.

[103] *Id*.

[104] *Conley v. Shearer*, 64 Ohio St.3d 284, 288 (1992).

[105] *Id*. at 288-89.

[106] Sections 4928.03 and 4928.05(A), Revised Code.

Duke further ignores the fact that at least one other group of EDUs, the FirstEnergy EDUs, that are also operating under an FRR election, are receiving compensation for Capacity Service at an auction-based rate. Further, the Dayton Power and Light Company, though not an FRR Entity, is receiving compensation based on RPM-Based Prices for Capacity Service. Apparently, Duke's view of equal protection of the laws is nothing more than an attempt to identify which other EDU is receiving above-market compensation for Capacity Service and then seek authorization to receive the same treatment. There is no constitutional protection for this opportunistic behavior.

Under the applicable constitutional analysis, moreover, Duke cannot demonstrate that it is entitled to similar treatment afforded to AEP-Ohio. "To prevail on an equal protection claim, the plaintiff must show that the government has treated it differently from a similarly situated party and that the government's explanation for the differing treatment 'does not satisfy the relevant level of scrutiny.'"[107] Strict scrutiny of a difference in treatment applies if the government regulation impinges a fundamental right or is based on a suspect classification.[108] When, as here, neither a suspect class or a fundamental right is affected by the government action, the State need only show a rational basis for its action.[109] Under the "rational relationship" test, there is no violation

[107] *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (citation omitted).

[108] *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 481 (2007). "[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'… Moreover, the only classifications recognized as 'suspect' are those involving race, alienage, and ancestry." *State v. Williams*, 88 Ohio St.3d 513, 530 (2000). "Recognized fundamental rights include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment to the United States Constitution, the right to procreate, and other rights of a uniquely personal nature. *Id.*

[109] *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d at 216.

if the difference in regulation is rationally related to a legitimate goal of government.[110] To establish a violation of the rational basis standard, Duke must "negative every conceivable basis [for the distinction]."[111]

Duke cannot meet that high hurdle because there are several reasons for treating Duke differently. Duke entered the ESP Stipulation that set out its total compensation for Capacity Service with knowledge of the compensation it would receive for the service.[112] Unlike AEP-Ohio, Duke waived its Section 205 rights in the BTR Stipulation. In contrast to relief provided to AEP-Ohio that increased its compensation for Capacity Service provided to only shopping customers, Duke is seeking to increase its total compensation for Capacity Service provided for both default and shopping customers. Unlike the relief granted to AEP-Ohio which was prospective only, Duke is seeking a retroactive increase in its total compensation. Thus, Duke is situated differently and presents a materially different claim that does not justify the application of the Capacity Order "precedent" to its Application.[113]

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[110] *Toledo v. Tellings*, 114 Ohio St.3d 278, 285 (2007).

[111] *State v. Williams*, 88 Ohio St.3d at 531; *see, also, LTV Steel Co. v. Industrial Comm'n*, 140 Ohio App.3d 680, 692-93 (10 Dist. Ct. App. 2000). "When social or economic legislation is at issue, the Equal Protection Clause allows States wide latitude." *City of Cleburne v. Cleburn Living Center*, 473 U.S. 432, 440 (1985).

[112] Of course, AEP-Ohio had accepted the use of RPM-Based Pricing in its first ESP. Thus, the Commission initially determined that RPM-Based Prices were the appropriate state compensation mechanism for AEP-Ohio. *Capacity Case*, Entry (Dec. 8, 2010). The end result was correct because AEP-Ohio had no claim to anything more than RPM-Based Prices under the RAA. Duke has no better claim to an increase in compensation in excess of the RPM-Based Prices. Either it is subject to the default pricing rule of the RAA, IEU-Ohio Ex. 9 at 122, or it agreed to a state compensation mechanism when it entered the ESP Stipulation and agreed to provide PJM with Capacity Service that would be provided to CRES providers at the RPM-Based Price. IEU-Ohio Ex. 5 at 12.

[113] *City of Englewood v. Montgomery County Budget Comm'n*, 39 Ohio App.3d 153, 156 (10th Dist. Ct. App. 1987) (decision relied upon by appellee of no precedential value because it was distinguishable on its facts).

## VIII. STATE ENERGY POLICY DOES NOT PROVIDE DUKE A GUARANTEE OF THE FINANCIAL INTEGRITY OF ITS LEGACY GENERATING ASSETS

As a part of its collection of constitutional and policy arguments to support its claim for increased compensation for Capacity Service, Duke also asserts that the Commission must increase its compensation for Capacity Service so as to protect Duke's financial integrity. Apart from relying again on the often cited *Capacity Case*, Duke cites the Commission's Mission Statement for authority.[114]

Whatever may be contained in the Mission Statement, the Commission must enforce the energy policy.[115] It is the policy of the State to ensure the "availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service," "[e]nsure diversity of electricity supplies and suppliers," "prohibit[] the recovery of any generation-related costs through distribution or transmission rates," and "[e]nsure retail electric service consumers protection [from] … market power."[116] Absent from the list of state policies the Commission is to effectuate is a policy encouraging the Commission to prop up the legacy generation business of an EDU that is supposed to be operating on a competitively neutral basis. In fact, such action is prohibited.[117]

Further, as Duke's affiliate pointed out when AEP-Ohio similarly sought to rely on the Commission's Mission Statement to justify an increase of its compensation for the supply of Capacity Service to CRES providers, such reliance is improper:

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[114] Duke Initial Brief at 27-30.

[115] Section 4928.06, Revised Code.

[116] Section 4928.02(A), (C), (H), & (I), Revised Code.

[117] Section 4928.02(H), Revised Code (prohibiting the collection of generation-related costs through distribution or transmission rates).

> Putting aside the fact that the reference, in that mission statement, to financial integrity says nothing about which entities' financial integrity the Commission hopes to ensure (that is, regulated utilities or competitive providers), a mission statement cannot possibly form the basis for a legal order. As even AEP Ohio has recognized, the Commission is a creature of statute and, thus, has the power only to issue orders under the provisions of statutes that grant such power. A mission statement written and published by the Commission itself grants no such power.[118]

Further, as a statutory matter, the Commission has no authority to adjust Duke's compensation to assure the financial integrity of its competitive generation business. The Capacity Service for which Duke is seeking increased compensation is a wholesale competitive generation service, outside the Commission's price regulation. To the extent that Duke is seeking a retail charge for a generation-related service, the traditional regulatory provisions are no longer applicable.[119] To the extent that Duke is seeking above-market revenue (essentially amounting to additional transition revenue for its generation resources), the Commission is specifically precluded from authorizing additional transition revenue or its equivalent.[120] Accordingly, there is no lawful basis for the Commission to increase Duke's compensation for a wholesale generation-related service so as to assure Duke recovers a particular rate of return on its legacy generation assets.

It is also clear that increasing Duke's compensation violates corporate separation requirements, injuring the development of a competitive retail market and consumer well-being. Duke's proposed charges will provide its legacy generation assets above market revenue in violation of the prohibition contained in Section 4928.02(H), Revised

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[118] FES Ex. 8 at 7.

[119] Section 4928.05(A), Revised Code.

[120] Section 4928.38, Revised Code.

Code.[121] This violation would in turn trigger a violation of Duke's corporate separation plan that must conform to the state policies contained in Section 4928.02, Revised Code.[122] These above market payments would disrupt the efforts of CRES providers to enter Duke's service territory and, more importantly, deprive consumers of the full opportunity to reduce their electric bills through the exercise of their customer choice rights.[123] Thus, Duke's proposed increase in compensation will adversely affect the competitive generation market in violation of state law and policy.[124]

## IX. DUKE RESOLVED ITS COMPENSATION FOR CAPACITY SERVICE IN THE COMMISSION-APPROVED ESP STIPULATION

To avoid enforcement of the terms of the ESP Stipulation which set its compensation for Capacity Service at RPM-Based Prices, Duke claims "the services at issue in the ESP proceeding, as addressed by the Commission's ESP Order, cannot be the same services as those that form the basis for this Application."[125] As demonstrated by Duke, its assertion the ESP Stipulation did not address its compensation for Capacity Service is plainly wrong.

Duke itself cannot maintain the façade that the ESP Stipulation did not address its compensation for Capacity Service in its Initial Brief and testimony. For example, in explaining why it should be treated similarly to AEP-Ohio, Duke makes the following

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[121] Section 4928.02(H), Revised Code, prohibits the recovery of generation-related revenue through transmission or distribution rates. In the *Sporn* case, the Commission held that the recovery of generation-related retirement costs was a violation of this provision. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012). A similar conclusion is required here because Duke seeks to recover generation-related costs through a nonbypassable rider.

[122] Section 4928.17, Revised Code.

[123] FES Ex. 3 at 12-13.

[124] *See* IEU-Ohio Initial Brief at 53-56.

[125] Duke Initial Brief at 32.

admission concerning the Capacity Service compensation it is seeking: "A state compensation mechanism with two sources of compensation is similarly appropriate for Duke Energy Ohio. Such a structure—*comprised of market-based prices and a deferral applicable to all retail customers who indirectly benefit from the service but are one step removed from it*—ensures consistent treatment of FRR entities, as contemplated under the federal and state equal protection clauses."[126] Later, it complains that the retail capacity rider ("Rider RC"), based on RPM-Based Prices, does not provide sufficient revenue because "[t]he net effect is that Duke Energy Ohio, as the capacity supplier, receives only the FZCP [Final Zonal Capacity Price] rates for its FRR capacity services."[127] As Duke's witness, Keith Trent, also made clear in his testimony, the relief sought in this case is an additional charge to compensate Duke for the provision of Capacity Service.[128] Further, in calculating the charge, Duke proposes to reduce the total revenue requirement by the revenue received under the ESP Stipulation for the Capacity Service provided to PJM.[129] Thus, as Duke itself makes clear repeatedly, Duke is seeking an increase in the compensation it is currently receiving for Capacity Service, not some mysterious other service.

The reason Duke cannot maintain the façade is simple: the ESP Stipulation resolved the issue of Duke's compensation for the provision of Capacity Service. The ESP Stipulation provides that Duke is to "supply" Capacity Service to PJM which in turn will charge successful SSO bidders and CRES providers the RPM-Based Price of

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[126] *Id.* at 45 (emphasis added).

[127] *Id.* at 62.

[128] Tr. Vol. II at 353.

[129] Application, Attachment C.

capacity for the load that they serve.[130] Through the PJM settlement process, Duke then recovers compensation for Capacity Services based on RPM-Based Prices.[131]

Duke also understood that it was resolving its compensation for Capacity Service as an FRR Entity when it entered the ESP Stipulation. As detailed in IEU-Ohio's Initial Brief, Duke's testimony in support of the ESP Stipulation demonstrated that Duke was agreeing to give up a cost-based capacity charge contained in its ESP application for compensation based on RPM-Based Prices and the Electric Service Stability Charge ("ESSC").[132]

The Commission need only look to its order approving the ESP Stipulation, as Duke itself suggests,[133] to conclude that the Commission has already determined Duke's total compensation for the provision of capacity and energy. For nonshopping customers, the Commission noted that the price paid will be determined primarily by the results from the procurement of energy and capacity through a competitive bidding process ("CBP").[134] "The resulting average rate for the bundled capacity and energy product will be decoupled so that prices for capacity and energy can ultimately be shown separately on customers' bills as Rider RC or Rider RE."[135] The Supplier Cost Reconciliation Rider ("Rider SCR") provided a means of truing up the costs of procuring SSO supply and revenue collected from customers for SSO service, which according to

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[130] IEU-Ohio Ex. 5 at 7 & 12.

[131] Tr. Vol. V at 1202.

[132] IEU-Ohio Brief at 19-22.

[133] Duke Initial Brief at 35.

[134] *In the Matter of Application of Duke Energy Ohio, Inc. 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 Services*, Case No. 11-3549-EL-SSO, Opinion and Order at 16 (Nov. 22, 2011) ("ESP Order").

[135] *Id.*

the Company's testimony, "provides a means of making Duke's customers, Duke, and SSO suppliers whole for the energy and capacity procured to meet the SSO load obligation."[136] Suppliers of the SSO would secure capacity at the RPM-Based Price.[137] For shopping customers, the Commission summarized the terms of the Stipulation that Duke now seeks to avoid: "During the term of the ESP, 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."[138] No further discussion was necessary.

The ESP Stipulation further provided Duke with ESSC revenue expressly for the purpose of addressing Duke's FRR obligation. Summarizing the same testimony justifying the purpose of the ESSC that is in this record as IEU-Ohio Ex. 16, the Commission in its order approving the ESP Stipulation stated:

> With respect to the ESSC, Duke Witness Wathen avers that Rider ESSC is necessary because Duke is required to supply capacity for Duke's entire footprint until at least the 2015/2016 PJM Planning Year. Duke will satisfy its obligation, in part, with its generation assets. … According to Mr. Wathen, 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.

Thus, the Commission clearly understood the manner in which Duke would be compensated for its FRR obligation under the ESP Stipulation because Duke unequivocally explained the sources of its compensation. Duke cannot avoid the results of the ESP Stipulation by asserting it did not address Duke's total compensation for Capacity Service. The ESP Stipulation setting Duke's total compensation for Capacity

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[136] *Id.*

[137] *Id*.

[138] *Id*. at 18.

Service is entitled to the force of law because it was approved by the Commission's order.[139]

## X. THE ESP STIPULATION CONTAINS AN EXPRESS WAIVER OF FURTHER CLAIMS FOR CAPACITY COMPENSATION

Duke further argues, "Nowhere does the ESP Order specify how much Duke Energy Ohio would be paid for providing wholesale capacity service or that Duke Energy Ohio voluntarily relinquished its right to recover its costs, including a fair return, for providing such service. It would *strain credulity* to suggest that [Duke] knowingly and intentionally waived its constitutional rights on a subject that neither the ESP Stipulation nor the ESP Order ever addressed."[140]

Duke's attempt to avoid the compromise of claims in the ESP Stipulation is meritless. As noted previously, Duke sought a cost-based capacity charge in its Application.[141] According to Duke, it was providing Capacity Service so as to "insulate all customers from the vagaries of the wholesale capacity market by providing them with an adequate and stable supply of capacity over a nine year, five month period."[142] The capacity to serve its customers "will be supplied from the Company's existing legacy generating assets,"[143] and the cost for these assets would be set at the "embedded cost of supply."[144]

The ESP Stipulation resolved Duke's request for compensation for Capacity Service. As Duke indicated in its testimony in support of the ESP Stipulation, "Duke

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[139] *Ohio Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 340, 344 (2007).

[140] Duke Initial Brief at 39 (emphasis added).

[141] Kroger Ex. 5 at 8-12.

[142] *Id*. at 10.

[143] *Id*.

[144] *Id*.

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."[145] Duke, thus, settled and understood it had established the pricing and compensation for Capacity Service under the ESP Stipulation.

Having agreed to a price for Capacity Service, Duke also agreed that it was giving up the right to pursue claims inconsistent with the terms of the ESP Stipulation. Duke specifically agreed to "support the reasonableness of this ESP and this Stipulation before the Commission" and "to do nothing, directly or indirectly, to undermine the Stipulation or the Commission's approval of it."[146]

Further, Duke recognized that the ESP Stipulation represented a package of inter-related terms that could not be torn apart later with issue-by-issue litigation. It agreed that:

- "[t]he Stipulation represents a just and reasonable resolution of the issues raised in these proceedings,"[147]
- the ESP Stipulation was "a reasonable compromise that balances diverse and competing interests,"[148]
- "all of the related issues and concerns raised by the Parties have been addressed in the substantive provisions of this Stipulation, and [the substantive provisions] reflect, as a result of such

[145] IEU-Ohio Ex. 6 at 5.

[146] IEU-Ohio Ex. 5 a 41.

[147] *Id*. at 2.

[148] *Id*.

discussions and compromises by the Parties, an overall reasonable resolution of all such issues,"[149]

- the "Stipulation represents a serious compromise of complex issues and involves substantial benefits that would not otherwise have been achievable"[150]

Through an integrated settlement, Duke intended to resolve all outstanding claims. Only Duke is "straining credulity" by asserting that it did not resolve the issue of its compensation for Capacity Service through the ESP Stipulation that the Commission approved.

Further, if Duke is correct that the ESP Stipulation either does not or cannot address its compensation for a wholesale capacity service, then Duke is receiving exactly the compensation that is required by the RAA. If the ESP Stipulation does not establish Duke's compensation for Capacity Service, then the Commission by implication has not established a state compensation mechanism. In the absence of a state compensation mechanism, the FRR entity will be compensated at the RPM-Based Price.[151] Duke is currently receiving exactly that amount, regardless of the source of authority to justify the level of compensation.

But if Duke is right, it also cannot run to either the Commission or FERC to increase its compensation. As discussed above, the Commission cannot approve Duke's Application because it lacks authority to set Duke's total compensation for Capacity Service through the invention and application of a cost-based ratemaking

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[149] *Id*. at 4.

[150] *Id*.

[151] IEU-Ohio Ex. 9 at 122.

methodology.[152] If there is no state compensation mechanism, then Duke could have filed an application under Section 205 of the Federal Power Act, but it gave up the right in the BTR settlement. Regardless of the theory the Commission adopts, therefore, Duke does not present a lawful claim for increased compensation for Capacity Service to this Commission.

## XI. THE RELIEF DUKE SEEKS IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL

In response to the Joint Motion to Dismiss and arguments presented in initial comments by intervenors and the Staff of the Public Utilities Commission of Ohio ("Staff"), Duke asserts that the res judicata and collateral estoppel do not bar the relief it is requesting.[153] In support of this argument, Duke claims that Commission proceedings are legislative and thus are not judicial or quasi-judicial proceedings to which res judicata and collateral estoppel apply and that the requirements of res judicata and collateral estoppel are not satisfied. Neither argument is valid.

### A. Res judicata and collateral estoppel apply to the Commission's quasi-judicial proceeding

To avoid dismissal because its Application is barred by res judicata and collateral estoppel, Duke initially argues that Commission proceedings are legislative in nature, and thus res judicata and collateral estoppel do not apply. On its face, this argument is laughable because the process by which the Commission is reviewing the Application is quasi-judicial. The Commission conducted hearings preceded by discovery, took sworn testimony and evidence from witnesses, created a record, and is expected to issue an

[152] IEU-Ohio Initial Brief at 25-31.

[153] Duke Initial Brief at 39-44.

opinion and order based on findings of fact and conclusions of law.[154] The Commission's order then will be subject to rehearing and appeal. These steps are the classic elements of a judicial or quasi-judicial process.[155]

The Court, moreover, has held res judicata and collateral estoppel apply to the Commission's quasi-judicial proceedings to establish and adjust rates. In *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*,[156] the Office of the Ohio Consumers' Counsel ("OCC") sought an adjustment to remove all system loss costs previously overcollected under an electric fuel clause ("EFC"). During the review of a prior audit period, the Commission had permitted an overcollection, and OCC had not sought rehearing or appealed the Commission's decision. In the case addressing the next audit period, the Commission recognized that there was an overcollection in the prior period but refused to reduce the charges in the current period. In response to OCC's argument that the Commission should have adjusted rates for the overcollection in the prior period, the Court found that the Commission did not act unlawfully or unreasonably, stating that the prior decision permitting the overcollection barred OCC's claim under both res judicata and collateral estoppel.

> The inevitable conclusion from these facts is that OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate the issue of the EFC rate which was previously determined to be proper. These doctrines operate to preclude the relitigation of a point of

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[154] Section 4903.09, Revised Code, requires the Commission in contested cases to make a complete record and to file the record, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact. If the Commission was exercising authority under Chapter 4909, Revised Code, the increase in compensation would have been governed by the hearing process set out in Section 4909.19, Revised Code.

[155] *Ohio Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 111 Ohio St.3d 384, 2006-Ohio-5853 at ¶19 (*quoting Ohio Domestic Violence Network v. Pub. Util. Comm'n of Ohio*, 70 Ohio St.3d 311, 315 (1994) (Commission proceedings "characterized by notice, hearing, and the making of an evidentiary record" are quasi-judicial)).

[156] 16 Ohio St.3d 9 (1985).

> law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. … The doctrine of collateral estoppel has been applied to administrative proceedings. …
>
> In the interest of affording finality to the decisions of administrative bodies which are left unchallenged, we hereby determine that OCC lost its only opportunity to challenge the propriety of CEI's system loss costs computation for the period prior to September 1, 1982, when it failed to appeal or to request a rehearing of the previous order. This question was directly at issue in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question.[157]

Thus, res judicata and collateral estoppel can apply to Commission quasi-judicial proceedings. Therefore, the issue before the Commission is whether Duke's Application is barred by the Commission's decision approving the ESP Stipulation.

**B. Res judicata bars relitigation of Duke's ESP Stipulation**

Duke argues that res judicata does not preclude it from pursuing its Application because different "evidence" is involved in the ESP Stipulation proceeding and the Application.[158] According to Duke, the ESP Stipulation addressed Duke's retail rates, and the Application addresses Duke's provision of wholesale capacity.[159] Duke further asserts that "[n]either the ESP Stipulation nor the controlling Commission order approving it addressed Duke Energy Ohio's costs to provide noncompetitive wholesale capacity service or the Company's right to recover such costs"[160]

Duke's claims are unsupported. It is clear that the ESP Stipulation and the Order approving it addressed Duke's total compensation for the provision of Capacity Service. As discussed above, Duke sought a cost-based capacity charge in its ESP

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[157] *Id.* at 10 (citations omitted).

[158] Duke Initial Brief at 41.

[159] *Id*. at 41-42.

[160] *Id*. at 42.

application,[161] but agreed to provide capacity to PJM that would be priced at the RPM-Based Price as a term of the ESP Stipulation.[162] Additionally, Duke sought and was permitted to recover the ESSC to address its financial integrity while serving as an FRR Entity.[163] When questioned about the service provided by Duke, Mr. Trent admitted that Duke was seeking to increase the compensation it receives for the Capacity Service it already is providing (and provided back to August 1, 2012).[164] Thus, Duke's claim that its cost to provide Capacity Service was not addressed in the ESP Stipulation is not credible: Duke presented the issue of a cost-based capacity charge to the Commission and resolved the issue in the ESP Stipulation.

### C. Collateral estoppel bars the relitigation of issues resolved by the ESP Stipulation

In response to the claim that its Application is barred by collateral estoppel Duke asserts that collateral estoppel cannot be applied for two reasons. First, it argues that the Commission decided no issues relating to compensation for noncompetitive wholesale electric service.[165] This claim is one more in the string of misrepresentations about what the Commission approved in the ESP Stipulation. Clearly, the Commission established Duke's total compensation for Capacity Service. As a result, Duke cannot relitigate that issue in this proceeding.

Second, Duke argues a party cannot be collaterally estopped from raising issues previously resolved by a settlement. In support of its argument, it relies on *State, ex rel.*

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[161] Kroger Ex. 5.

[162] IEU-Ohio Ex. 5 at 7 & 12.

[163] *Id*. at 15-16.

[164] Tr. Vol. II at 353.

[165] Duke Initial Brief at 44.

*Davis, v. Public Employees Retirement Board*.[166] In that case, the Court held that employees were not precluded from raising an issue concerning their status as public employees when that issue was specifically withheld from consideration in a prior proceeding. The Court concluded that collateral estoppel did not apply to preclude review of the issue because the Court had not previously decided it.[167] In contrast to the facts presented in *Davis*, the Commission, when it approved the ESP Stipulation, specifically addressed the total compensation Duke would receive for Capacity Service. Thus, *Davis* does not provide any support for Duke's request to increase the compensation.

Under Ohio law, moreover, "[t]he doctrine of collateral estoppel provides that a final judgment, including a final judgment based upon a specific settlement agreement, which adjudicates an issue of fact between the parties, which determination is essential to the judgment, determines that fact conclusively for use in a subsequent action between the same parties even though the claim is different."[168] In *Nye v. Ohio Board of Examiners of Architects*,[169] for example, the appellant sought to avoid being collaterally estopped in an administrative proceeding to revoke his professional license from contesting admissions of fraudulent behavior contained in a prior settlement resolving a civil complaint. The Tenth District Court of Appeals found that collateral estoppel applied because the appellant's factual admissions were incorporated into the

[166] 120 Ohio St.3d 386 (2008).

[167] *Id.* at 394.

[168] *Red Haven Nursing Home v. Cuddy*, 1984 WL 5750 at *2 (Ohio 10th Dist. Ct. App. May 17, 1984).

[169] 165 Ohio App.3d 502 (10th Dist. Ct. App. 2006).

agreed judgment entry so that the civil action was deemed actually litigated and determined.[170]

Similarly, Duke resolved its claim to additional compensation for the provision of Capacity Service. In the ESP case, Duke settled a request for a capacity charge based on a "formulaic methodology" tied to the embedded cost of its legacy generation assets; it now seeks to renew that claim in this Application as the basis for increasing its total compensation for Capacity Service.[171] The Commission must reject that claim, however, because Duke is collaterally estopped from relitigating the same factual claims supporting its request to increase its total compensation for Capacity Service.

## XII. OHIO LAW AND ACCOUNTING PRINCIPLES DO NOT PERMIT THE COMMISSION TO AUTHORIZE DUKE'S REQUESTED MODIFICATIONS TO ITS ACCOUNTING AUTHORITY AND THEREBY RETROACTIVELY INCREASE ITS COMPENSATION FOR CAPACITY SERVICE

Duke argues that its request to modify its accounting practices under Section 4905.13, Revised Code, is reasonable and should be approved.[172] Duke's request, however, is unlawful and unreasonable.

As IEU-Ohio showed in its Initial Brief, the Commission cannot authorize Duke's accounting changes under Section 4905.13, Revised Code. Section 4928.05(A)(1), Revised Code, states that the Commission may regulate competitive retail electric services, such as capacity service, under only specific sections of the Revised Code. None of the authorized sections includes Section 4905.13, Revised Code. The only other section of Title 49 that authorizes the Commission to modify an electric utility's accounting to create a regulatory asset is Section 4928.144, Revised Code, which

[170] *Id*. at 507.

[171] *Compare* Kroger Ex. 5 at 26-27 *with* Application at 7.

[172] Duke Initial Brief at 48.

applies to rates and prices established under Sections 4928.141 to 4928.143, Revised Code. Duke, however, states that these sections do not apply to its Application (and in that regard Duke is correct).[173] Thus, the Commission does not possess the requisite authority to authorize the accounting modifications that Duke requests.

Duke further argues that the accounting authority it is seeking will not result in retroactive ratemaking.[174] It claims that calculating the regulatory asset starting August 1, 2012 is not retroactive because it is simply requesting accounting modifications and has not requested (at this time) that the Commission establish any new rates to amortize the regulatory asset.[175]

Duke's position is merely semantics; if the Commission cannot authorize Duke to implement a rate that amortizes a balance that is retroactively calculated, then it would simply be a waste of time to authorize accounting changes that create a regulatory asset that cannot be lawfully collected.

Duke itself is well aware of the limited authority the Commission has to authorize accounting changes. In the order approving the Rate Stabilization Plan of Duke's predecessor, Cincinnati Gas & Electric Company's ("CG&E"),[176] the Commission rejected a term of the stipulation that requested accounting changes to create a regulatory asset. The Commission found that the request should be denied because it could not ultimately authorize the amortization of the regulatory asset:

> The Commission finds that, while deferrals are not rate increases, the amounts that would be deferred under the stipulation are representative of amounts that ultimately may be charged to customers.

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[173] *Id*. at 31.

[174] *Id.* at 48-49.

[175] *Id*. at 48.

[176] *Id*. at 49, n.186.

> Those costs, if and when ultimately recovered, would be based on accruals during the MDP, and the deferrals would therefore violate the rate cap under SB 3.[177]

Duke offers no additional authority to support its claim that the Commission may authorize accounting changes that would permit Duke to retroactively increase its total compensation for Capacity Service.[178] In fact, three of the cases it cites explicitly state that the Commission was only authorizing accounting modifications for booking purposes and would address ratemaking issues at a future date.[179]

The unreasonableness of Duke's request is further demonstrated by its fundamental inconsistency with the accounting requirements applicable to regulatory accounting. For Duke to return its generation assets to regulatory accounting, it is necessary for Duke to demonstrate that the recovery of the expenses is probable.[180] To establish probable recovery, the Commission must have authority to authorize the revenue that Duke is seeking, *i.e*., there must be a lawful order.[181] The Commission, however, cannot lawfully authorize the recovery of revenue to retroactively increase Duke's compensation.[182] As a result, the accounting authority Duke is seeking is

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[177] *In the Matter of the Cincinnati Gas & Electric Company to Modify its Nonresidential Customers Rates to Provide for Market-Based Standard Service Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, *et al.,* Opinion and Order at 34 (Sept. 29, 2004).

[178] Duke Initial Brief at 49 n.186.

[179] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods*, Case No. 12-1135-GA-AAM, Entry at 3 (July 18, 2012); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods*, Case No. 09-371-GA-AAM, Entry at 3 (July 8, 2009); *In the Matter of the Application of the Ohio Edison Company for Authority to Defer Certain Operation and Maintenance Costs Associated with Perry Unit No. 1 after May 31, 1987*, Case No. 88-144-EL-AAM, Entry at 2 (Feb. 2, 1988).

[180] Duke Ex. 9 at 4.

[181] *Id*. (the rates must be approved by a board empowered by statute to establish rates that bind customers).

[182] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 514-15 (2011).

worthless as a basis for permitting Duke to retroactively increase its compensation and should be rejected.

## XIII. DUKE'S APPLICATION VIOLATES "TRADITIONAL RATEMAKING PRINCIPLES"

In an attempt to justify its math, Duke invokes the requirements of "[b]oth Ohio law, as codified, and case precedents" to support an increase in compensation for Capacity Service.[183] According to Duke, Ohio law "gives the Commission … the responsibility to ensure that approved rate and rate structures are reasonable."[184] Despite invoking Ohio law, Duke then ignores the most basic jurisdictional, procedural, and substantive requirements of Ohio law for setting rates under traditional ratemaking when they do not serve Duke's purpose.

Duke's basic claim that the Commission has authority to apply "traditional regulatory principles" to increase its total compensation for Capacity Service is based on the faulty premise that the Commission has some authority to apply cost-based ratemaking to a wholesale generation service. It does not. As outlined in IEU-Ohio's Initial Brief and above, the Commission's authority to establish rates under traditional ratemaking principles is set out in Chapter 4909, Revised Code. That chapter does not apply to wholesale electric services.[185] Further, it does not apply to retail electric generation service because it has been declared competitive.[186]

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[183] Duke Initial Brief at 51.

[184] *Id*.

[185] Sections 4905.02, 4905.03, and 4909.01, Revised Code, limit the Commission's authority to regulation and supervision of retail utility services, and specifically exclude those service provided through a regional transmission organization such as wholesale capacity service that is sold through the organized PJM capacity market under FERC-approved tariffs.

[186] Section 4928.03 and 4928.05(A), Revised Code.

Duke further ignores the procedural requirements applicable to an increase in compensation for a noncompetitive service. As IEU-Ohio showed in its Initial Brief, an EDU seeking to increase its rates for noncompetitive services must comply with detailed notice and filing requirements.[187] Other than filing an application (which itself would be incomplete under the applicable requirements), Duke has complied with none of them.

Moreover, the ratemaking formula for an increase in rates requires a review of property and expenses by the Staff of the Commission.[188] That review did not happen. Staff did not complete an audit or issue a Staff report. In fact, the Commission Staff did not engage its only witness in the case until a few weeks before the hearing.[189] Thus, there was not even an attempt to conduct the detailed review required by the traditional ratemaking principles on which Duke states it is relying.

[187] IEU-Ohio Initial Brief at 31-37.

[188] Section 4909.05, Revised Code.

[189] Tr. Vol. IX at 2336. *See, also*, Initial Brief of the Retail Energy Supply Association and Interstate Gas Supply, Inc. at 32-33 (June 28, 2013) (summarizing errors in Staff consultant's review of Application).

## XIV. CONCLUSION

It is time to put an end to Duke's unlawful aspirations. There is no constitutional or statutory basis for the Commission to increase Duke's compensation by $729 million for Capacity Service and thereby deprive retail customers of the benefits of competition embedded in Ohio law. Because the Commission has no authority to deny customers those benefits by inventing and applying a cost-based ratemaking methodology to increase Duke's compensation for Capacity Service, the Commission must reject the Application.

Respectfully submitted,

/s/ Frank P. Darr
Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 30th day of July, 2013, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

/s/ Frank P. Darr
FRANK P. DARR

Amy B. Spiller
Rocco D'Ascenzo
Jeanne Kingery
Elizabeth Watts
Duke Energy Business Services LLC
139 East Fourth Street
1303 Main
Cincinnati, Ohio 45202
amy.spiller@duke-energy.com
rocco.dascenzo@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

**On Behalf of Duke Energy Ohio, Inc.**

Bruce J. Weston
Consumers' Counsel
Maureen R. Grady (Counsel of Record)
Kyle L. Kern
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
grady@occ.state.oh.us
kern@occ.state.oh.us

**On Behalf of the Office of the Ohio Consumers' Counsel**

David F. Boehm
Michael L. Kurtz
Jody M. Kyler
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkyler@bkllawfirm.com

**On Behalf of the Ohio Energy Group**

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
Cmooney2@columbus.rr.com

**On Behalf of Ohio Partners for Affordable Energy**

Douglas E. Hart
411 Vine Street, Suite 4192
Cincinnati, Ohio 45202
dhart@douglasehart.com

**On Behalf of The Greater Cincinnati Health Council and Cincinnati Bell Inc.**

Kimberly W. Bojko (Counsel of Record)
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215
bojko@carpenterlipps.com
mohler@carpenterlipps.com

**On Behalf of Kroger Co.**

Jay E. Jadwin
Yazen Alami
Madelon Kuchera
Jon Casadont
American Electric Power Service Corporation
155 Nationwide Avenue
Columbus, Ohio 43215
jejadwin@aep.com
yalami@aep.com
mkuchera@aepenergy.com
jcasadont@aepenergy.com

**On Behalf of AEP Energy**

Thomas J. O'Brien
J. Thomas Siwo
Matthew W. Warnock
Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com
tsiwo@bricker.com
mwarnock@bricker.com

**On Behalf of the Ohio Manufacturers' Association and the City of Cincinnati**

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik
Lydia M. Floyd
Jones Day
North Point, 901 Lakeside Avenue
Cleveland, OH 44114-1190
dakutik@jonesday.com
lfloyd@jonesday.com

**On Behalf of FirstEnergy Solutions Corp.**

M. Howard Petricoff
Stephen M. Howard
Gretchen L. Petrucci
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
lkalepsclark@vorys.com

**On Behalf of Constellation NewEnergy, Inc., Exelon Generation Company, LLC, Interstate Gas Supply, Inc., Retail Energy Supply Association, Miami University and the University of Cincinnati**

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corp.
1 Riverside Plaza 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com

**On Behalf of Ohio Power Company**

Joseph G. Strines
DPL Energy Resources Inc.
1065 Woodman Drive
Dayton, Ohio 45432
Jospeh.strines@DPLINC.com

Andrew J. Sonderman
Margeaux Kimbrough
Kegler, Brown, Hill & Ritter Co. LPA
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com

**On Behalf of DPL Energy Resources Inc.**

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
judi.sobecki@DPLINC.com
randall.griffin@DPLINC.com

Jeffrey S. Sharkey
James W. Pauley
Faruki Ireland & Cox PLL
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402
jsharkey@ficlaw.com

**On Behalf of The Dayton Power and Light Company**

Kevin J. Osterkamp
Roetzel & Andress LPA
PNC Plaza
Twelfth Floor
155 East Broad Street
Columbus, Ohio 43215
kosterkamp@ralaw.com

Rick D. Chamberlain
Behrens, Wheeler & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, Oklahoma 73105
Rdc_law@swbell.net

**On Behalf of Wal-Mart Stores East, LP, and Sam's East, Inc.**

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Ave.
Columbus, Ohio 43215
barthroyer@aol.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, Pennsylvania 15212-5817
Gary.a.jeffries@dom.com

**On Behalf of Dominion Retail, Inc.**

Steven Beeler
John Jones
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
steven.beeler@puc.state.oh.us
john.jones@puc.state.oh.us

**On Behalf of the Staff of the Public Utilities Commission of Ohio**

Christine Pirik
Katie Stenman
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
Christine.pirik@puc.state.oh.us
Katie.stenman@puc.state.oh.us

**Attorney Examiners**

Summary: Reply Brief of Industrial Energy Users-Ohio electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio