BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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I. INTRODUCTION

The Kroger Co. ("Kroger") is one of the largest grocers in the United States with over 65 stores, manufacturing plants, and offices in Duke Energy Ohio, Inc.'s ("Duke") service territory, consuming over 225 million kWh per year. As a substantial consumer of electricity and related services in Duke's service territory, Kroger sought and was granted intervention in the above-captioned matters, participated in the hearing, and submitted an Initial Post-Hearing Brief on June 28, 2013. As established by the Attorney Examiner at the conclusion of the hearing,[1] Kroger hereby respectfully submits its Reply Brief.

[1] Tr. Vol. XI at 2813.

Duke and 30 other parties, including Kroger, entered into two settlements in good faith to resolve all issues in two prior proceedings. Despite the settlements reached in those prior proceedings, Duke filed an application in this proceeding on August 29, 2012, seeking to charge customers an additional $776 million (in the form of a deferral) for the same capacity service provided for under the prior proceedings ("Application").[2] In an effort to discount the stipulations, Duke attempts to argue that the two stipulations did not resolve the issues that are the subject of its Application.[3] Duke's claims are misplaced and its Application must be rejected as unlawful. The prior stipulations clearly establish that Duke is to be compensated for its capacity service as an FRR entity based upon market-based rates, and not its embedded costs. Duke is in direct violation of the stipulations, and therefore, the Public Utilities Commission of Ohio ("Commission") should summarily deny Duke's Application.

Nonetheless, even upon consideration of the merits, Duke's Application must be denied as Duke failed to demonstrate that an increase in compensation for the provision of capacity service as an FRR entity is just, reasonable, prudent, and lawful. Duke's request to create a regulatory asset amounts to a request for impermissible retroactive ratemaking, and Duke has failed to establish undue harm. Additionally, if the Commission entertains a cost-based capacity charge, the amount of the compensation requested should be reduced as Duke excluded revenues recognized through Rider ESSC[4] and included its embedded costs of legacy generating assets that are not dedicated to Duke's fixed resource requirement ("FRR") Plan.

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[2] Office of the Ohio Consumers' Counsel (OCC) and the Ohio Energy Group (OEG) Joint Ex. 1 at 1 (Comments); Industrial Energy Users – Ohio (IEU) Ex. 17 at 18 (Comments); Kroger Ex. 2 at 1 (Comments).
[3] Duke Brief at 14-15, 30-44.
[4] Tr. Vol. VIII at 1928; OEG Ex. 1 at 28 (Kollen Direct); FirstEnergy Solutions Corp. (FES) Ex. 1 at 3-4, 12-14 (Lesser Direct).

II. LEGAL ARGUMENT

A. Prior settlements

The fundamental issue in this proceeding is whether prior settlements govern the request in Duke's Application. As fully set forth in the intervenors', including Kroger's, Initial Briefs and the Joint Motion to Dismiss that was filed by several intervenors, the two stipulations entered into by Duke unequivocally prevent Duke from requesting a cost-based charge for its capacity service during its term as an FRR entity.[5] Notwithstanding these two stipulations, Duke is now seeking cost-based compensation for its capacity services. Duke has not presented any evidence to establish that Duke is entitled to unilaterally modify the provisions of either of the prior settlements. As discussed more fully below, Duke's central argument is that the Commission's decision in Case No. 10-2929-EL-UNC ("AEP-Ohio Case") somehow acts to alter the terms of both settlements.[6]

1. RTO Stipulation

On April 26, 2011, Duke submitted an application and Stipulation and Recommendation ("RTO Stipulation") to the Commission in Case No. 11-2641-EL-RDR for approval of a transfer from the Midcontinent Independent System Operator, Inc. ("MISO")[7] to PJM ("RTO Proceeding").[8] Pursuant to the RTO Stipulation, Duke agreed not to seek approval from the Federal Energy Regulatory Commission ("FERC") of a wholesale capacity charge based upon its

[5] Staff Brief at 12-19; IEU Brief at 22-25; Ohio Partners for Affordable Energy (OPAE) Brief at 5-7; The Greater Cincinnati Health Council and Cincinnati Bell Inc. (GCHC) Brief at 1; OCC Brief at 2; The Retail Energy Supply Association and Interstate Gas Supply, Inc. (IGS) Brief at 6-7; OEG Brief at 5-11; FES Brief at 8-14; Kroger Brief at 4-6.

[6] Duke Brief at 1-5, 10-11, 15-17, 21-27, 29-34, 36-37, 42, 44-47, 49, 52, 56, 58-61, 64; also see Tr. Vol. IV at 872.

[7] Formerly known as the Midwest Independent System Operator, Inc.

[8] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs*, Case No. 11-2641-EL-RDR, et al. (RTO Realignment) (Application).

costs as an FRR entity for the period between January 1, 2012 and May 31, 2016.[9] The Commission approved Duke's application and adopted the RTO Stipulation on May 25, 2011.[10] As several intervenors have explained, Duke affirmatively agreed to not pursue its option under the RAA to receive cost-based compensation for its capacity.[11] Duke cannot now request exactly what it agreed not to seek--a cost-based capacity charge pursuant to a state-compensation mechanism under the RAA--regardless of the venue.[12] Duke committed to forgo its right to seek a cost-based rate for capacity from FERC, and the Commission lacks jurisdiction to authorize the collection of additional compensation for a wholesale capacity charge.[13]

2. ESP Stipulation

On June 20, 2011, Duke submitted an application to the Commission in Case No. 11-3549-EL-SSO ("ESP Case") for, *inter alia*, approval of a non-bypassable charge for its embedded costs of supplying capacity.[14] However, Duke chose to forgo a cost-based charge in favor of settling the ESP Case.[15] On October 24, 2011, Duke and 30 parties submitted a Stipulation and Recommendation ("ESP Stipulation") to the Commission.[16] The ESP Stipulation provided for a comprehensive resolution of *all* issues, including the price of capacity furnished by Duke as an FRR entity and Duke's compensation for such services.[17] Specifically, Duke

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[9] Duke Ex. 15 at ¶ 20 (RTO Realignment)(RTO Stipulation).
[10] RTO Realignment, Opinion and Order at 14-16 (May 25, 2011).
[11] Staff Brief at 8; Kroger Brief at 4-9; OCC Brief at 35-37; IEU Brief at 19; OPAE Ex. at 5-7.
[12] See Duke Memo contra Motion to Dismiss at 6 (October 19, 2012).
[13] See IEU Brief at 25-27.
[14] Kroger Ex. 5 at 10-11 (*In the Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., Application (June 20, 2011)(ESP Application)).
[15] Tr. Vol. II at 384-85.
[16] See IEU Ex. 5 (*In The Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., Stipulation and Recommendation (October 24, 2011) (ESP Stipulation)).
[17] Id. at 2.

agreed to promptly transition to market pricing and charge the market-based Reliability Pricing Model ("RPM") rate for capacity provided to CRES providers to serve the shopping load in exchange for, among other things, being allowed to collect $330 million from customers for its electric stability service charge ("Rider ESSC"). On November 22, 2011, the Commission approved the ESP Stipulation with slight modifications.[18]

a. The ESP Stipulation resolved all issues in Duke's ESP Case and is controlling through May 2015.

The Commission's approval of the ESP Stipulation controls in this proceeding because *all* issues presented by Duke's Application were settled by the ESP Stipulation.[19] In its ESP Application, Duke initially argued that a cost-based charge should be established as the Commission's state compensation mechanism pursuant to PJM's RAA,[20] but abandoned its original proposal in favor of reaching a settlement.[21] Under the ESP Stipulation, Duke agreed, among other things, to promptly transition to market pricing and charge the market-based RPM rate for capacity provided to CRES providers to serve shopping load in exchange for, among other things, being allowed to collect $330 million from customers for its Rider ESSC.[22] Duke negotiated for the establishment of Rider ESSC with the intent that it would receive

[18] See Kroger Ex. 8 (*In The Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (November 22, 2011) (ESP Order)).
[19] See IEU Ex. 5 (ESP Stipulation); Staff Brief at 19-21; University of Cincinnati and Miami University Brief at 10-11; OCC Brief at 30-31; IGS Brief at 5-6; OEG Brief at 5.
[20] Kroger Ex. 5 at 25-26 (ESP Application).
[21] IEU Ex. 5 at 6-8 (ESP Stipulation).
[22] See Id.

compensation,[23] which would allow for "stability and certainty regarding [Duke's] provision of retail electric service as an FRR entity while continuing to operate under an ESP."[24]

Contrary to Duke's argument, the Commission's approval of the ESP Stipulation *is* precedent for this proceeding and the Commission should respect that precedent.[25] Preserving the integrity of stipulations provides regulatory certainty which benefits customers, shareholders, and investors alike.[26] While Duke seems to agree that precedent must be followed, and in fact, demands that the Commission respect its own precedents in order to assure predictability in the administrative process with regard to the AEP-Ohio case, [27] Duke advocates for the Commission to selectively follow its precedent and encourages the Commission to disrupt regulatory certainty by asking the Commission to ignore its approval of the negotiated ESP Stipulation.[28]

Duke must realize that if the Commission grants Duke cost-based recovery, the Commission would be defeating its own goal of providing rate certainty for consumers. Duke acknowledges that the Commission has three significant goals in establishing rate stabilization plans: "(1) rate certainty for consumers, (2) financial stability for the utility, and (3) the further development of competitive markets."[29] However, Duke only presents arguments that claim its Application will further the financial stability for Duke and allow further development of competitive markets.[30] Noticeably, Duke ignores the third goal of the Commission – rate

[23] Kroger Ex. 1 at 6 (Higgins Direct).
[24] IEU Ex. 5 at 16 (ESP Stipulation); Kroger Ex. 1 at 6 (Higgins Direct); OEG Ex. 1 at 15 (Kollen Direct); Tr. Vol. II at 253-54; Tr. Vol. VI at 1372-73 (April 22, 2013).
[25] Staff Brief at 19-21; OCC Brief at 30; University of Cincinnati and Miami University Brief at 10-11; IGS Brief at 9-10.
[26] OCC Brief at 30-31.
[27] Duke Brief at 22.
[28] See Id. at 34.
[29] Duke Brief at 27 (quoting *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al., Opinion and Order at 38 (Sept. 29, 2004)).
[30] Id. at 27-30.

certainty for consumers.[31] Approval of Duke's Application would change the compensation for capacity that was negotiated and agreed to in the ESP Stipulation. Allowing a change to Duke's compensation prior to the expiration of the ESP Stipulation would disrupt regulatory certainty and impair the integrity of settlements. Accordingly, the precedent that must be followed in this proceeding is the precedent set by the approval of the ESP Stipulation.

b. Duke's Application is for the same capacity service.

Duke argues that the ESP Stipulation addressed Duke's competitive retail services and that Duke's Application relates to noncompetitive wholesale service and, therefore, the ESP Stipulation should not prevent the Commission from granting Duke's request for a new state compensation mechanism in this proceeding.[32] As explained further below, Duke's argument that its capacity service is noncompetitive is based on its self-serving interpretation of the AEP-Ohio Case. Duke argues that the Commission determined that the capacity service provided by an FRR entity is a noncompetitive service. Citing Section 4928.141(A), Ohio Revised Code, Duke asserts that a competitive retail electric service was considered in Duke's ESP Proceeding, not a noncompetitive wholesale service.[33]

There is no dispute that Duke applied to the Commission in the ESP Case to establish an SSO through an ESP.[34] There is also no dispute that the ESP Stipulation discussed herein was entered into as a result.[35] The dispute is over Duke's contention that the same service that was addressed in the ESP Stipulation as retail electric service is now somehow noncompetitive

[31] Id.
[32] Id. at 31.
[33] Id.
[34] Id.
[35] See Id.

wholesale electric service for which the Commission can establish a new state compensation mechanism.[36]

Duke argues that since its capacity service provided as an FRR entity is allegedly a wholesale service pursuant to the Commission's decision in the AEP-Ohio Case, the Commission did not have the authority to establish a state compensation mechanism for that service as set forth in Chapter 4928, Revised Code.[37] In fact, Duke states that "the service at issue in the ESP proceeding, as addressed in the Commission's ESP Order, cannot be the same services as those that form the basis for this Application."[38] However, this argument rests on the assumption that the Commission has already determined that capacity service is noncompetitive. As noted above, the Commission did *not* determine that capacity service is noncompetitive. In fact, the Commission made no determination at all with respect to the competitiveness of capacity services. The Commission explicitly stated that it was not necessary for it to determine if capacity service was competitive or noncompetitive.[39] Further, it has previously been determined that generation capacity service is competitive.[40]

In addition, as mentioned in Kroger's Initial Brief, Duke concedes that it cannot locate a place in the ESP Stipulation where there is a distinction between retail and wholesale services provided by Duke.[41] This is because there is no distinction: Duke is only providing one service. As OCC stated, "[t]he reality is that the distinction Duke now seeks to make is a fiction, one that has never been made by the [Commission]."[42] Duke is providing a single capacity service

[36] See Id. at 3, 31.
[37] Id. at 32.
[38] Id.
[39] Tr. Vol. II at 319; Tr. Vol. VIII at 1958; OCC Ex. 1 at 13 (AEP-Ohio Case, Opinion and Order)
[40] Kroger Brief at 18; IEU Ex. 17 at 11-16 (Comments); Section 4928.03, Revised Code.
[41] Kroger Brief at 16; Tr. Vol. III at 308.
[42] OCC Brief at 81; Staff Brief at 17.

"under which it furnishes capacity to CRES providers and to wholesale supply auction winners from a single set of assets."[43]

The compensation for this single service provided by Duke was established and approved through the ESP Stipulation. The ESP Stipulation, by its own terms, resolved *all* issues in the ESP Case[44] and one of the major issues in the ESP Case was the establishment of a capacity charge for Duke to charge CRES providers.[45] Contrary to Duke's argument,[46] signatory parties to the ESP Stipulation understood exactly what the ESP Stipulation resolved. In fact, Kroger Witness Higgins participated in the ESP proceeding and filed testimony in support of the ESP Stipulation. Kroger Witness Higgins also testified in the case at bar, explaining that the ESP Stipulation resolved Duke's compensation for its capacity service: "As Duke's compensation for capacity was one of the key issues raised in the [ESP Case], it was not left unresolved."[47] He further stated that "it [was] incontrovertible [that] the parties knew and understood what Duke's compensation was going to be as part of [the ESP Stipulation]."[48] Even Duke witnesses stated that Duke's compensation for its capacity service was settled by the ESP Stipulation, conceding that the former President of Duke previously recognized that the ESP Stipulation encompassed compensation: "[Duke] bears the obligation to provide the capacity resources necessary to serve all customers in [its] footprint for the term of the ESP and [Duke] will be compensated for capacity resources based upon competitive PJM prices."[49] Duke also admits that there is no

[43] OCC Brief at 82; OCC Ex. 22 at 16 (Hornby Direct).
[44] IEU Ex. 5 at 2 (ESP Stipulation).
[45] Tr. Vol. IV at 996; Staff Brief at 5-6.
[46] Duke Brief at 35.
[47] Kroger Ex. 1 at 9, 10 (Higgins Direct).
[48] Kroger Brief at10; Tr. Vol. IX at 2285-86.
[49] Tr. Vol. II at 303-305; IEU Ex. 6 at 4-5 (Janson Supp. Direct).

distinction in the ESP Stipulation to show that the compensation that was established applied only to a competitive capacity service and not to a noncompetitive service.[50]

Further, Duke's own statements demonstrate that Duke is already being compensated for its capacity service and that this Application is simply a request for additional compensation: "without an approved state compensation mechanism to *augment PJM auction-based* rates" Duke is not receiving a just and reasonable return on its investment;[51] and Duke "has been *compensated* under PJM's tariffs at a rate equal to the capacity price in the unconstrained portions of the PJM Region, or the FZCP," since January 1, 2012.[52] These are admissions by Duke that it is already being compensated for its provision of capacity service as an FRR entity and that it just desires additional compensation for the same service.

Duke seeks additional compensation for its capacity service despite the fact that Duke and 30 other signatory parties already negotiated and provided Duke with additional compensation for its capacity service above what it would receive through the market-based charges.[53] In the ESP Stipulation, signatory parties "agreed to pay Duke $110 million per year for 3 years to provide stability and certainty regarding Duke's provision of retail electric service as an FRR entity while continuing to operate under an ESP"[54] through Rider ESSC. Interestingly, Duke witnesses do not disagree. Duke Witnesses Trent and Wathen confirm that Rider ESSC was included in the ESP Stipulation to provide stability and certainty for Duke's provision of capacity services as an FRR entity.[55] The revenue received through Rider ESSC

[50] Tr. Vol. II at 306-08.
[51] Duke Brief at 1 (emphasis added).
[52] Id. at 16 (emphasis added).
[53] Staff Brief at 6.
[54] Id.
[55] Tr. Vol. II at 253-54; Tr. Vol. VI at 1372-73; Staff Brief at 6.

was "intended to protect [Duke's] financial integrity and ensure that the overall revenue under the ESP is adequate to [Duke] in its provision of an SSO."[56]

Accordingly, there is no distinction in the ESP Stipulation which shows that the compensation currently being provided to Duke is limited to compensation for its competitive capacity service. In fact, there is no distinction at the Commission at all regarding the competitiveness of capacity service. The bottom line is that Duke is providing a single capacity service and the compensation for that service was established in the ESP Stipulation. For Duke to argue that the ESP Stipulation is now ambiguous and that only the Commission can interpret it through its orders is disingenuous.[57]

c. Duke was fully aware of what it agreed to when it signed the ESP Stipulation.

Duke had full knowledge of how it would be compensated for its capacity service as an FRR entity from the time that Duke voluntarily chose to realign to PJM through the time when Duke signed the ESP Stipulation. In June 2010, Duke initiated proceedings at FERC to realign from MISO to PJM.[58] At the time, PJM had already administered Base Residual Auctions ("BRAs") through the 2013/2014 delivery and, thus, if Duke wanted to join PJM beginning in 2012, Duke would have to join as an FRR entity.[59] Duke had the option of staying in MISO until June of 2015 where it could have participated in the RPM auctions instead of becoming an FRR entity.[60] Instead, Duke voluntarily chose to join PJM in 2012 and to function as an FRR entity.[61]

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[56] Tr. Vol. VIII at 1930, 1950; IEU Ex. 6 at 14 (ESP Case, Janson Supp. Direct); FES Ex. 1 at 12 (citing Duke Witness Wathen's testimony supporting the ESP Stipulation); IEU Ex. 17 at 9-11, 15-18 (Comments); FES Ex. 10 at 3-4, 7; Tr. Vol. I at 84-87, 88-89, 94-98, 100-101.
[57] See Duke Brief at 34-36.
[58] FES Ex. 6 (Letter to FERC).
[59] See Tr. Vol. III at 645; IEU Brief at 18.
[60] See Tr. Vol. II at 495; IEU Brief at 45.
[61] See Duke Ex. 15 (RTO Stipulation); IEU Brief at 18.

Duke also voluntarily "represented to FERC that it would 'deliver the load at the RPM price" upon its transition to PJM.[62] At the time Duke made this commitment, it knew what RPM RTO prices were for the entire relevant period because all relevant BRAs had already occurred.[63] Duke joined PJM and committed to those prices anyway.[64] Duke further agreed, through the RTO Stipulation, not to seek cost-based recovery from FERC for the relevant time period.[65]

In its public statements regarding Duke's RTO realignment, Duke confirmed that it would receive market-based compensation for its capacity service while an FRR entity.[66] In its applications submitted to FERC in 2010, Duke stated: "Duke will serve [its capacity] load at the RPM prices;"[67] "the price paid by [the] wholesale load under the Duke FRR plan will be the [FZCP] for the unconstrained portion of the PJM region;"[68] and "Capacity Resources supplied by [Duke] under the Duke FRR Plan will be supplied at the RPM [FZCP] for the unconstrained region of PJM."[69] These statements make it clear that Duke understood, and had the expectation, that it would be compensated at market-based rates for its capacity service while it was an FRR entity.

Duke had full knowledge of all issues associated with the pricing and compensation of capacity service at the time it entered into the ESP Stipulation. At the time Duke submitted its application in the ESP Case, Duke understood that the "wholesale capacity market [was] both unpredictable and volatile" and that this "characterization [was] not likely to change in the foreseeable future."[70] Duke also understood that the PJM capacity prices it was agreeing to were

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[62] IEU Brief at 19.
[63] Tr. Vol. II at 534-35; Tr. Vol. IV at 998; FES Brief at 3, 49.
[64] FES Brief at 3.
[65] IEU Brief at 45; IGS Brief at 15; University of Cincinnati and Miami University Brief at 8.
[66] IGS Brief at 11.
[67] FES Ex. 7 at 12-13 (Duke Letter to FERC).
[68] Id. at 13, footnote 19.
[69] Id. at 16.
[70] Kroger Ex. 5 at 8 (ESP Application); Staff Brief at 5.

low compared to Duke's capacity revenue earned in the past.[71] Duke was especially aware of the capacity pricing issues since the AEP-Ohio Case was on-going at the time Duke filed its ESP Application and Duke or a Duke affiliate intervened in those proceedings.[72] In the AEP-Ohio Case, AEP-Ohio was requesting approval of a cost-based compensation mechanism for its capacity services as an FRR entity.[73] With the AEP-Ohio Case still unresolved and still with no clarity from the Commission as to its position on capacity pricing, Duke agreed to the ESP Stipulation.[74]

Duke also had full knowledge of its obligations as an FRR entity within PJM at the time it signed the ESP Stipulation.[75] Duke understood that, as an FRR entity, it would be required to "demonstrate that it [could] supply its entire capacity obligation for all the projected load in its service area for the term of its participation" and that it would be compensated as set forth in the RAA.[76] "Duke acknowledged through testimony in support of its [ESP A]pplication that it had alternative capacity pricing options available under the RAA that Duke could pursue as an FRR entity."[77] The RAA sets default compensation for capacity services at market-based rates; however, it does not limit an FRR entity to that form of compensation.[78] The RAA provides that a state compensation mechanism will prevail over other forms of compensation if one exists, or, in the absence of a state compensation mechanism, an FRR entity may "seek FERC approval to change the methodology of compensation from the default RPM-Based Pricing method to another basis that is 'just and reasonable.'"[79] Accordingly, an FRR entity may seek

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[71] Tr. Vol. IV at 999.
[72] Staff Brief at 9, 23-24; IEU Brief at 21; See OCC Brief at 34.
[73] Staff Brief at 9.
[74] IEU Brief at 21; Tr. Vol. II at 310.
[75] See Tr. Vol. III at 658; OPAE Brief at 7.
[76] See OPAE Brief at 7.
[77] Staff Brief at 5; Tr. Vol. X at 2705; Kroger Ex. 4 at 18 (ESP Case Trent Direct).
[78] Tr. Vol. X at 2705; IEU Brief at 9.
[79] IEU Ex. 9 at 122 (RAA Agreement); IEU Brief at 9-10; OCC Brief at 8-9.

compensation for capacity based on its embedded costs but it must go through a filing at FERC.[80] Although Duke was aware of these options, Duke decided to apply to the Commission for cost-based compensation and ultimately entered into the ESP Stipulation where it agreed to be compensated through market-based charges.[81]

At the time that Duke agreed to accept market-based charges through the ESP Stipulation, it knew that the BRA rate was $66.06/MW-Day[82] and it "knew, or should have known, its embedded cost of capacity was higher than procuring the needed capacity from the market."[83] In fact, OCC Witness Hornby testified "that as early as June 2010 Duke knew or should have known that its embedded cost of capacity would significantly exceed (by $208 per MW-day) the revenues it would receive for capacity at market rates between January 2012 and May 2014."[84] It is inconceivable that the management at Duke would not have taken this into consideration and completed the financial projections necessary to judge whether the market-based rate would generate enough revenue to support its operations before agreeing to that rate in the ESP Stipulation.[85] Staff agrees and states that "[i]t is hard to believe that any fortune 500 company, like Duke, would not have considered [whether it was receiving just and reasonable compensation] when Duke signed the ESP Stipulation."[86]

Duke apparently did conduct a financial analysis at the time the ESP Stipulation was approved because Duke's management said that the regulated assets would be "financially viable."[87] Duke must have believed that it was true because for six months Duke was compensated for its capacity service as an FRR entity through a market-based state

[80] OCC Brief at 9.
[81] See Id. at 9, 34.
[82] City of Cincinnati Brief at 3.
[83] FES Brief at 27; OCC Brief at 27-28, 37.
[84] OCC Brief at 108; OCC Ex. 22 at 20 (Hornby Direct).
[85] City of Cincinnati Brief at 3.
[86] Staff Brief at 7.
[87] FES Ex. 13 at 13 (Duke Conference Call Transcript); FES Brief at 50.

compensation mechanism, i.e., the FZCP, as contemplated by the ESP Stipulation without contention.[88] It was not until after the Opinion and Order was issued in the AEP-Ohio Case that Duke claimed that the ESP Stipulation did not provide Duke just and reasonable compensation for its capacity services.[89] However, as demonstrated herein, the AEP-Ohio Case has no impact on the ESP Stipulation that Duke and 30 other parties voluntarily entered into. Duke and the other signatory parties agreed to all the terms in the ESP Stipulation, which resolved *all* issues in the ESP Case, and submitted the ESP Stipulation to the Commission for its approval. The Commission approved the ESP Stipulation and the fact that AEP-Ohio was granted a cost-based compensation mechanism does nothing to change this fact. If Duke truly believed it needed to be compensated for its capacity services at cost-based rates, Duke could have litigated the ESP Case to conclusion.[90] "The fact that Duke chose not to do so speaks volumes."[91] This is clearly a "contrived and disingenuous"[92] argument made in an attempt to support its revisionist history. Accordingly, Duke's Application should be summarily denied.

d. Duke's Application is an improper remedy for its change in position.

If Duke was not satisfied that the compensation mechanism established in the approved ESP Stipulation provided just and reasonable compensation to Duke, the proper remedy was to apply for rehearing of the ESP Order. However, Duke did not, and had no reason to, apply for rehearing at the time the ESP Stipulation was approved because Duke believed that the regulated assets would be "financially viable."[93] Instead, Duke waited until six months after the ESP Stipulation was in effect (eight months after the Commission approved it) to file its Application

[88] Tr. Vol. X at 2705; Tr. Vol. II at 311; Duke Brief at 16.
[89] See Staff Brief at 7.
[90] See OCC Brief at 109.
[91] Id. at 110.
[92] Kroger Ex. 1 at 5 (Higgins Direct).
[93] FES Ex. 13 at 13 (Duke Conference Call Transcript); FES Brief at 50.

in this proceeding alleging that the compensation mechanism established under the ESP Stipulation did not provide Duke with just and reasonable compensation.[94] The Application was not filed because of any change in financial circumstances for Duke but was filed because Duke had 'buyer's remorse' and wished that it had reached a different deal.[95] This is evidenced by Duke's admission that the Application in this proceeding is based solely on the Commission's decision in the AEP-Ohio Case.[96]

Given that the time period for an application for rehearing on the ESP Order, approving the ESP Stipulation, had already passed by the time the decision in the AEP-Ohio Case was issued, Duke filed its Application in the instant proceeding under the guise of an application for new services in an attempt to have the Commission reconsider Duke's compensation mechanism for capacity service.[97] Duke's Application is an improper application for rehearing and should be summarily rejected as such. "Duke cannot avoid the requirements of the law by calling its filing an Application to establish a new service"[98] when, in fact, Duke is not establishing a new service and is simply attempting to disguise its late filed application for rehearing.

e. The ESP Stipulation is a package that cannot be altered unilaterally by one signatory party in a piecemeal fashion.

As explained by several intervenors, the ESP Stipulation was negotiated as a compilation of agreed-upon issues between Duke and the other signatory parties and each separate bargained-for provision depends on the enforcement of the other bargained-for provisions.[99] The ESP Stipulation states that it represents "an agreement by all Parties to a package of provisions rather

[94] Tr. Vol. II at 407.
[95] See Id.
[96] Tr. Vol. VI at 1352.
[97] See Section II.D below.
[98] Staff Brief at 24.
[99] Staff Brief at 20-21; Kroger Brief at 22-24; IGS Brief at 9; University of Cincinnati and Miami University Brief at 10.

than an agreement to each of the individual provisions within the Stipulation."[100] Even Duke states that the ESP Stipulation was "an overall package of terms" and "a comprehensive settlement of various and complex issues."[101] However, now Duke attempts to unilaterally revise a single provision of the ESP Stipulation without offering the other signatory parties any benefits in exchange.

As explained previously, is clear that the signatory parties to the ESP Stipulation believed that it resolved the issue of compensation for Duke's capacity services. Specifically, Kroger Witness Higgins testified that "Kroger found Duke's proposed capacity pricing in its ESP application to be quite alarming and it was a major issue of concern for Kroger."[102] He further testified that Kroger believed its "large concern over [Duke's] proposed treatment of capacity charges" had been resolved by the ESP Stipulation.[103] If there was a distinction, as alleged by Duke, between compensation for competitive versus noncompetitive services, Duke "had an obligation to disclose, in writing, that critical distinction to the Commission and to the other signatory parties to the ESP Stipulation as a matter of fair dealing, particularly in accepting the compensation provided by Rider ESSC as a bargained-for exchange."[104] Duke made no such disclosure.

Duke, as a signatory party to the ESP Stipulation, cannot now attempt to isolate the capacity price provision from the rest of the ESP Stipulation after the ESP Case has been resolved in its entirety and claim that one issue is still outstanding and was never resolved.[105] If

[100] IEU Ex. 5 at 2-3 (ESP Stipulation); Staff Brief at 20.
[101] Tr.Vol. VIII at 1929.
[102] Tr. Vol. IX at 2273; Kroger Brief at 23.
[103] Tr. Vol. IX at 2273; Kroger Brief at 23.
[104] Kroger Ex. 1 at 10 (Higgins Direct); Tr. Vol. IX at 2298-99.
[105] See Tr. Vol. III at 775-778; See Staff Ex. 2 at 11 (Comments).

Duke wishes to re-litigate the capacity pricing provision in the ESP Stipulation, then Duke must also re-litigate all other issues that were addressed in the ESP Case.[106]

B. Res judicata and collateral estoppel

The Commission is precluded from consideration of Duke's Application by the doctrines of res judicata and collateral estoppel because all of the issues presented in Duke's Application have been resolved through the ESP and RTO Stipulations. As stated in Kroger's Initial Brief, the doctrine of res judicata is applicable to cases which are resolved through settlement.[107]

Nonetheless, Duke argues that res judicata and collateral estoppel do not bar the Commission's review of Duke's Application because the outcome of the ESP Case was not based on a final judicial determination on the merits.[108] However, the Commission did make a final judicial determination as the ESP Stipulation had to be approved by the Commission before it could take effect. The Commission also "provided notice, held an evidentiary hearing, and provided parties the opportunity to introduce evidence."[109] Specifically, the Commission was presented with the ESP Stipulation and testimony from intervenors and Duke in support of the Stipulation before it made its final determination to approve the ESP Stipulation.[110] Upon review of the ESP Stipulation and testimony in support, the Commission approved all terms in the ESP Stipulation, including Duke's compensation for capacity services. This was a final judicial determination on the merits.

Duke further alleges that the application of res judicata in this proceeding would deny Duke its due process rights because Duke would not have "a fair opportunity to fully litigate and

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[106] See Tr. Vol. III at 773-78; FES Brief at 14.
[107] Kroger Brief at 25(citing *Scott v. East Cleveland* (1984), 16 Ohio App.3d 429, 476 (Ct. App.)).
[108] Duke Brief at 39.
[109] OCC Brief at 32; Kroger Brief at 25.
[110] See Staff Brief at 26-27.

be 'heard.'"[111] Duke, however, ignores the fact that it was already granted its opportunity to "fully litigate and be heard" when it filed is application in the ESP Case. Duke's ESP Application requested the exact same thing Duke is requesting in this Application – cost-based compensation for capacity services. If Duke wished to present further evidence in front of the Commission which would have supported its request for cost-based charges, the ESP Proceeding was the place to do so. Duke decided not to litigate the issue of cost-based compensation in the ESP Case, and instead, decided to forgo its right to litigate the issues contained in its Application (i.e., cost-based compensation for capacity services) and settle the matter. By this decision, Duke "fully exercised its rights by agreeing to an ESP Stipulation and urg[ing] the Commission to adopt the Settlement through supporting testimony and supporting briefs."[112]

With the "benefit of the Commission's subsequent ruling in the AEP-Ohio Case"[113] Duke now regrets its decision to settle. Duke's regret does nothing to change the fact that the issue of Duke's compensation for capacity service was already settled through the ESP Stipulation. All evidence that Duke presented at the hearing in this proceeding could have been presented in the ESP Case if Duke had not agreed to the ESP Stipulation.

The Supreme Court of Ohio provides that res judicata applies where a party had an opportunity to litigate a matter and failed to do so:[114]

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

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[111] Duke Brief at 40.
[112] Staff Brief at 27.
[113] Tr. Vol. II at 306, 308.
[114] Staff Brief at 25 (quoting *Covington and Cincinnati Bridge Co. v. Sargent*, 27 Ohio St. 233, 237-38 (1875)).

Duke had every opportunity to present the issue of cost-based compensation to the Commission in the ESP Case but chose to forgo that opportunity in favor of settlement. The fact that Duke now regrets its decision to settle does not defeat the doctrine of res judicata. Res judicata applies to Duke's Application in this proceeding because Duke already had the opportunity to litigate for a cost-based charge for its capacity service and it failed to do so. The only thing unfair about this situation is that intervenors were forced to incur additional expenses to re-litigate an issue that Duke knew had already been settled though the ESP Stipulation.[115]

Finally, Duke argues that, even if res judicata and collateral estoppel did apply, the intervenors did not establish the requisite elements of either.[116] With respect to res judicata, Duke claims that the issue in the ESP Proceeding and the issue presented in its Application in this proceeding are "separate and distinct" because one addressed competitive retail electric service and the other is requesting compensation for noncompetitive wholesale service.[117] However, as discussed above, the distinction Duke makes between competitive and noncompetitve capacity service is a distinction without a difference.[118] Whether Duke calls it a competitive or noncompetitive service does not change the fact that Duke is providing a single capacity service and that the compensation for that service was settled through the ESP Stipulation. Duke has admitted that its service and its FRR obligations did not change and that it is requesting a deferral of the difference between current compensation and requested compensation.[119] This request amounts to the same request that was made in Duke's ESP Application, which Duke chose not to pursue. Accordingly, both applications are addressing the same issue and res judicata applies to bar consideration of Duke's Application.

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[115] Id. at 28.
[116] Duke Brief at 41.
[117] Id.
[118] Staff Brief at 17; OCC Brief at 81.
[119] Tr. Vol. I at 136; Tr. Vol. II at 355.

Duke further argues that collateral estoppel does not apply to its Application because the issue of compensation was not actually litigated and decided in the ESP Proceeding.[120] Duke states that because the ESP Proceeding was resolved through the ESP Stipulation there were no facts or issues actually litigated.[121] However, as admitted by Duke, the Commission determined that the ESP Stipulation did not violate "any important regulatory principle or practice."[122] One important regulatory principle that the Commission would consider is whether the compensation provided to Duke was just and reasonable as required by Chapter 4909, Revised Code. "When the Commission approved the [ESP] Stipulation, it set just and reasonable rates for Duke's capacity services...for the duration of Duke's ESP."[123] Accordingly, the Commission did decide issues relevant to Duke's compensation for capacity service when it approved the ESP Stipulation. This review of issues regarding compensation prevents the Commission's review of Duke's Application in this proceeding under the doctrines of res judicata and collateral estoppel.

C. AEP-Ohio Case is distinguishable.

Duke alleges that the AEP-Ohio Case concludes that capacity service is a noncompetitive wholesale electric service and that this conclusion allowed the Commission to create a generic state compensation mechanism for all Ohio FRR entities.[124] Duke further claims that because the Commission determined that capacity service is a noncompetitive wholesale service, the ESP Stipulation could not have set compensation for Duke's provision of capacity service through the ESP Application and, therefore, the Commission can now set such compensation through traditional ratemaking standards.[125] Duke's arguments rest on Duke's self-serving analysis that

[120] Duke Brief at 43.
[121] Id. at 44.
[122] Id.
[123] OPAE Brief at 6.
[124] See Tr. Vol. I at 80; City of Cincinnati Brief at 2.
[125] See Tr. Vol. I at 80; Tr. Vol. II at 307.

the AEP-Ohio Case somehow grants Duke the authority to change the terms of the ESP Stipulation that Duke and 30 other parties entered into. Duke's reliance on the AEP-Ohio Case is misplaced and the terms of the ESP Stipulation govern Duke's compensation for capacity service through May 2015.

In the AEP-Ohio Case, the Commission held that AEP-Ohio would charge CRES providers the RPM price for the capacity it provided.[126] The Commission also granted AEP-Ohio's request to collect the difference between AEP-Ohio's fully embedded cost of capacity and the RPM price from third parties.[127] Finally, the Commission authorized AEP-Ohio to defer the difference between embedded costs and RPM prices beginning on the date of its order and to collect the deferrals from retail customers.[128] Duke alleges that this decision established a generic state compensation mechanism for all Ohio utilities and established that capacity service provided by an FRR entity is a noncompetitve wholesale service that is not subject to the provisions of Chapter 4928, Revised Code.[129]

Duke claims that the Commission must grant it the same state compensation mechanism as was granted to AEP-Ohio because Duke is "a similarly situated entity ... requesting the same treatment granted to AEP-Ohio under virtually identical circumstances."[130] Duke further claims that the Commission's failure to follow the alleged precedent set in the AEP-Ohio Case "would result in unduly discriminatory treatment of similarly situated utilities, in violation of [Duke's]

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[126] OCC Ex. 1 at 23 (AEP-Ohio Opinion and Order); OCC Brief at 10.
[127] OCC. Ex. 1 at 23 (AEP-Ohio Opinion and Order).
[128] OCC Ex. 1 at 23 (AEP-Ohio Opinion and Order); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Opinion and Order at 36 (August 8, 2012).
[129] Duke Brief at 32; Tr. Vol. I at 80; Tr. Vol. II at 372-73.
[130] Duke Brief at 22-23.

equal protection rights under the United States and Ohio Constitutions."[131] However, Duke's analysis and reliance on the Commission's decision in the AEP-Ohio Case is flawed.

First, the AEP-Ohio Case did not create precedent that the Commission must follow in determining whether to grant Duke's request in this proceeding. Duke states that "the Commission should 'respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law."[132] Duke further states that the Commission's reasoning in the AEP-Ohio Case is "undeniably precedential" and must be applied to Duke in this proceeding.[133] However, the exact opposite is true: the AEP-Ohio Case is *not* precedential.[134] In fact, the AEP-Ohio Opinion and Order explicitly states that it is *not* precedent: "nothing in this opinion and order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule or regulation."[135]

Not only did the Commission specifically state that its decision was not to be used as precedent, but the Commission states repeatedly in its Opinion and Order and Entry on Rehearing that its decision is limited to AEP-Ohio.[136] This includes limiting the state compensation mechanism the Commission created to AEP-Ohio: the "state compensation mechanism *for AEP Ohio* be adopted as set forth [in the Opinion and Order.]"[137] This does not create a generic state compensation mechanism to be applied to all Ohio utilities as alleged by

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[131] Id. at 23.
[132] Id. at 22 (citing *office of the Ohio Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 128 (1992)).
[133] Duke Brief at 2.
[134] See Staff Brief at 9-11; City of Cincinnati Brief at 4; Ohio Power Company Brief at 3; University of Cincinnati and Miami University Brief at 9; OCC Brief at 7-12; IGS Brief at 15-16; OEG Brief at 16.
[135] OCC Ex. 1 at 38 (*In the Matter of the Commission Review the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC (AEP-Ohio Case)(AEP-Ohio Opinion and Order)); OCC Brief at 11; OCC-OEG Joint Ex. 1 at 3 (Comments); Ohio Power Company Ex. 1 at 2 (Comments); See Tr. Vol. VIII 1951-52.
[136] OCC Brief at 10; See OCC Ex. 1 (AEP-Ohio Opinion and Order); OCC Ex. 3 (AEP-Ohio Entry on Rehearing)).
[137] OCC Ex. 1 at 38 (AEP-Ohio Opinion and Order)(emphasis added); Staff Brief at 10.

Duke.[138] "The fact that a unique compensation mechanism was adopted for AEP-Ohio does not justify" ignoring the unique state compensation mechanism that was established for Duke in the ESP Stipulation and "imposing an additional charge on customers for Duke's capacity."[139]

Further, in the Entry on Rehearing, the Commission stated that the AEP-Ohio Case was initiated "*solely to review AEP-Ohio's capacity costs* and determine an appropriate capacity charge for its FRR obligations"[140] and that it did not consider "the costs of any other capacity supplier subject to [its] jurisdiction nor [did they] find it appropriate to do so."[141] Therefore, the Commission made it clear in its entries in the AEP-Ohio Case that its decision was limited to AEP-Ohio and it was not to be used as precedent.

Second, Duke is not similarly situated to AEP-Ohio and, therefore, the Commission will not violate Duke's equal protection rights by denying Duke's Application. While Duke goes to great lengths to describe all the similarities between itself and AEP-Ohio,[142] Duke noticeably ignores the major distinguishing factor: Duke voluntarily entered into a stipulation with 30 other parties where it agreed to be compensated for its provision of capacity service, as an FRR entity, at a market-based rate, but AEP-Ohio, instead of settling, chose to take the risk of litigation.[143] At the time Duke signed the ESP Stipulation, it explicitly distinguished its position from that of AEP-Ohio's. As explained by OCC, Duke had the same opportunities as AEP-Ohio to establish a cost-based charge, but Duke chose to pursue different options:[144]

> [Duke] could have filed for a cost-based charge with FERC pursuant to the RAA at any time after its acceptance into PJM in October 2010. It did not...Duke could have requested the

[138] OCC Brief at 7; OPAE Brief at 8; Kroger Brief at 6.
[139] OPAE Brief at 8 (citing OEG Ex. 1 at 6 (Kollen Direct)).
[140] OCC Ex. 3 at 32 (AEP-Ohio Entry on Rehearing)(emphasis added); IEU Brief at 47; OCC Brief at 11.
[141] OCC Ex. 3 at 77 (AEP-Ohio Entry on Rehearing); OPAE Brief at 8.
[142] Duke Brief at 15-16.
[143] City of Cincinnati Brief at 4; IEU Brief at 48; FES Brief at 15; OCC Brief at 9, 27, 37; GCHC Brief at 20; OEG Brief at 3.
[144] OCC Brief at 37.

> [Commission] to investigate a state compensation mechanism for it based on embedded costs (similar to the [Commission's] review for AEP Ohio). It did not. Duke could have litigated its second ESP, rather than settle. It did not. Duke could have sought to include a provision in the [ESP] Stipulation establishing that second ESP preserving its right to request an embedded cost-based state compensation mechanism for capacity. It did not.

Duke chose to settle the ESP Case by signing the ESP Stipulation and agreeing to a market-based charge for capacity service. That alone distinguishes Duke from AEP-Ohio. However, there are several other reasons that the two utilities are not similarly situated. As noted by OEG, 1) Duke's generating assets are effectively unregulated and are no longer committed to provide capacity, while AEP-Ohio's are still regulated and committed, 2) Duke already has approval to divest itself of its generating assets, but AEP-Ohio cannot divest its generating assets immediately, and 3) Duke is requesting a state compensation mechanism that would apply retroactively and AEP-Ohio's state compensation mechanism applies only prospectively.[145] Duke and AEP-Ohio are not similarly situated.

Finally, in the AEP-Ohio Case, the Commission did not establish that capacity service is noncompetitive as claimed by Duke.[146] The Commission's Opinion and Order explicitly states that it did not consider whether capacity service was competitive: "Accordingly, we find it unnecessary to determine whether capacity service is considered a competitive or noncompetitive service under Chapter 4928, Revised Code."[147] Duke's argument that its capacity service provided as an FRR entity is a noncompetitive service that was not considered in the ESP Stipulation must be rejected. The AEP-Ohio decision did nothing to distinguish

[145] See OEG Brief at 17.
[146] Duke Brief at 10.
[147] OCC Ex. 1 at 13 (AEP-Ohio Opinion and Order); See also Tr. Vol. II at 319; Tr. Vol. VIII at 1958; OCC Brief at 18.

between competitive and noncompetitive capacity service and it certainly did nothing to explain what was considered and agreed to in the ESP Stipulation.

Once Duke's argument that the AEP-Ohio Case grants authority for Duke to unilaterally change the terms of the ESP Stipulation fails, Duke is left without a basis for its Application. Duke has presented absolutely no relevant or reliable evidence to establish that the Application in this proceeding does not cover issues that have already been resolved through the negotiated ESP Stipulation. Accordingly, Duke's Application should be summarily rejected.

D. Duke's Application is unlawful.

If Duke's Application is not summarily rejected as violating two prior settlements, Duke's Application should be rejected as unlawful. Duke claims that the Commission should consider its Application under traditional regulatory principles and ratemaking standards.[148] If Duke's claims are true, Duke has improperly filed its Application and it should be rejected.

1. Duke's Application constitutes a rate increase.

Duke is requesting an increase in rates, which have already been established and approved by the Commission through the ESP Stipulation. While Duke alleges that it is requesting a deferral of costs, what it is really requesting is a deferral of revenue.[149] Duke is requesting that it be able to collect the additional revenue that it would be able to receive under a cost-based compensation mechanism and create a rider to charge those revenues back to customers.[150] As stated in Kroger's Initial Brief, Duke's requested increase in compensation may be based in theory on its embedded costs, but what Duke is asking for the Commission to

[148] Duke Brief at 3-4.
[149] See OEG Ex. 1 at 8 (Kollen Direct); IEU Ex. 17 at 34 (Comments).
[150] OEG Ex. 1 at 29-30 (Kollen Direct).

defer is the additional revenue that Duke could receive under a cost-based compensation mechanism.

This request amounts to a request for an increase in rates because "Duke is requesting approval to collect two sets of revenues for the same capacity."[151] Given that Duke is already collecting market-based rates for its capacity service as an FRR entity, Duke's Application is a request for additional compensation through cost-based charges for the same capacity service.[152] Duke's own testimony and filings in this proceeding support that Duke is requesting an increase in rates by showing that Duke's requested compensation is in addition to the compensation Duke is already receiving. In its Initial Brief, Duke states that "without an approved state compensation mechanism to *augment* PJM auction-based rates" Duke will not receive a reasonable return on its investments.[153] Duke's request for a compensation mechanism with two sources of revenue is further evidence that Duke's Application is for an increase in rates. Duke specifically states that the compensation mechanism requested would be "comprised of market-based prices," which Duke is already receiving, "and a deferral applicable to all retail customers who indirectly benefit from the service but are one step removed from it."[154] Duke also alleges that it is not a request for increase in rates because "suppliers will continue to be charged FZCP for capacity" and the requested compensation will be "implemented through a non-bypassable charge to all customers."[155] Again, Duke is making a distinction without a difference.[156] No matter how Duke wants to categorize its request, it is seeking to increase its compensation for the same capacity service that it currently provides. Given that Duke's Application is a request for

[151] OCC Brief at 25.
[152] OCC Brief at 25; See Tr. Vol. I at 136; See Tr. Vol. II at 355.
[153] Duke Brief at 1 (emphasis added).
[154] Id. at 45.
[155] Id. at 46-47.
[156] Staff Brief at 17; OCC Brief at 81.

an increase in rates, the Application should be rejected as Duke has failed to meet the statutory requirements for an application for an increase in rates.[157] Under Section 4909.18, Revised Code, a utility must provide public notice of its application and the application must contain the information specified under subsections (A) through (E) of the statute.[158] "Duke did neither."[159] As such, Duke's Application is deficient and in violation of Ohio law.

2. Duke's Application is not for a new service.

Duke is asking the Commission to reconsider Duke's compensation for its provision of capacity services as an FRR entity that was agreed to in the ESP Stipulation.[160] Duke cannot have the Commission's approval of one component of the ESP Stipulation reviewed and modified by merely calling its Application an application to "establish a new service."[161] It is apparent that Duke is not attempting to establish a new service, but is simply attempting to receive additional compensation for a service, it is already providing. Duke admits that its capacity service is not going to change in any way.[162] Duke is requesting to receive additional compensation for the single capacity service Duke provides "under which it furnishes capacity to CRES providers and to wholesale supply auction winners from a single set of assets."[163] This is evident in Duke's Application where Duke requests a deferral that is to be composed of the difference between Duke's current compensation and Duke's requested compensation.[164]

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[157] OCC Brief at 46-49; IEU Brief at 34-37.
[158] Section 4909.18, Revised Code; OCC Brief at 46.
[159] OCC Brief at 46.
[160] Staff Brief at 23; IEU Brief at 32.
[161] Duke Ex. 1 at 5 (Application).
[162] Tr. Vol. II at 355.
[163] OCC Brief at 81.
[164] Kroger Brief at 20.

Duke is not establishing a new service, but instead, is attempting to disguise its request for an increase in rates as a request for a new service. Accordingly, Duke's Application should be summarily rejected as it is an improper application to establish a new service.

3. Retroactive ratemaking is prohibited.

Under Ohio law, a utility may not establish retroactive rates.[165] Duke agrees with this proposition of law but argues that its Application does not amount to a request for retroactive ratemaking because Duke is not asking the Commission to set rates, but is instead asking for the deferral of costs which is a practice widely accepted by the Commission.[166] Duke claims that it must be granted deferral authority beginning on August 1, 2012, the first month after the AEP-Ohio Opinion and Order was issued, or Duke will be denied the equal protection of the laws."[167] Both of these arguments lack merit.

It is interesting that on the one hand, Duke asks that the Commission grant its Application using "traditional ratemaking standards" to ensure "appropriate compensation for these [capacity] services," claiming that "[i]f [the current market-based capacity] rates remain in place, they will be unconstitutionally confiscatory."[168] On the other hand, in response to retroactive ratemaking arguments, Duke states: "Where the Commission has not exercised its ratemaking authority, there cannot be, as a matter of law, retroactive rates."[169] Duke cannot have it both ways. Duke is in fact asking the Commission to set rates; Duke is asking the Commission to set capacity rates at "its embedded costs" to "augment" its current market-based rates.[170]

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[165] *See In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-4276, ¶¶ 8-14.
[166] Duke Brief at 48.
[167] Id. at 49.
[168] Id. at 1, 3-4.
[169] Id. at 48.
[170] Id. at 1.

Duke is "clearly seeking to benefit from an increase in compensation that reaches backwards and would increase the cost of Capacity Service that it has already provided."[171] Approval of Duke's request for an increase in compensation for capacity service, effective August 1, 2012, would constitute retroactive ratemaking in violation of Ohio law.

Moreover, Duke argues that it must receive authority to increase its compensation back to August 1, 2012 because it is entitled to the same recovery as AEP-Ohio.[172] Duke has argued throughout the proceeding that it is similarly situated to AEP-Ohio and that it is entitled to the same treatment as AEP-Ohio. Nonetheless, when Duke does not like a particular provision of the AEP-Ohio Order, it simply ignores it (and does not seek similar treatment). In its Application, Duke requests the retroactive application of increased compensation for its capacity service even though this provision is contrary to the treatment AEP-Ohio received in the AEP-Ohio Case. In its case, AEP-Ohio was only granted capacity deferrals on a prospective basis – beginning after the Commission issued its final order in the AEP-Ohio Case.[173]

Duke's claims that the Commission will be denying it the equal protection of the laws if it is not granted deferral authority beginning on August 1, 2012 must be rejected. The granting of such deferral authority would be in violation of Ohio law, which prohibits the collection of revenues lost when a utilities application is pending.[174] Once again, Duke is making opportunistic arguments in an attempt to gain additional compensation for its capacity services. Duke's request for a retroactive increase in rates must be denied.

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[171] IEU Brief at 57 ("Duke's request attempts to avoid the prohibition on retroactive ratemaking by superficially requesting that the Commission defer today, for collection tomorrow, what the Commission unequivocally could not authorize today."); See OCC Brief at 68; FES Brief at 24-25.
[172] Duke Brief at 49.
[173] OCC Ex. 1 (AEP-Ohio Opinion and Order); OCC Brief at 69.
[174] OCC Brief at 69.

III. ECONOMIC CONSIDERATIONS AND ARGUMENT

A. Increase in Compensation

Duke's Application fails to demonstrate that an increase in compensation for the provision of capacity service in connection with its status as an FRR entity is just, reasonable, prudent, or lawful. Duke has failed to sustain its burden of proof for an increase in current ESP revenues in the magnitude of $776 million.[175]

B. Undue financial harm

Duke claims that it will be operating at a significant loss if its compensation for capacity service as an FRR entity is not increased.[176] Duke cites to the federal takings clause and states that "utilities must receive just and reasonable compensation for property used to provide services to the public."[177] Duke claims that its Application must be granted as the federal takings clause is intended to protect "utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[178] Duke alleges that its current compensation is so unjust and unreasonable that it acts as a confiscatory taking.

However, in order for the Commission to modify Duke's capacity charge, "there must be reasonable grounds stated by Duke that its capacity rate is unjust and unreasonable. Duke bears the burden of proving that its market-based capacity rate (plus ESSC) is unjust and unreasonable."[179] Duke has failed to satisfy its burden. Duke's entire argument is that it is entitled to more compensation because AEP-Ohio was granted a cost-based state compensation mechanism and Duke must be treated the same as AEP-Ohio. In fact, Duke Witness Savoy

[175] Id. at 6-7.
[176] Duke Ex. 1 at 8-9 (Application); Duke Ex. 2 at 11 (Trent Direct); Duke Ex. 7 at 5 (Savoy Direct); Duke Ex. 5 at 10 (DeMay Direct).
[177] Duke Brief at 18.
[178] Id. at 18-19.
[179] OCC Brief at 48.

admitted that the "impetus and driving factor in this proceeding is not Duke's financial integrity, but Duke wanting to get what AEP-Ohio got."[180]

As demonstrated above, Duke is not entitled to receive what AEP-Ohio received because they are not similarly situated entities and Duke is bound by the ESP Stipulation through May 2015. Nonetheless, in an attempt to receive the same treatment as AEP-Ohio, Duke filed its Application in this proceeding alleging that it is in a dire financial situation and requires additional compensation for its capacity service.[181] However, it was not until Duke learned that AEP-Ohio was granted a cost-based state compensation mechanism that Duke decided it was not receiving just and reasonable compensation for its capacity service. These are not the actions of a utility that is in a dire financial situation. Instead, these are the actions of a utility that is suffering from 'buyer's remorse' and scrambling to find a way out of deal that it is bound by through May 2015.

Further, Duke's inaction with respect to its legacy generation assets demonstrates that Duke is not in a dire financial situation. Duke has had approval since September of 2012 to transfer these assets, yet Duke has still failed to do so.[182] Once transferred, Duke will no longer be incurring the embedded costs associated with those assets and approximately $500 million of debt will be moved off of Duke's financial statements.[183] If Duke was truly in a dire financial situation it could easily transfer these assets and avoid the embedded costs associated therewith while receiving full compensation for its actual costs incurred. Duke has chosen to retain these

[180] OCC Brief at 108; Tr. Vol. IV at 872.
[181] See Tr. Vol. II at 309-311; Duke Ex. 1 (Application).
[182] GCHC Brief at 19.
[183] Tr. Vol. III at 811-813; GCHC Brief at 19.

assets and request additional compensation from ratepayers. Duke should not be rewarded for its choice to delay the transfer of its generating assets.[184]

In addition, Duke cannot demonstrate that it is entitled to emergency rate relief. As explained by the intervenors, although Duke does not state that it is requesting relief under Section 4909.16, Revised Code, it is necessary to analyze that statute since Duke is requesting an increase in rates established pursuant to its ESP Stipulation prior to the expiration of Duke's ESP.[185] Duke cannot "warn the [Commission] about the dire financial straits of its financial integrity on the one hand, but then argue that it did not file for emergency rate relief on the other."[186] The truth is Duke does not want the Commission to analyze its request under the emergency rate statute because Duke cannot meet the requirements of that statute.

Duke has not demonstrated by clear and convincing evidence that any additional compensation is necessary;[187] Duke failed to demonstrate that circumstances have changed, let alone are extraordinary; and Duke has failed to establish that it has exhausted its remedies to cure the alleged financial harm.[188] Duke is not in a dire financial situation that requires an emergency rate increase; Duke simply regrets its managerial decision to sign the ESP Stipulation and now attempts to circumvent the compensation provision contained in the ESP Stipulation.

Lastly, as fully set forth by OCC, Duke's financial projections are not based on the most recent and accurate financial data available to Duke.[189] A majority of Duke's witnesses relied on Mr. Savoy's financial projections for their assessment of Duke's financial position.[190] However, Mr. Savoy himself admitted that his projections were "stale" and "not relevant" because his

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[184] GCHC Brief at 19.
[185] See IEU Brief at 4, FN 18; See OCC Brief at 79-80; Kroger Brief at 28-29.
[186] OCC Brief at 80.
[187] Tr. Vol. I at 117; Kroger Brief at 29.
[188] Kroger Brief at 29.
[189] See Tr. Vol. IV at 885-86; OCC Brief at 116-119.
[190] Tr. Vol. III at 742-43; Duke Ex. 5 at 5 (DeMay Direct); Duke Ex. 6 at 19 (Cannell Direct); Duke Ex. 12 at 19 (Wathen Direct); OCC Brief at 116.

projections were not the latest projections made by Duke.[191] Mr. Savoy's projections were based on two months of actual data and ten months of projected data.[192] Although these financial projections were updated, "Duke did not choose to file the updated projections with the Commission."[193]

An analysis of the updated financial projections obtained through discovery "reveal[s] a much improved financial outlook for Duke."[194] Even Mr. Savoy testified that the updated projections show a better financial position for Duke and he accredited the financial improvements to "decreases in the cost of fuel, emissions, capacity purchases, and O&M expense levels."[195] Accordingly, the projections Duke provided to the Commission are not an accurate representation of Duke's financial position.

Duke is not in a dire financial situation: "[A]s shown by its own projections – projections Duke did not furnish as part of its case – its financial integrity associated with its legacy generating assets, does not place Duke in a 'dire' and 'precarious' position."[196] Accordingly, Duke's request for additional compensation should be rejected.

C. Duke's Application is unjust and unreasonable.

If Duke's Application is not summarily rejected as violating two prior settlements and for being unlawful, Duke's Application fails to account for certain revenues received by Duke and overstates Duke's embedded costs. Assuming, arguendo, that the Commission determines that a cost-based compensation mechanism is appropriate for Duke, then the Commission must reduce the additional revenue requested from Duke. First, Duke admits that it did not include revenues

[191] Tr. Vol. IV at 881; OCC Brief at 117.
[192] Tr. Vol. IV at 882; OCC Brief at 117.
[193] OCC Brief at 117.
[194] Id.
[195] Tr. Vol. IV at 911; OCC Brief at 117.
[196] OCC Brief at 118.

from Rider ESSC in its calculation of current revenues received from its capacity service. Second, Duke includes its legacy generating assets in its calculation of required revenues to earn a reasonable rate of return on its investment for the entire term of the ESP Stipulation although Duke is required to transfer its legacy generation assets by December 2014. Both of these factors should act to reduce the amount of additional revenue allegedly required by Duke to earn a just and reasonable rate of return on its investments.

1. Rider ESSC revenues

Duke's revenue requirement must be reduced by the Rider ESSC revenues. Duke admits that Rider ESSC was "intended to ... ensure that the overall revenue under the ESP is adequate to [Duke] in its provision of an SSO."[197] Nonetheless, Duke did not account for Rider ESSC when it established its projected income statement in connection with the Application in this proceeding.[198] As explained in Kroger's Initial Brief, Duke admits that it is receiving revenue from Rider ESSC and that the revenues are allocated to its Commercial Power business segment, which is associated with Duke's legacy generation assets,[199] and that the revenue is eventually rolled into the regulated electric revenue line item set forth on the income statement filed with Duke's 10-k.[200] Nonetheless, inexplicably, Duke does not recognize revenues received though Rider ESSC in its overall calculation of revenues generated from the provision of capacity service as an FRR entity.[201] The Rider "ESSC revenues are capacity revenues collected by Duke

[197] IEU Ex. 6 at 14 (Janson Supp. Direct).
[198] Tr. Vol. IV at 934, 937; OCC Brief at 80.
[199] FES Ex. 1 at 13 (Lesser Direct).
[200] Tr. Vol. IV at 934-35; Tr. Vol. VII at 1660-61; OCC Brief at 81.
[201] Tr. Vol. III at 783; FES Ex. 1 at 3-4, 12-14 (Lesser Direct).

in recognition of its FRR obligation and supplement Duke's RPM based compensation at the wholesale level."[202]

Duke's argument that it does not need to include revenue received through Rider ESSC because that revenue was intended to subsidize Duke's retail electric service, not the provision of capacity service consistent with its FRR obligation, should be rejected. As established above, the distinction between competitive and noncompetitive services in this context is a distinction without a difference.[203] "Duke is not providing two different services, but providing a single service under which it furnishes capacity to CRES providers and to wholesale supply auction winners from a single set of assets."[204] Further, the ESP Stipulation does not distinguish between competitive and noncompetitive capacity service at all, let alone for the allocation of Rider ESSC revenues.[205] The ESP Stipulation states that Rider ESSC is "intended to provide stability and certainty regarding [Duke's] provision of retail electric service as an FRR entity."[206] As stated by Kroger Witness Higgins: "At the end of the day it's dollars to the company, and...the company ran the math on the dollars to the company and took that into account as part of the entire package."[207] At a minimum,[208] Rider ESSC must be included in the calculation of any capacity revenues, and the amount of revenues received from Rider ESSC must then be used to reduce the amount of above-market embedded capacity costs Duke is authorized to collect.[209]

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[202] OCC Brief at 81; See IGS Brief at 27; OEG Brief at 26-27; FES Brief at 37-39.
[203] Staff Brief at 17; OCC Brief at 81.
[204] OCC Brief at 81.
[205] Tr. Vol. III at 308; OCC Brief at 81.
[206] IEU Ex. 5 at 16 (ESP Stipulation).
[207] Tr. Vol. IX at 2280.
[208] As some intervenors argue, if the Commission allows Duke to collect above-market embedded capacity costs, additional adjustments are necessary to the amount Duke has requested. FES Ex. 1 at 11 (Lesser Direct); OCC Ex. 25 at 6-7 (Effron Direct); OEG Ex. 1 at 6-11 (Kollen Direct).
[209] FES Brief at 39; OEG Brief at 26-27.

2. Legacy Generating Assets

The ESP Stipulation required Duke to transfer its legacy generating assets by December 31, 2014[210] and, once transferred, Duke will no longer be incurring the embedded cost of capacity associated with those assets.[211] Nonetheless, Duke includes the embedded costs of capacity for these assets through May 31, 2005, the end of its FRR participation. Duke alleges that it is appropriate to include these legacy assets for the entire term of its FRR participation because, even after transferred, Duke will still be relying on the assets to meet its capacity requirements.[212] Duke further states that without the certainty of this additional revenue, "there is no assurance that the transferee will have the financial support necessary to enable the provision of capacity service to satisfy [Duke's] obligations."[213] Finally, and not surprisingly, Duke argues that AEP-Ohio was allowed to recover its embedded costs for its legacy generating assets for the entire term of its FRR obligations and, therefore, Duke should also be allowed to recover embedded costs for the entire term of its FRR obligations.[214] Once again, these arguments are without merit.

Once the transfer occurs, Duke will no longer own the generating assets and "will then be fully compensated for the actual cost of its FRR obligations without additional recoveries for the costs of the legacy generating assets that it will no longer own."[215] Additionally, after the transfer, Duke's embedded costs would have no relevance to the rates established for Duke's capacity service.[216] Accordingly, Duke should only be allowed to recover its embedded costs for its legacy generating assets up until the date of transfer, or at the latest, December 31, 2014.

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[210] IEU Ex. 5 (ESP Stipulation); Duke Ex. 2 at 7 (Trent Direct).
[211] GCHC Brief at 19.
[212] Duke Brief at 50.
[213] Id.
[214] Id.
[215] OCC Brief at 105-106.
[216] GCHC Brief at 19.

Moreover, any revenue received by Duke through Rider DR-CO after the transfer of the generating assets will be subsidizing Duke's unregulated generation service in violation of Section 4928.02(H), Revised Code.[217] As noted by the OCC, Section 4928.02(H), Revised Code, "requires the [Commission] to ensure effective competition by avoiding anti-competitive subsidies flowing from non-competitive retail service (SSO generation native load) to a competitive retail service."[218] Under Duke's proposal, ratepayers would be subsidizing Duke's unregulated generation service because ratepayers "would be forced to pay the difference between RPM and Duke's embedded cost of capacity."[219] Accordingly, if cost-based compensation is allowed, the recovery of embedded costs for the legacy generating assets should, at a minimum, be limited to the period before December 31, 2014 when Duke is required to transfer the assets.[220]

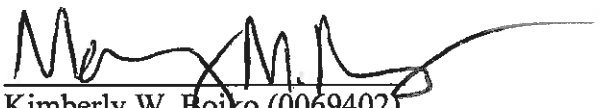
In addition, the amount of embedded costs for its legacy generation assets should be further reduced because Duke's calculations account for all of its legacy generating assets when only some of the assets are actually dedicated to Duke's FRR plan.[221] For example, Duke included Beckjord 1-5 and Killen CT in its calculation for embedded costs when those "legacy generating assets are not included in [Duke's] FRR Plan at any time through May 31, 2015 and, thus, not being used to satisfy [Duke's] FRR obligation."[222] Accordingly, the embedded costs requested by Duke should be analyzed to ensure that the legacy generation assets included in its calculation are actually being used by Duke to fulfill its FRR obligation.

[217] OCC Brief at 106; IGS Brief at 24.
[218] Section 4928.02(H), Revised Code; OCC Brief at 106.
[219] OCC Brief at 106; IGS Brief at 24-25.
[220] OCC Brief at 107.
[221] FES Brief at 29, 30.
[222] Id. at 29.

IV. CONCLUSION

Duke's Application to obtain a cost-based compensation mechanism is in direct violation of settlements that Duke voluntarily entered into and is, therefore, barred by res judicata and collateral estoppel. For the reasons set forth herein and in Kroger's Initial Brief, the Commission should deny Duke's Application for the establishment of a cost-based compensation mechanism and the associated deferral as unjust, unreasonable, imprudent, and in violation of Ohio law.

Respectfully submitted,



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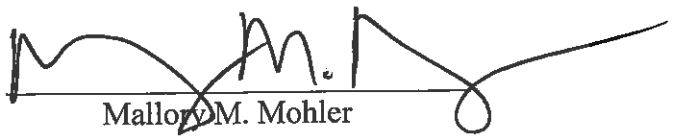
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 30th day of July, 2013 by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.



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