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 Section 4909.18, Revised Code.	))))	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

OPINION AND ORDER

The Commission, considering the above-entitled application and the record in these proceedings, hereby issues its Opinion and Order.

APPEARANCES:

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Bruce J. Weston, Ohio Consumers' Counsel, by Maureen R. Grady and Kyle L. Kern, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility customers of Duke Energy Ohio, Inc.

Colleen L. Mooney, 231 West Lima Street, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

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Bricker & Eckler, LLP, by Thomas O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the city of Cincinnati.

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Yazen Alami and Jay E. Jadwin, American Electric Power Service Corporation, 155 Nationwide Avenue, Columbus, Ohio 43215, on behalf of AEP Retail Energy Partners, LLC dba AEP Energy and AEP Energy, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Gretchen L. Petrucci, 52 East Gay Street, Columbus, Ohio 43216, on behalf of Constellation NewEnergy, Inc., and Exelon Generation Company, LLC.

Steven T. Nourse, American Electric Power Service Corporation, 1 Riverside Plaza, 29th Floor, Columbus, Ohio 43215, on behalf of Ohio Power Company.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Gretchen L. Petrucci, 52 East Gay Street, Columbus, Ohio 43216, on behalf of the Retail Energy Supply Association.

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Judi Sobecki, The Dayton Power and Light Company, 1065 Woodman Drive, Dayton, Ohio 45432, and Faruki, Ireland & Cox, P.L.L., by James W. Pauley, 500 Courthouse Plaza, S.W., 10 North Ludlow Street, Dayton, Ohio 45402, on behalf of The Dayton Power and Light Company.

Behrens, Taylor, Wheeler & Chamberlain, by Rick D. Chamberlain, 6 Northeast 63rd Street, Suite 400, Oklahoma City, Oklahoma 73105, and Roetzel & Andress LPA, by Kevin J. Osterkamp, 155 East Broad Street, 12th Floor, Columbus, Ohio 43215, on behalf of Wal-Mart Stores East, LP and Sam's East, Inc.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of Dominion Retail, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Gretchen L. Petrucci, 52 East Gay Street, Columbus, Ohio 43216, on behalf of Interstate Gas Supply, Inc.

Douglas E. Hart, 441 Vine Street, Suite 4192, Cincinnati, Ohio 45202, on behalf of Cincinnati Bell, Inc.

Bricker & Eckler, LLP, by Matthew W. Warnock and J. Thomas Siwo, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Manufacturers' Association.

Douglas E. Hart, 441 Vine Street, Suite 4192, Cincinnati, Ohio 45202, on behalf of The Greater Cincinnati Health Council.

Mike DeWine, Ohio Attorney General, by M. Howard Petricoff, Special Assistant Attorney General, 52 East Gay Street, Columbus, Ohio 43216, on behalf of Miami University and the University of Cincinnati.

OPINION:

I. HISTORY OF THE PROCEEDINGS

Duke Energy Ohio, Inc. (Duke or applicant), is an electric company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06. Duke supplies electric generation, transmission, and distribution services to approximately 690,000 customers in southwestern Ohio (Duke Ex. 1 at 1).

On August 29, 2012, Duke filed an application in these cases that seeks to: establish the amount of a cost-based charge for the provision of capacity services at $224.15/megawatt (MW)-day from the date of the application through May 31, 2015; modify Duke's accounting practices to establish a deferral to account for the difference between the amounts being recovered by Duke for the provision of capacity and Duke's cost of providing capacity, plus carrying costs; and implement a new tariff, Rider

Deferred Recovery - Capacity Obligation (Rider DR-CO), for future recovery of those deferred amounts (Duke Ex. 1 at 10).

By Entry issued September 13, 2012, the Commission established October 15, 2012, as the deadline for the filing of motions to intervene. By Entry issued February 13, 2013, the following entities were granted intervention in these cases: Industrial Energy Users-Ohio (IEU); Ohio Consumers' Counsel (OCC); Ohio Energy Group (OEG); Ohio Partners for Affordable Energy (OPAE); The Greater Cincinnati Health Council (GCHC); Cincinnati Bell, Inc. (CBI); The Kroger Co. (Kroger); city of Cincinnati (Cincinnati); FirstEnergy Solutions Corp. (FES); Ohio Manufacturers' Association (OMA); AEP Retail Energy Partners, LLC dba AEP Energy and AEP Energy, Inc. (jointly referred to as AEP Energy); Constellation NewEnergy, Inc. (Constellation) and Exelon Generation Company, LLC (Exelon Generation) (jointly referred to as Exelon); Ohio Power Company (AEP-Ohio); Interstate Gas Supply, Inc. (IGS); University of Cincinnati and Miami University (jointly referred to as the Universities); Retail Energy Supply Association (RESA); DPL Energy Resources, Inc. (DPLER); Dayton Power and Light Company (DP&L); Wal-Mart Stores East LP and Sam's East, Inc. (jointly referred to as Walmart); and Dominion Retail, Inc. (Dominion Retail).

By Entry issued October 3, 2012, as revised by the attorney examiner at the prehearing conference held on March 7, 2013, and by Entry issued April 1, 2013, the procedural schedule was established for these cases. The final procedural schedule was as follows: comments and reply comments were due on January 2, 2013, and February 1, 2013, respectively; Duke's testimony was due by March 1, 2013; intervenor testimony was due by March 26, 2013; Staff testimony was due by April 9, 2013; and the hearing was rescheduled to commence on April 15, 2013, at the offices of the Commission. The hearing commenced as rescheduled on April 15, 2013, and direct testimony was concluded on April 25, 2013. Rebuttal testimony was filed on May 13, 2013, and the hearing was reconvened on May 20 and 21, 2013, for the purpose of receiving rebuttal testimony. Initial and reply briefs were filed on June 28, 2013, and July 30, 2013, respectively.

On May 4, 2012, OCC, OEG, Cincinnati, OPAE, GCHC, OMA, Kroger, IEU, CBI, and Walmart (jointly referred to as Joint Movants) filed a joint motion to dismiss these cases. Duke filed a memorandum contra the joint motion on October 19, 2012. Joint Movants filed a reply to Duke's memorandum contra on October 26, 2012. At the hearing, Joint Movants renewed their motion to dismiss. The attorney examiner stated that, after the closure of the hearing and the briefing schedule, the joint motion would be presented to the Commission for consideration. (Tr. I at 13-15.)

In this Order, the Commission will, initially, address the outstanding procedural issues. Thereafter, we will review the positions of Duke and the intervenors regarding

Duke's proposed revenue requirement in these cases. Lastly, we will summarize and consider the legal and substantive issues concerning Duke's application that have been raised by Staff, Joint Movants, and the other intervenors, as well as Duke's response to those issues.

II. PROCEDURAL MATTERS

A. Motions for Protective Orders

Motions for protective orders (MPOs) requesting protection of certain information contained in documents filed in these cases were filed by Duke, OCC, and FES (the MPO Movants) on August 29, 2012, March 1, 2013, March 26, 2013, April 9, 2013, May 13, 2013, June 28, 2013, and July 30, 2013. In addition, at the hearing in these cases, Duke moved for the issuance of a protective order regarding certain information contained within the testimony and exhibits, including the documents listed in Attachment A to this Order.

In support of the motions for protective orders, Duke asserts that these documents contain certain information, the public disclosure of which could damage its competitive position and business interests. According to Duke, the documents cover projections and competitively sensitive information. Duke states that, in accordance with the requirements of R.C. 1333.61, the business and financial information contained within the documents are trade secrets that derive independent economic value from not being generally known or ascertainable by others who can obtain their own value from use of the information. Furthermore, the documents are the subject of reasonable efforts by Duke to maintain their secrecy. Duke requests the Commission make a determination that the redacted information is confidential, proprietary, and a trade secret. Therefore, in accordance with Ohio Adm.Code 4901-1-24, the MPO Movants request the Commission grant the motions for protective orders. No one filed an objection to the motions for protective order. At the hearing in these matters, the attorney examiner found that the motions were reasonable and should be granted. At this time the Commission finds that the attorney examiner's ruling should be affirmed and the motions for protective orders of the information listed in Attachment A to this Order should be granted.

Consistent with Ohio Adm.Code 4901-1-24, the Commission finds that it would be appropriate to grant protective treatment for 24 months from the date of this Order. Therefore, the docketing division should maintain, under seal, the information filed confidentially on the dates set forth in Attachment A to this Order until February 16, 2016. If the Commission believes the information should no longer be provided protective treatment, prior to the release of the information, the parties will be notified and given an opportunity, in accordance with Ohio Adm.Code 4901-1-24(F), to file motions to extend the protective order.

B. Notice of Additional Authority and Motion to Strike

On October 18, 2013, IEU filed notice of additional authority. On October 21, 2013, Duke filed a motion to strike the notice of additional authority filed by IEU on October 18, 2013. IEU filed a memorandum contra Duke's motion to strike on October 28, 2013, and Duke filed a reply on October 30, 2013.

In its notice of additional authority filed on October 18, 2013, IEU submitted the decision of the United States (U.S.) District Court of Maryland, in which IEU explains the court found that the Maryland Public Service Commission was preempted from authorizing above-market compensation for the provision of wholesale energy and capacity. *PPL Energyplus, LLC v. Douglas R.M. Nazarian*, Md Civ. No. MJG-12-1286; 2013 U.S. Dist. LEXIS 140210 (Sept. 30, 2013). In addition, IEU submitted a decision from the U.S. District Court of New Jersey, which IEU states found that the New Jersey Long-term Capacity Pilot Project Act, P.L. 2011, Chapter 9, approved Jan. 28, 2011, codified at N.J.Stat.Ann. 48:3-51, 48:3-98.2-.4, was unconstitutional because it violated the Supremacy Clause, U.S. Constitution, Article VI, Section 2. *PPL Energyplus LLC v. Robert M. Hanna*, NJ Civ. No. 11-745; 2013 U.S. Dist. LEXIS 147273 (Oct. 11, 2013).

In its motion to strike the notice of additional authority filed by IEU, Duke notes that these proceedings had been fully briefed and were before the Commission at the time the notice was filed. Duke asserts that IEU's effort to sidestep established procedures at the Commission and prejudice Duke's ability to make appropriate substantive arguments should be rejected. Duke points out that nothing in the Commission's procedural rules, Ohio Adm.Code Chapter 4901-1, allow for this type of filing. Duke contends IEU's filing must be viewed as a legal brief, through which IEU attempts to advance its position. However, Duke argues there is no basis for such a filing, either under the Commission's regulation or the procedural schedule established in these cases. Duke notes that the attorney examiners provided detail instructions concerning the timing, form, and content of briefs, and only initial and reply briefs were permitted.

In response, IEU argues the Commission should deny Duke's motion to strike because the notice of additional authority identifies a jurisdictional subject matter that bars the Commission's authority, which can be raised at any time. IEU asserts the notice does not violate a Commission rule and Duke is not prejudiced by the notice.

Duke states that IEU improperly challenges the subject matter jurisdiction of the Commission. According to Duke, IEU ignores the broad authority afforded the Commission, as well as existing Supreme Court precedent.

Initially, the Commission notes that the briefing period established in these cases concluded on July 30, 2013; IEU filed this notice of additional authority well beyond the mandated period. Therefore, the Commission finds that Duke's motion to strike IEU's notice of additional authority filed on October 18, 2013, is reasonable and should be granted.

III. APPLICATION AND DUKE'S PROPOSED REVNEUE REQUIREMENT

A. Summary of Application and Duke's Proposed Revenue Requirement

Duke filed this application pursuant to R.C. 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18 and related sections. Through this application, Duke requests that the Commission, under the authority of R.C. 4905.04, 4905.05, and 4905.06, authorize it to establish the amount of the cost-based charge for the provision by Duke of capacity service throughout its service territory, pursuant to Ohio's newly-adopted state compensation mechanism approved in *In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012) (*AEP Capacity Case*). In addition, under R.C. 4905.13 and 4909.18, Duke requests authority to defer the difference between the amounts being recovered by Duke for the provision of capacity services and Duke's cost of providing capacity services, as such cost is established pursuant to Ohio's newly-adopted state compensation mechanism and implement a new tariff for future recovery of the deferred amounts through Rider DR-CO. (Duke Ex. 1 at 2, 5.)

Duke explains that it is a fixed resource requirement (FRR) entity in PJM Interconnection, LLC (PJM), and is a signatory to PJM's Reliability Assurance Agreement (RAA), which is part of PJM's tariff approved by the Federal Energy Regulatory Commission (FERC). According to Duke, the RAA requires Duke to self-supply the capacity resources for its entire load zone or service territory in an amount that will satisfy the criteria under Schedule 8.1 of the RAA. Further, the RAA provides that a state compensation mechanism, where it exists, will prevail to determine the pricing of capacity that is supplied by the FRR entities. Duke offers that, in its July 2, 2012 Order in the *AEP Capacity Case*, the Commission determined that the state mechanism shall be based on the costs incurred by the FRR entity for its FRR capacity obligations. The Commission went on to adopt a methodology to establish just and reasonable costs for the provision of capacity by an FRR entity. (Duke Ex. 1 at 2; Duke Br. at 2-3.)

Noting that its FRR plan terminates on May 31, 2015, Duke states that, as an FRR entity, it is obligated to ensure the existence of adequate capacity resources for the duration of its FRR plan. Furthermore, Duke offers that it is providing capacity services for the load-serving entities (LSEs) in its territory, which the Commission found in the *AEP Capacity Case* to be an intrastate wholesale matter, not a retail electric service as

defined by Ohio law. According to Duke, it has committed owned-legacy generation resources to fulfilling its obligations as an FRR entity. (Duke Ex. 1 at 3.)

Currently, for the capacity it self-supplies as an FRR entity, it is only receiving the auction-based final zonal capacity price (FZCP) in effect for the rest of the PJM region for the current PJM delivery year. The FZCP structure applies to all retail load in Duke's territory through May 31, 2015. According to Duke, the FZCP is significantly less than Duke's cost of providing capacity sufficient to meet its FRR obligations. (Duke Ex. 1 at 4.)

Therefore, Duke requests the Commission determine that, for the duration of Duke's commitment as an FRR entity, the rate for the capacity services associated with its FRR obligations is $224.15/MW-day, which is calculated using the formula the Commission found reasonable in the *AEP Capacity Case*. (Duke Ex. 1 at 4.) Duke calculates, under its proposal, the average FZCP will approximate $66.06/MW-day. According to Duke, reducing its capacity cost by the estimated amount charged to suppliers yields an incremental difference of approximately $158.08/MW-day. (Duke Ex. 1 at 5.)

Duke asserts that this is an application for a new service and a new charge under R.C. 4909.18, because the Commission has not previously set any charge for Duke pursuant to the new state compensation mechanism adopted in the *AEP Capacity Case* and Duke has never had a tariff for the collection of the costs incurred by it in fulfilling its obligation as an FRR entity to provide capacity pursuant to the state compensation mechanism. In addition, Duke contends that, because it seeks only the establishment of the level of the charge, deferral authority, and approval of the mechanism by which the collection will be made, this application seeks no increase in the amounts to be paid by customers. (Duke Ex. 1 at 5-6.)

Duke states that, in keeping with the formulaic methodology established in the *AEP Capacity Case* for a cost-based state compensation mechanism, only the following elements of the annual capacity revenue requirement are included in its calculation: rate base, limited to net plant, accumulated deferred income taxes, and allowance on materials and supplies; return on rate base, using Duke's cost of capital and a return on equity (ROE) of 11.15 percent; operating and maintenance expenses (O&M) attributed to capacity costs; depreciation expense on capacity-related rate base; allocable capacity-related taxes, other than income; income and commercial activities taxes, including the production tax credit approved in the *AEP Capacity Case*; net costs of capacity purchased to fulfill the FRR obligation; and all projected margins from the sale of energy and ancillary services derived from Duke's generating assets are included as an offset to the overall revenue requirement (Duke Ex. 1 at 7-8; Duke Br. at 63-64). Using this methodology, Duke asserts that the average revenue requirement to achieve an

11.15 percent ROE on its investment in resources used to provide the capacity services as an FRR entity from August 1, 2012 through May 31, 2015, is $364,876,433, or approximately $244.15/MW-day. Duke explains that netting this additional revenue against its overall costs results in a net annual revenue requirement for Duke's capacity service as an FRR entity from August 1, 2012 through May 31, 2015, of $257,337,205 or a cost-based charge of approximately $158.08/MW-day above its current market-based FZCP revenues. Therefore, Duke asserts that this is the incremental amount of revenue and the average incremental capacity rate that Duke needs to ensure that it has an opportunity to earn 11.15 percent on its shareholders' investment in capacity-related services through the term of its FRR obligation. Absent sufficient capacity compensation for rendering service as an FRR entity, Duke states that its estimated annualized ROE would range from (13.5)[1] percent to (3.6) percent for the period of August 1, 2012 through May 31, 2015. (Duke Ex. 1 at 7-9; Duke Ex. 5 at 10, 12; Duke Ex. 7 at 5-6; Duke Ex. 2 at 13.) With these ROE figures, Duke asserts that it will need at least $134 million annually to reach a zero percent return. Therefore, without the requested relief in these cases, Duke claims that its ROE is unreasonable. (Duke Br. at 53-54; Duke Ex. 7 at 4.)

Duke requests authority to create Rider DR-CO, stating that it will, subsequently, seek to recover the approved deferred balance through such rider. In the subsequent proceeding, Duke will seek Commission approval to establish a rate that will allow for the collection of $258,747,429 per year for three years. Duke proposes that, as the FZCP and the PJM load for subsequent PJM planning years become known, it will then adjust that rate through an annual filing to update the information. At the end of the deferral collection period, Duke will file an application to true-up the total collected amount. Finally, Duke asserts that, to the extent it has, at the time of recovery of the deferred balance, transferred its legacy generating assets to an affiliate, that portion of the recovery attributable to the time period during which the assets were owned by the affiliate should then be passed through to such affiliate. According to Duke, this is the same process as the one approved in the *AEP Capacity Case*. (Duke Ex. 1 at 9-10.)

Duke explains that, when it exited the Midwest Independent System Operator (MISO) and initiated its realignment with PJM in June 2010, PJM had already administered the base residual auctions (BRAs) through the 2013/2014 delivery year. Upon realignment on January 1, 2012, Duke had no choice but to function as an FRR entity, at least through the 2013/2014 delivery year. Therefore, Duke established a transitional FRR plan to cover its resource requirements for the period January 1, 2012 through May 31, 2014, meeting the requirements with a combination of its own resources and bilateral purchases. In order to satisfy the initial five-year commitment

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[1] Throughout this Order, a number in parentheses indicates a negative number.

applicable to FRR entities, Duke's status as an FRR entity was extended through the 2015/2016 delivery year. (Duke Br. at 11-12; Duke Ex. 3 at 10, 17.)

Consistent with the stipulation approved in *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (Nov. 22, 2011) (*Duke ESP Case*) (ESP Stipulation), Duke explains that it obtained PJM approval to cease functioning as an FRR entity after the 2014/2015 delivery year. Therefore, Duke's commitment to self-supply adequate capacity for its footprint will end on May 31, 2015. Duke has already participated in the BRAs for delivery years subsequent to the 2014/2015 delivery year. The ESP Stipulation also required Duke to transfer legacy generating assets, which are committed to its FRR plan, to an affiliate or subsidiary by December 31, 2014. Duke explains that, even after asset transfer, it must fulfill its FRR capacity service obligations, for which it is entitled to just and reasonable compensation, and has dedicated its legacy generating assets for that purpose. (Duke Br. at 14-15; Duke Ex. 2 at 7.)

In further support of its application, Duke argues that the current rates are an unlawful taking within the meaning of the federal and state constitutions. Under the U.S. and Ohio constitutions, it is entitled to receive reasonable compensation for the regulated capacity service that it must provide as an FRR entity; therefore, it must be able to recover its actual costs, together with a fair return. The constitution protects utilities from being limited to a charge, *i.e.*, the FZCP, that is unjust and confiscatory. *See Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898); the Fifth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article. I, Section 2; *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm. of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); *City of Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115 (2006). (Duke Br. at 5, 18-20, 22-23, 52.) In addition, Duke argues it should be treated comparably to AEP-Ohio, as a similarly situated utility that the Commission authorized to recover its embedded costs of regulated capacity service, as calculated through a cost-based state compensation mechanism. Duke states that it is not currently subject to a state compensation mechanism, has not waived its right to a cost-based recovery mechanism, and no waiver may be implied on the basis of Duke's electric security plan (ESP). (Duke Br. at 5-6, 24-25, 38.)

Duke asserts that R.C. 4905.22 requires that all charges by a utility are to be just and reasonable. In addition, R.C. 4909.15 provides that, in evaluating such rates, a new rate shall be set whenever the Commission concludes that the existing one is or will be unjust or unreasonable, or that the maximum allowed rates are insufficient to yield a reasonable compensation for the service, and are unjust and unreasonable. Duke argues that, in such a situation the Commission is mandated to fix a just and reasonable rate that includes a fair and reasonable rate of return, in accordance with R.C. 4909.15. (Duke Br. at 51.)

B. Intervenors' Positions on Duke's Proposed Revenue Requirement

RESA/IGS submit the application should be rejected because the calculations contain errors and are not based on the most current or reliable data, including errors for failure to account for: accumulated amortization of intangible plant; accumulated deferred income taxes; the $330 million electric stability service charge (ESSC) revenues, which is recovered through Rider ESSC, in accordance with the ESP Stipulation; reduction of O&M; the actual 2012 adjusted net income data; the lower and more accurate forecast of interest expense data; the new lower projected costs for capacity purchases and margins; energy hedges; the change in the cost of capacity that will occur after Duke no longer owns the legacy generating assets; and the correct load for its capacity under PJM, rather than MISO (RESA/IGS Br. at 25- 31).

OEG states that Duke's proposed cost-based capacity charge calculation suffers from a host of errors. Those errors, and their associated reductions calculated by OEG, assuming authorization begins on August 1, 2013, include: failure to deduct the ESSC revenues, $265.833 million; the inclusion of deferrals beginning August 1, 2012, which is impermissible retroactive ratemaking, more than $222 million; deferrals beyond December 31, 2104, the date by which Duke must divest its generation assets, $66.862 million; failure to reflect O&M expense reductions and increased projected market energy margins, $25.332 and $65.167, respectively; improper allocation of property tax expense to the unregulated generation segment, $57.571 million; an excessive 11.15 percent ROE, using Duke's long-term cost of debt of 4.11 percent the reduction would be $49.446 million; and the inclusion of imprudent costs associated with Duke's bilateral contracts for FRR capacity. OEG explains that, if the calculation does not take the ESSC revenues into account, Duke will recover the ESSC revenues twice, once through Rider ESSC and once through Rider DR-CO. (OEG Br. at 4, 15, 20, 26-33; OEG Ex. 1 at 29, 31-32, 37-40, 46.) Applying all of its proposed adjustments, OEG calculates the total deferral and rate increase, before interest, would be ($112.884) million, plus a reduction for the imprudent costs associated with Duke's bilateral contracts for FRR capacity (OEG Br. at 34-36).

OCC asserts that Duke's embedded cost of capacity is only $47 million per year, once the amount is reduced for certain items, including: the ESSC revenues; property taxes, $40 million; the overstated 2011 O&M expenses; the overstated rate base; and the overstated ROE, which should be no more than 8.75 percent (OCC Br. at 3, 80-84, 96-107; OCC Ex. 24 at 15; OCC Ex. 25 at 19-21). OCC opines that Duke greatly overstated its claim for $729 million, because the information initially relied on by Duke in arriving at that amount was primarily projected forecasts that have since been updated. According to OCC, the information reveals that Duke's net income improves due to decreases in the cost of fuel, emissions, capacity purchases, ancillary services, and reductions in O&M and interest expense levels. (OCC Br. at 117; Tr. IV at 911-913.)

According to OCC, once the outdated forecast is replaced with the latest approved 2013 five-year forecast for Duke Corporation, Duke's alleged significant financial loss shrinks markedly for 2013 and 2014. (OCC Br. at 4; OCC Ex. 8A.)

FES agrees that Duke's proposed embedded costs should be reduced to account for the Rider ESSC revenues and the O&M expenses. In addition, FES calculates that, after making the necessary corrections for the higher than expected net income in 2013 and 2014, the ESSC revenues, and overstated costs and interest expense, the legacy generating assets would be profitable, as the ROE for 2012, 2013, 2014 would be 0.3 percent, 2.7 percent, and 7.7 percent, respectively. (FES Br. at 47-48; FES Ex. 1 at 12, 15-16, 54-57.)

OCC notes that, in the *AEP Capacity Case*, the Commission approved AEP-Ohio's state compensation mechanism on a going-forward basis. Whereas, in these proceedings, Duke requests its deferral date back to August 2012, which is the first month AEP-Ohio's state compensation mechanism was in effect and when Duke filed this application. OCC notes that its recalculated revenue requirement can only apply, if at all, to service rendered after the Commission approves a capacity rate for Duke. Duke cannot go back to August 1, 2012, and seek rate increases to services rendered in the past, as that would be retroactive ratemaking, which is prohibited under the Ohio and U.S. Constitutions, as well as R.C. 4905.30 and 4905.32. *See Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St 254, 141 N.E.2d 4645 (1957); *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997); *Pub. Util. Comm. v. United Fuel Gas Co.*, 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943). (OCC Br. at 3, 26, 62-66; IEU Br. at 57.)

GCHC/CBI point out that, in the *Duke ESP Case*, Duke committed to transfer the legacy generation assets as soon as practicable upon the necessary regulatory approvals. Duke received the Commission's approval in 2011 and FERC's in 2012. However, Duke has not yet transferred the assets. Once the legacy generation assets are transferred, Duke's embedded costs of those generation assets will have no relevance with respect to the appropriate rates for Duke's capacity. GCHC/CBI assert Duke should not be rewarded for delaying this transfer. (GCHC/CBI Br. at 19; IEU Ex. 5 at 25.)

FES points out that Duke alone decided to move to PJM and Duke could have accomplished such migration without undertaking FRR entity status. According to FES, as part of its move to PJM, Duke knew what the reliability pricing model (RPM) regional transmission organization (RTO) prices were for the entire relevant period, but it committed to those prices anyway. In addition, Duke could have and, in fact, is purchasing capacity at market prices to meet its FRR obligation. However, instead of obtaining resources from the market, Duke requests a cost-based rate for its inefficient

high-cost legacy generating assets, for which the costs were not prudently incurred. (FES Br. at 3.)

Even if it were appropriate to permit Duke to institute a cost-based rate for FRR service, FES states that the cost-based rate should be based on the actual cost of providing that service. FES explains that Duke calculated its proposed capacity rate by calculating the net costs associated with its legacy generating assets that are not used by Duke to meet its FRR obligation. According to FES, there is only an incidental relationship between Duke's legacy generating assets and Duke's FRR plan. Duke's FRR plan includes a subset of the legacy generating assets; however, it also includes other assets, including assets owned by affiliates and market purchases of capacity. Therefore, FES asserts there is no reason why capacity pricing should be based on unprofitable units, while profitable assets and market-based purchases are ignored. FES advocates that Duke's above-market costs for its legacy generating assets be disallowed, since market alternatives are available. According to FES, Duke made no effort to show sufficient lower-price capacity is unavailable from bilateral markets to satisfy at least some of its FRR obligation it otherwise intends to satisfy using its high-cost legacy generating assets. Under a cost-based rate compensation system, Duke must establish that the costs to be recovered match the service provided to customers. FES argues there is no justification for this disconnect in Duke's proposal; therefore, no cost-based rate can be established based on the record in these cases. Moreover, FES asserts there is no policy justification for a rate based only on legacy generating assets, as using such a rate would distort the wholesale and retail markets. (FES Br. at 26-32.)

FES offers that any cost-based rate should be based on avoidable costs, not fully-embedded costs, pointing out that PJM uses avoidable costs, less an offset for revenue from energy and ancillary service, to calculate the maximum allowable capacity bid. FES' analysis shows that Duke's market-based revenue is roughly equivalent to its avoidable costs; thus, Duke's legacy generating assets require no additional revenue to compensate Duke for its avoidable costs of operating units. FES also states that reductions must be made to the calculation because Duke: understates the capacity revenues by incorrectly using BRA prices instead of FZCP prices; includes excess allocation for general plant in rate base that is inconsistent with Duke's distribution rate case, *In re Duke Energy Ohio, Inc.*, Case No. 12-1682-EL-AIR, et al., which would lead to double-recovery for certain assets; allocated too much for intangible plant to legacy generating assets; and needs to account for reduction due to structural separation. After recalculating to reflect these adjustments, Duke's total claimed revenue is reduced from $729,122,082 to $200,447,690, or $70,746,244 annually. This implies a capacity rate of $100.74/MW-day net of energy and ancillary services credits, and a rate of $43.46/MW-day net of capacity sales revenues. Further, taking into consideration the effects of corporate separation post-January 1, 2015, the net revenue requirement is reduced to $124,455,400, which is equivalent to a rate of $31.64/MW-day net of capacity

sales revenues. FES asserts the regulatory asset should also be reduced by the ESSC payments and it should reflect the improvement in adjusted net income for years 2013 and 2014 resulting from O&M cost reductions, as well as increased margins on capacity, energy, and ancillary services. (FES Br. at 32-44; FES Ex. 1 at 15-23; FES Ex. 2 at 27.)

OEG states that Duke's financial integrity claim is overstated and based on skewed information. According to OEG and RESA/IGS, Duke's skewed financial projections only reflect a subset of the generation assets Duke owns, *i.e.*, its legacy coal assets. However, OEG notes Duke owns a number of gas generating assets through its direct subsidiary, Duke Energy Commercial Asset Management. RESA/IGS point out that these assets are only part of Duke's financial picture, *e.g.*, they do not include the ESSC revenues or any other regulated electric revenues billed to retail customers. In addition, OEG offers that the earnings projections do not reflect the earnings that are reported to the investment community, which include coal and gas assets, and the ESSC revenues. RESA/IGS state that Duke's outlooks in 2013 demonstrate that Duke is not and will not be in a dire financial condition between now and May 2015. (RESA/IGS Br. at 18-23; OEG Br. at 18-20.)

OEG points out that Duke's calculation of the $158.08/MW-day charge only takes into account the compensation Duke will receive for providing capacity equivalent to its FRR load. Duke's calculation fails to account for the additional compensation Duke will receive for satisfying PJM's 15 percent reserve margin. According to OEG, when this additional compensation is taken into account, the amount Duke would recover from customers increases far above Duke's claimed revenue requirement. Therefore, without this correction Duke will over-recover from customers through Rider DR-CO (Duke Br. at 4, 25.)

AEP-Ohio states that, if the Commission does apply the state compensation approach to these cases, it should do so in a manner consistent with the decision in the *AEP Capacity Case*. AEP-Ohio notes that, even though Duke asserts that it followed the same approach and adjustments as adopted in the *AEP Capacity Case* for the demand charge portion of the calculation, it is not clear that the method for establishing the energy credit was followed. AEP-Ohio submits that, if a cost-based state mechanism is established for Duke, the same method adopted in the *AEP Capacity Case* should be used. (AEP-Ohio Br. at 2-3.)

OCC maintains that, if the Commission approves Duke's application to collect some amount of additional capacity costs, it should require Duke to collect those additional costs from the parties to whom the wholesale capacity service is provided, competitive retail electric service (CRES) providers and wholesale supply auction winners, in proportion to the quantity of capacity provided to each group. Duke should

not be allowed to charge its distribution customers under Rider DR-CO. (OCC Br. at 59-61.)

IV. ARGUMENTS OF THE PARTIES

A. Standard of Proof and the Joint Motion to Dismiss

As stated previously, Joint Movants filed a motion to dismiss these cases on October 4, 2012. Joint Movants' arguments and Duke's replies are set forth below. However, as an initial matter, in its memorandum contra filed on October 19, 2012, Duke asserts that Joint Movants' motion should be rejected, as it is defective and cannot satisfy the applicable standard of proof. Duke states that Civ.R. 12(B) sets forth the following underlying theories for motions to dismiss: lack of jurisdiction over the subject matter or person; improper venue; insufficiency of process or service of process; and failure to state a claim upon which relief can be granted or to join a party. According to Duke, of these theories, the only two that the motion to dismiss can be based on are lack of subject matter jurisdiction or failure by Duke to state a claim in its application upon which relief can be granted. As to the first of these remaining theories, Duke maintains Joint Movants have the burden of proving that the application fails based on lack of subject matter jurisdiction. *See State ex. Rel. Bush v. Spurlock,* 42 Ohio St.3d 77, 537 N.E.2d 641 (1989). Duke states the Commission has subject matter jurisdiction over Ohio's state compensation mechanism, deferral authority, and tariff approval. With regard to the second remaining theory, that Duke failed to state a claim upon which relief can be granted, Duke submits the Commission must first accept, as true, the content of the application, and only then can the Commission dismiss the application for failure to state a claim if Duke can prove no set of facts that would permit the Commission to provide the requested relief. *See Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 668 N.E.2d 889 (1996); *In re Indus. Energy Users-Ohio v. Midwest Independent Transm. Sys. Operator, Inc.*, Case No. 10-1398-EL-CSS, Opinion and Order (June 8, 2011). Duke contends Joint Movants have not demonstrated, beyond a doubt, that there are no facts entitling Duke to the relief sought, just and reasonable compensation for the wholesale capacity services it provides pursuant to a state compensation mechanism. (Memo Contra at 2.)

In reply, Joint Movants note that even Duke concedes that the Commission is not bound by the rules of civil procedure and, therefore, the Commission may, in its discretion, grant the motion to dismiss for good cause. Even if the rules of civil procedure did apply, however, Joint Movants assert the arguments in their motion to dismiss meet one or more of the grounds justifying dismissal under those rules. (Reply Memo Contra at 3-4.)

The Commission notes that our jurisdiction is quasi-judicial in nature and, thus, Joint Movants' observation that the Commission is not strictly bound by the rules of

civil procedure is accurate. That being said, we determined at the outset of these proceedings that we would follow a thorough evidentiary process, in order to give all interested parties an opportunity to be heard on the issues pertaining to Duke's application. In light of the fact that we did not summarily grant the Joint Movants' motion to dismiss prior to a full adjudicatory process, we find it unnecessary to address the issue posed by Duke regarding the standard of proof. Rather, we will proceed with our review and consideration of the substantive and legal arguments which were comprehensively litigated by Duke, Staff, Joint Movants, and the intervening parties and issue our decision on whether Duke has sustained its burden of proof based on the evidence of record and the merits of Duke's case.

B. Substantive and Legal Arguments on the Application

With the exception of Duke, all of the parties in these cases oppose Duke's application. The opposing parties[2] set forth five arguments in support of their positions. First, they assert the Commission should enforce the stipulation approved in the *Duke ESP Case* and the stipulation approved in the base transmission rate (BTR) rider and regional transmission organization (RTO) rider cost recovery case, *In re Duke Energy Ohio, Inc.*, Case No. 11-2641-EL-RDR, et al., Opinion and Order (May 25, 2011) (*Duke BTR/RTO Case*) (BTR/RTO Stipulation). Second, they argue Duke failed to timely apply for rehearing of the Commission's Order in the *Duke ESP Case* and failed to timely file an appeal. Third, the opposing parties state that Duke is precluded, under the doctrines of res judicata and collateral estoppel, from relitigating the ESP. Fourth, they contend that, even if Duke was not barred under the terms of the ESP Stipulation from seeking the relief set forth in the application, the Commission has no authority to grant Duke the relief requested. Fifth, they state that the *AEP Capacity Case* is limited to AEP-Ohio.

1. Argument 1: Duke's Application, the ESP Stipulation, and the BTR/RTO Stipulation

a. Opposing Parties' Arguments on the ESP Stipulation and the BTR/RTO Stipulation

Joint Movants assert that dismissal of these cases will prevent an unjust retail electric service rate increase from being imposed on customers in direct violation of the ESP Stipulation, to which they were signatory parties. Under the ESP Stipulation, Duke was allowed to collect $330 million from customers under Rider ESSC, in order "***to provide stability and certainty regarding Duke Energy Ohio's provision of retail electric service as an FRR entity***" (Jt. Mot. at 1, 6; IEU Ex. 5 at 16.) In addition, the stipulating parties agreed that the default generation supply price was to be established through a

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2 Opposing parties refers hereafter to Staff and the intervenors.

competitive bidding process. Therefore, Joint Movants argue that, by agreeing to the ESP Stipulation, Duke waived its right to seek cost-based capacity rates during the term of its ESP, January 1, 2012 through May 31, 2015. (Jt. Mot. at 1-2.)

In support of their positions, Joint Movants and RESA/IGS relate the chronology of the *Duke ESP Case*, pointing out that Duke's initial application in that case requested authority to collect its embedded costs of providing capacity, plus a reasonable rate of return, with the cost of capacity being based on Duke's election to provide capacity in PJM as an FRR entity that self-supplies all of the capacity in its footprint (Jt. Mot. at 3; RESA/IGS Br. at 11-12). Thus, relying on PJM's RAA, Duke's initial proposal in the *Duke ESP Case* was for a cost-based, "state-determined" rate for capacity provided to CRES providers to serve shopping load, rather than a market-based RPM auction rate. (Jt. Mot. at 3-4; Kroger Ex. 4 at 5-6; OEG Br. at 8.) However, after negotiations with the parties, the ESP Stipulation approved by the Commission provided that the wholesale capacity charge for CRES providers would be priced at the RPM prices, not Duke's embedded costs, for the term of the ESP (Jt. Mot. at 4-5; IEU Ex. 5 at 6-7; IEU 6 at 4-5). FES states that capacity pricing was a critically-important issue that was addressed and resolved by the ESP Stipulation. The ESP Stipulation resolved all aspects of capacity pricing, by providing that Duke would be compensated for its capacity using the PJM RPM FZCP in the unconstrained region for each year of the ESP. In exchange, Duke received the ESSC, which was intended to compensate Duke $110 million per year for providing FRR capacity service. (FES Br. at 9-12; FES Ex. 3 at 10; FES Ex. 22 at 10-13.)

FES explains that PJM conducts long-term planning and requires that enough capacity be committed at least three years ahead of anticipated capacity needs through either PJM's RPM auction process or FRR rules. The RPM auctions are held three years in advance of each planning year and are followed by later incremental auctions that procure additional needed capacity. The final capacity price for a planning year is known as the FZCP. The FZCP is the market price charged to LSEs. The FRR alternative allows certain LSEs to self-supply their own capacity resources. (FES Br. at 48-49; FES Ex. 2 at 8-9.) Duke was not required to make an FRR election and was in control of the timing of its migration to PJM. When Duke made its FRR election, it was aware of what RPM prices would be over the term of the FRR plan, since all relevant BRAs had already occurred. (FES Br. at 49; FES Ex. 2 at 11-12; IEU Br. at 45.) FES opines that Duke is requesting cost-based capacity pricing now to compensate for the impact that lower-than-expected energy pricing has had on the deal negotiated in the ESP Stipulation (FES Br. at 50).

Further, FES expounds that Schedule 8.1, Section D.8 of PJM's RAA provides that a state compensation mechanism will prevail when a state commission directs a CRES provider to pay certain capacity providers, FRR entities, such as AEP-Ohio, for capacity serving switched load. However, the Commission has no similar basis for exercising

jurisdiction over Duke's application, because no PJM tariff authorizes a state compensation mechanism for capacity Duke sells to PJM. (FES Br. at 1.) In addition, IEU states that, even if the Commission derived some jurisdiction from the RAA, the charge that Duke is seeking does not conform to the description of a state compensation mechanism contained in the RAA, because Duke is seeking a nonbypassable charge that can be collected from retail customers (IEU Br. at 41).

GCHC/CBI agree that Schedule 8.1, Section D.8 only provides for the application of a state compensation mechanism: to load that switches to an alternative LSE; and where the state requires switching customers or their LSE to compensate the FRR entity for its capacity obligations. The RAA does not allow for the application of a state compensation mechanism to capacity prices for the FRR entity's own retail customers, it only applies to switching customers. GCHC/CBI point out that Duke's own retail customers purchase capacity service from Duke as part of its standard service offer (SSO) and already compensate Duke for that capacity through Rider RC. The progression is: Duke supplies capacity to PJM; PJM bills the wholesale auction winner; Duke pays the auction winners for capacity in accordance with its supplier contracts; and then Duke converts those capacity payments into retail rates to be charged to customers through Rider RC. What is left is the other side of the market, *i.e.*, shopping customers that receive their energy from a CRES provider. According to GCHC/CBI, this is the only market segment to which Schedule 8.1, Section D.8 of PJM's RAA speaks. However, this provision only applies when a state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR entity for its capacity obligations. GCHC/CBI note that Duke did not point to any Ohio statute or provision within the ESP Stipulation requiring CRES providers to compensate Duke for its FRR capacity obligations. GCHC/CBI submit there is no state compensation mechanism requiring anything different than the normal PJM rules. However, if the Order approving the ESP Stipulation is somehow viewed as an Ohio requirement under the RAA that CRES providers must buy capacity from Duke, then that Order must also be seen as establishing the state compensation mechanism, which was exactly the same as the default rule under the PJM rules, FZCP pricing. If the ESP Stipulation is not considered a state compensation mechanism, GCHC/CBI advocate that the Commission should not create one for Duke at this time. (GCHC/CBI Br. at 16-18.)

It is OCC's understanding that Duke's application requests authority to provide noncompetitive wholesale capacity service consistent with its FRR obligations, because Duke believes this noncompetitive wholesale service is separate and distinct from the competitive services it is providing under its ESP. However, OCC believes that, contrary to Duke's assertions, it is not providing two different services. Instead, Duke is providing a single service under which it furnishes capacity to CRES providers and to wholesale auction winners using a single set of assets. (OCC Br. at 25-26.) OCC explains that PJM simply bills CRES providers on Duke's behalf and then remits the

capacity payments by CRES providers and wholesale suppliers to Duke. Therefore, the distinction Duke is trying to make, that PJM charges CRES providers instead of Duke, is inconsequential to the meaning of the ESP Stipulation. (OCC Br. at 42; Tr. VIII at 1893.) In addition, GCHC/CBI submit that Duke's provision of capacity to PJM, either as a customer or as its agent for dealing with wholesale LSE customers, cannot be deemed a different service than the capacity service received by retail customers from the LSE. According to GCHC/CBI, it is one and the same; therefore, Duke cannot sell the same capacity once to PJM/LSEs and a second time to retail customers. However, that is, in fact, what Duke is asking for in this application. (GCHC/CBI Br. at 14.)

Additionally, OCC asserts Duke is requesting to collect two sets of revenues for the same capacity: market-based rates of approximately $66.06/MW-day under the ESP Stipulation to CRES and wholesale supply auction winners; and $158.08/MW-day in additional revenues for the same capacity by charging Rider DR-CO to customers. According to OCC, Duke did not provide any evidence to support its position that it is providing two distinct services to two different sets of customers by relying on two different sets of capacity assets. (OCC Br. at 25-26.)

Joint Movants emphasize that the RPM compensation mechanism in the ESP Stipulation was balanced by other provisions, including their agreement to pay Duke an additional $110 million per year for three years and the creation of Rider ESSC to collect this $330 million, which is in addition to the capacity revenues Duke would receive from CRES providers and SSO customers. According to Joint Movants, under the ESP Stipulation, Duke would get the RPM capacity revenues, plus the $330 million through Rider ESSC, and, in exchange, Duke gave up its right to collect wholesale capacity revenues from CRES providers for shopping load based on its embedded costs of capacity. (Jt. Mot. at 6-7.)

Staff explains that Duke attempts to differentiate between its commitments under the ESP Stipulation and its request herein by asserting that it agreed to pricing of capacity service in the ESP Stipulation, but somehow did not agree to its compensation for capacity services in that same stipulation. Duke's new distinction that PJM charges capacity to CRES providers, rather than Duke, is improper. Contrary to Duke's assertions that it only agreed to the pricing of its capacity service, not compensation, Kroger attests that the other signatory parties to the ESP Stipulation believed pricing and compensation for Duke's provision of capacity service were affirmatively resolved in that stipulation. Kroger and Staff agree that Duke's distinction between price and compensation is disingenuous. Staff insists that, if Duke believed it was agreeing to pricing and not compensation, it had an obligation to disclose that critical distinction to the Commission and the other signatory parties. (Staff Br. at 15; Kroger Ex. 1 at 9-10; Kroger Br. at 9-11; Tr. IX at 2285-2286, 2298-2299.) Moreover, Staff and Kroger maintain the testimony in support of the ESP Stipulation supports their position that the issue of

compensation for capacity services was addressed and fully resolved in the *Duke ESP Case*. For example, one of Duke's witnesses testifying in support of the ESP Stipulation attested that Duke "***will be compensated for capacity resources based on the competitive PJM prices." Thus, confirming that the ESP Stipulation covered both pricing and compensation. (Kroger Br. at 14 IEU Ex. 6 at 4-5; Staff Br. at 18; FES Ex. 22 at 12, 18.)

Moreover, Kroger notes that, contrary to Duke's assertions, Attachment F, Section 6.2(b) of the ESP Stipulation clearly provides that the payment for capacity was going to be made on behalf of Duke to PJM. Kroger argues that making a payment on behalf of someone clearly speaks to compensation. In addition, Duke's agreed-upon compensation for its provision of capacity is further evidenced by Rider ESSC. (Kroger Br. at 14-15; IEU Ex. 5, Att. F at 35; Tr. IX at 2304.)

Kroger notes that, after the hearing in the *Duke ESP Case*, Duke filed a motion to amend paragraph IV.A of the ESP Stipulation substituting the word "PJM" for the words "Duke Energy Ohio" in the following sentence, "Duke Energy Ohio shall charge CRES providers for capacity as determined by the PJM RTO." At the time it requested the change, Duke explained that it was "an inadvertent typographical error." However, now Duke is attempting to attach a substantive meaning to this change and asks the Commission to believe that the ESP Stipulation did not address the issue of Duke's compensation for capacity. Kroger asserts that Duke's claim is not substantiated by the record in these cases. Duke's correction of the typographical error did not change the meaning of the ESP Stipulation or the understanding of the signatory parties. (Kroger Br. at 12-14; Tr. IX at 2286-2287, 2289, 2300.)

In addition, OEG asserts that Duke's request is unequivocally barred by its ESP Stipulation, noting that numerous sections of the ESP Stipulation, as well as Duke's testimony in support of the ESP Stipulation, outline a two-part de facto state compensation mechanism in recognition of its wholesale load obligations as an FRR entity for the duration of the ESP. Part one includes Duke's commitment to meet its wholesale load obligations by providing capacity to CRES providers and to its remaining SSO customers at PJM RPM-based prices. Part two includes Duke's ability to recover $110 million annually from retail customers via a nonbypassable Rider ESSC charge, which was established in recognition of Duke's FRR obligations. (OEG Br. at 5-8; IEU Ex. 6 at 4-5; OEG Ex. 1 at 11-14.)

Joint Movants insist the ESP Stipulation links retail SSO rates to wholesale capacity, noting that sections of the ESP Stipulation: address how CRES providers and wholesale supply auction winners will be charged PJM RPM-based prices for capacity; and explicitly link retail SSO rates to those wholesale capacity rates. Joint Movants point to several sections of the ESP Stipulation to support their contention, specifically

noting that paragraphs II.B and IV.B reflect Duke's commitment to supply capacity to PJM, which, in turn, would charge wholesale supply auction winners based on the FZCP and CRES providers at the PJM price. In addition, paragraph II.C drew a link between Duke's commitments regarding the wholesale capacity price for CRES providers and the price of capacity to Duke's SSO customers, by permitting Duke to implement two riders, retail capacity (Rider RC) and retail energy (Rider RE), to recover the costs for serving the SSO load. Joint Movants note that these two riders are fashioned so that the revenues collected would equal the auction clearing prices, as converted into retail rates, with the underlying capacity price for calculating Rider RC being PJM's FZCP. Therefore, Joint Movants submit it is clear that Rider RC covers the capacity portion of the auction price and Rider RE covers the energy portion of the auction price; with the auction pricing being set under paragraphs II.B and IV.A, which is based on the RPM pricing and not Duke's embedded cost of capacity. (Reply Memo Contra at 4-6; GCHC Br. at 11.) According to Joint Movants, while the ESP Stipulation may not use the exact term "compensation for FRR capacity" the scope of it clearly encompassed just and reasonable compensation in light of Duke's commitments, including its wholesale capacity commitments (Reply Memo Contra at 6). Furthermore, FES explains that the ESP Stipulation provides: what CRES providers will pay for capacity (IV.A), what wholesale suppliers to the SSO auction will pay for capacity (II.B), what SSO customers will pay for capacity through Rider RC (this payment flows through to the wholesale suppliers) (II.C), and what FES will pay for capacity provided to the percentage of income payment plan (PIPP) load (V.A). Therefore, what every type of customer would pay to Duke for every possible time period is clearly set out in the ESP Stipulation. (FES Br. at 13-14.)

GCHC/CBI note that paragraph I.B. of the ESP Stipulation provides that "***the auction-based pricing and cost-recovery provisions of the SSO structure under which [Duke] is operating as of May 31, 2015, shall persist until such time as a subsequent SSO is approved***" (Emphasis added). GCHC/CBI point out that Duke has attempted to discount this paragraph by arguing that it only addresses the period after the current ESP term. While technically correct as to the time frame in which the paragraph would apply, GCHC/CBI stress that Duke ignores the fact that this paragraph also describes what Duke had agreed to during the ESP period, as this is the preservation of the status quo provision. They argue the purpose of paragraph I.B is to maintain the existing situation until a new SSO is approved. Paragraph I.B then goes on to describe the auction process for SSO supply, followed by a description of the handling of capacity. GCHC/CBI point out that a scenario can only "persist" if it already existed. (GCHC Br. at 4-5; IEU Ex. 5 at 6.)

According to Joint Movants, the ESP Stipulation, in paragraphs I.B. and II.B. expressly adopts capacity priced at RPM prices. Paragraph I.B provides that, for as long as Duke is an FRR entity under PJM, it will provide capacity at the FZCP; further, for

the period during which Duke participates in the RPM and BRA, the capacity price is the FCZP and shall be provided pursuant to the RPM process. In addition, paragraph II.B. acknowledges Duke's status as an FRR entity and provides that Duke shall supply capacity to PJM and PJM, in turn, will charge for capacity to all wholesale supply auction winners for the applicable time periods of the ESP with the charge for said capacity determined by the PJM RTO, which is the FZCP in the unconstrained RTO region. Joint Movants assert Duke has asked the Commission to set aside the capacity pricing portion of the ESP Stipulation in favor of a cost-based capacity charge; thus, directly undermining the ESP Stipulation. (Jt. Mot. at 5; IEU Ex. 5 at 6-7.)

FES, the Universities, and RESA/IGS note that the ESP Stipulation, *e.g.*, paragraphs II.B, II.C, and VII.D, ensured that Duke would be compensated for its capacity at market-based pricing through May 2015 and thereafter (FES Br. at 2; Univ. Br. at 4-6; RESA/IGS Br. at 6-7). FES points out that Duke's proposal in these cases attempts to circumvent its previous commitments by manufacturing a new wholesale capacity service, *i.e.*, a sale between Duke and PJM. However, FES and GCHC/CBI point out that, under the RAA, PJM acts as a billing agent for capacity transactions and does not actually purchase or sell capacity. (FES Br. at 2-3; Tr. VIII at 2076-2077; GCHC/CBI Br. at 12-13.) FES opines that Duke crafted this application as seeking compensation for capacity allegedly sold to PJM because Duke stipulated in the *Duke ESP Case* that it would charge market-based rates to CRES providers and wholesale suppliers for switched and SSO load, respectively. Once the Commission approved the ESP Stipulation, in which paragraph IV.A provided that CRES providers would pay market-based rates for capacity, this became the existing state compensation mechanism for CRES provider charges. Thus, given that the ESP Stipulation set Duke's capacity prices for all entities that were required to obtain capacity from Duke, there is no transaction left for the Commission to fix that has not already been fixed at market-based rates by the ESP Stipulation. (FES Br. at 1-2.)

OMA points out that Duke's claims that its current application is unrelated to the proceedings that resolved the ESP are highly questionable, in light of the fact that Duke's current application would eliminate the state compensation mechanism approved in the *Duke ESP Case* (OMA Br. at 2). Joint Movants argue that, through this application, Duke seeks to increase rates an additional $776 million, plus interest; thus, abrogating, nullifying, and voiding both the ESP Stipulation and the BTR/RTO Stipulation (Jt. Mot. at 12). FES, the Universities, and RESA/IGS agree that both of these stipulations mandate that Duke receive market-based compensation for its FRR capacity (FES Br. at 8; Univ. Br. at 4, 9; RESA/IGS Br. at 15). Joint Movants and FES point out that, in the BTR/RTO Stipulation, Duke agreed that it would not seek approval from FERC under Schedule 8.1 of the PJM RAA, for cost-based capacity charges as an FRR entity from January 1, 2012 through May 31, 2016 (Jt. Mot. at 8; FES Br. at 8). Kroger notes that, in the instant application, Duke now believes the

Commission's decision in the *AEP Capacity Case* changed the landscape, so Duke is able to get out of the BTR/RTO Stipulation because it can ask the Commission, instead of FERC, for approval of a cost-based capacity charge (Kroger Br. at 8).

Kroger emphasizes that there have been no fundamental changes since either the ESP Stipulation or the BTR/RTO Stipulation were approved that would justify a change in the state compensation mechanism already approved by the Commission in those proceedings. Further, Duke has failed to meet its burden to demonstrate otherwise. In fact, Duke admits that the circumstances that led it to enter into those agreements still exist, it is still an FRR entity and it is still providing service pursuant to its ESP. (Kroger Br. at 6-7; OEG Ex. 1 at 5; Tr. II at 334.)

Staff confirms that, in the ESP Stipulation, Duke agreed to be compensated for capacity based on RPM prices (Staff Br. at 6, 13; FES Ex. 23 at 3-4; FES Ex. 6 at 4-5; Tr. II at 305, 330-331). Moreover, Staff agrees that Duke gave up its right to collect wholesale capacity revenues from CRES providers for shopping load based on its embedded costs of capacity in exchange for RPM capacity revenues, plus the $330 million ESSC (Staff Br. at 7). Staff points out that the Commission approved the ESP Stipulation, Duke did not file for rehearing of the Commission's Order, and the Commission has approved the SSO auction schedule and accepted four SSO auction results; therefore, Duke cannot now modify the capacity pricing mechanism agreed to in the ESP Stipulation. In addition, Staff asserts Duke cannot now modify the BTR/RTO Stipulation. (Staff Br. at 8, 12; IEU Ex. 5 at 7, 12.)

Joint Movants and RESA/IGS submit that, prior to signing both the ESP Stipulation and the BTR/RTO Stipulation, Duke was aware of the challenges to wholesale capacity pricing (Jt. Mot. at 9; RESA/IGS Br. at 10-11). In support of this assertion, Joint Movants point out that, in late 2010, Duke moved to intervene in a FERC case wherein American Electric Power Service Corporation (AEPSC) sought an increase from the RAA's default RPM-based pricing to cost-based pricing, using AEP-Ohio's fully-embedded cost of capacity. *In re American Elec. Power Serv. Corp.*, Docket No. ER-2183 (*AEPSC Application Case*). In December 2010, the Commission initiated the *AEP Capacity Case*, in which Duke Energy Retail Sales, LLC, likewise, moved to intervene. On January 20, 2011, FERC rejected the application in the *AEPSC Application Case*. In response, AEPSC sought rehearing of the FERC decision and filed a complaint with FERC to amend the state compensation mechanism provisions of the RAA to clarify the circumstances under which AEPSC may request a cost-based capacity rate from FERC that would be charged to CRES providers. *In re American Elec. Power Serv. Corp. v. PJM Interconnection, LLC*, Docket No. E-32. (*AEPSC Complaint Case*). Duke intervened in the *AEPSC Complaint Case*. (Jt. Mot. at 9.)

Duke had the opportunity and, in fact, presented evidence in its original application in the *Duke ESP Case* regarding its embedded costs of being an FRR entity; however, as part of the ESP Stipulation, Duke agreed to forgo cost-based capacity in lieu of market-based capacity and compensation through Riders RC and ESSC (Reply Memo Contra at 18; IEU Ex. 16 at 4-10.) Joint Movants submit that, in its Order in the *Duke ESP Case*, the Commission appropriately recognized that Duke agreed to charge market-based capacity prices to SSO customers and that pricing was specifically tied to wholesale capacity based on RPM pricing. Moreover, the Commission understood that Duke would receive additional compensation for its FRR capacity obligations in the form of the ESSC. Joint Movants also point to the tariffs filed by Duke in compliance with the Commission's Order in the *Duke ESP Case*, noting that said tariffs provide that Duke set the capacity charge to be paid by SSO customers, based on the PJM-determined wholesale FZCP, a market-based pricing approach. All of these evidence that the issue of just and reasonable compensation for Duke's FRR capacity obligations have already been resolved. (Reply Memo Contra at 11-14.) Joint Movants, the Universities, GCHC/CBI, and RESA/IGS further note that the testimony of Duke witnesses in the *Duke ESP Case* makes it clear that capacity pricing for Duke's SSO customers was to be based on market pricing. Moreover, their testimony confirms that Duke would receive just and reasonable compensation for its FRR service as a result of the ESP Stipulation. (Reply Memo Contra at 7, 18; FES Ex. 22 at 8-10, 18; FES Ex. 23 at 3-4; IEU Ex. 6 at 4-6, 14; Univ. Br. at 6-7; RESA/IGS Br. at 7-9, 12; GCHC/CBI Br. at 7-10.) In addition, RESA/IGS note that, in a report to investors in November 2011, Duke described the ESP Stipulation as a move to market pricing that, as a package, meets Duke's financial interests (RES/IGS Br. at 13-14; FES Ex. 13 at 7).

Joint Movants, Staff, the Universities, and RESA/IGS seek to enforce the ESP Stipulation, stating that it is to be viewed as a settlement package, not as individual provisions. They argue that altering one provision of the ESP Stipulation undermines and destroys the entire agreement bargained for. (Jt. Mot. at 14-15; IEU Br. at 23-24; Staff Br. at 21; Univ. Br. at 10; RESA/IGS Br. at 9; Duke Ex. 32 at 4.) Staff, the Universities, RESA/IGS, and Joint Movants recommend the Commission follow past precedent and affirm the integrity of the settlement process, enforce the ESP Stipulation, and require parties to keep their commitments. *See, e.g., In re Ohio Bell Tel. Co.*, Case No. 93-487-TP-ALT, et al., Entry (Feb. 8, 1995); *In re Columbia Gas of Ohio, Inc.*, Case No. 88-716-GA-AIR, Entry (June 6, 1989); *In re Cincinnati Gas & Elec. Co.*, Case No. 95-203-EL-FOR, et al., Opinion and Order (Dec. 19,1996); *In re Duke Energy Ohio, Inc.*, Case No. 09-1999-EL-POR, Opinion and Order (Dec. 15, 2010). (Staff Br. at 19; Universities Br. at 11; RESA/IGS Br. at 9; Jt. Mot. at 15.) Kroger offers that, if Duke is allowed to modify the capacity pricing provisions of the ESP Stipulation, the Commission must reopen the entire *Duke ESP Case* and allow the remaining parties to have the same opportunity to modify other provisions, *e.g.*, Rider ESSC (Kroger Br. at 24).

Moreover, Joint Movants and RESA/IGS assert there are strong policy reasons to support upholding the ESP Stipulation (Jt. Mot. at 15; RESA/IGS Br. at 14). First, failure to do so would hinder the Commission's ability to ensure that reasonably priced electric service is available to all consumers, in accordance with R.C. 4928.02(A), because this application would require the average residential customer to pay an additional $150 to $200 per year for three years and business customers would experience an increase of approximately $500 million over the three-year term. (Jt. Mot. at 15-16.) FES estimates that Duke's proposed capacity charge would cost the average residential customer $433, the average commercial customer $3,481, and the average industrial customer $80,078. If the current ESSC charge is factored in, residential, commercial, and industrial customers would pay $629, $5,056, and $116,321, respectively. (FES Br. at 44-45; FES Ex. 1 at 7-8.) The Universities anticipate that Duke's proposal in these proceedings will cause them to incur millions of dollars in additional energy costs (Univ. Br. at 2). Joint Movants note that the ESP Stipulation provided for a lesser amount related to the FRR rate for capacity and took into account the increase customers would bear based on the economic conditions of southwestern Ohio (Jt. Mot. at 15-16). Staff agrees that approval of this application would drastically affect the Commission's ability under R.C. 4928.02(A) to ensure reasonably priced electric service to customers (Staff Br. at 21).

Second, by respecting the precedential value of its decision in the *Duke ESP Case*, the Commission would provide regulatory certainty, which benefits customers, investors, and shareholders, and encourages the cost-saving practice of dispute resolution (Jt. Mot. at 16; RESA/IGS Br. at 14). FES notes that, if the Commission grants Duke's application after a stipulation has been approved, parties will be hesitant to make business decisions or enter into stipulations for fear of how those stipulations could change in the future (FES Br. at 18). OEG agrees that, if the Commission does not preserve the integrity of the ESP Stipulation in these cases, the Commission will discourage parties from entering into stipulations in future cases, and open the door for other utilities to relitigate key provisions of settlements that have already been approved (OEG Br. 13). Staff and the Universities agree that upholding stipulations provides regulatory certainty; therefore, the Commission should not depart from previous decisions without a clear need (Staff Br. at 22; Univ. Br. at 11-12).

Finally, OCC notes that the four corners rule is applicable in Commission proceedings, under this rule of contract interpretation, a contract is not ambiguous if its meaning can be determined from the four corners of the document (OCC Br. at 38; 43 Ohio Jurisprudence Evidence Section 516). OCC asserts that the ESP Stipulation, at paragraphs I.B and II.B, is clear and unambiguous. According to OCC, the Commission did not find any ambiguity in the ESP Stipulation when it was approved; however, after seeing the outcome of the *AEP Capacity Case*, Duke is attempting to create ambiguity. Nevertheless, if the ESP Stipulation is ambiguous, OCC argues the Commission should construe any ambiguities against the drafter, Duke. *See Graham v. Drydock Coal Co.*,

76 Ohio St.3d 311, 667 N.E.2d 949 (1996); *Franck v. Railway Exp. Agency,* Inc., 159 Ohio St. 343; 112 N.E.2d 381 (1953). (OCC Br. at 38-40, 42-44; 14 Ohio Jurisprudence Contracts Section 136.)

IEU asserts the Commission does not have authority to adjudicate controversies between parties as to contract rights. IEU states the RPM-based pricing is based on a FERC-approved contract that is binding on Duke. In addition, Duke has entered into an ESP Stipulation that contractually sets Duke's compensation for capacity service supplied to PJM. Under applicable federal and state law, IEU argues Duke must demonstrate that its current compensation under these agreements is not in the public interest before it can secure compensation under these agreements in excess of that provided by the agreements. (IEU Br. 42.)

b. Duke's Arguments on the ESP Stipulation and the BTR/RTO Stipulation

Duke asserts that, while Joint Movants demand that the capacity pricing provision not be separated from the rest of the ESP Stipulation, that is exactly what Joint Movants are doing. Joint Movants did not review the precise wording of the ESP Stipulation and are now seeking to alter the import of the language in both the ESP and BTR/RTO Stipulations. Such alteration would undermine and destroy the ESP Stipulation bargained for by Duke. (Memo Contra at 7.)

While the ESP Stipulation established a wholesale capacity charge for CRES providers, Duke argues that, contrary to Joint Movants' assertions, Duke did not stipulate to RPM-priced capacity. According to Duke, in reciting the ESP Stipulation, Joint Movants eliminated critical words from paragraph I.B, thus, misleading the reader, and they misinterpreted paragraph II.B. In paragraph I.B Duke asserts that the words "[f]or purposes of this paragraph***" are critical, because they make it clear that this paragraph refers solely to what would occur if the Commission rejects Duke's next ESP application, *i.e.*, Duke would provide capacity to PJM at the RPM price. Therefore, paragraph I.B has no relevance to the instant application. While paragraph II.B is relevant to the present circumstance, as it establishes what the wholesale supply auction winners will pay for capacity, Duke believes Joint Movants misinterpret this paragraph to explicitly provide for capacity to be priced at RPM prices, even though the paragraph only addresses the amount to be charged to auction winners (Memo Contra at 4-5).

In addition, contrary to the assertions by Joint Movants, Duke states that nowhere in its application does it ask the Commission to set aside the portion of the ESP Stipulation that set the price to be paid by auction winners and CRES providers for capacity obtained through PJM. Moreover, nowhere in this application has Duke asked

for authorization to charge auction winners and CRES providers for capacity on a cost basis. (Memo Contra at 5.)

According to Duke, the ESP Stipulation addressed the amount to be paid by auction winners and CRES providers, whereas the instant application asks the Commission to authorize the amount pursuant to which Duke would be compensated for fulfilling its FRR obligations, deferral, and rider. The ESP Stipulation says nothing about the charge for wholesale capacity service under a compensation mechanism or about how or whether Duke receives just and reasonable compensation for such services. Therefore, Duke argues the issues in this application were not resolved in the ESP Stipulation and this application does not violate the ESP Stipulation. The ESP Stipulation does not prohibit an application for a cost-based capacity charge under a mechanism that allows Duke the just and reasonable compensation to which it is entitled, under the Commission's traditional regulatory authority, for fulfilling its FRR obligations, according to Duke. (Memo Contra at 5.)

The opposing parties fail to accept that Duke's ESP application was one for an SSO of CRES, pursuant to which Duke would directly supply capacity to all end-use consumers in its territory; no wholesale or retail supplier would have had an obligation in respect of such capacity service. The requested compensation in the *Duke ESP Case* was for a retail service between Duke and all customers. However, the compensation requested in the instant cases is for a service that only indirectly involves end-use customers and directly involves suppliers, a service that the Commission found to be provided outside of the scope of R.C. Chapter 4928. (Duke Br. at 37.)

Moreover, Duke contends the ESP Stipulation did not establish a state compensation mechanism for wholesale service, in the form of the ESSC and the auction-based prices paid by wholesale and CRES suppliers. The ESP Stipulation confirms only that, during the term of the ESP, Duke will supply capacity to PJM and PJM will charge suppliers, both SSO auction winners and CRES providers, the FZCP. Duke offers that the Supreme Court has directed that only statutorily prescribed components expressly identified in R.C. 4928.143 may be included in an ESP. *See Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-4276, 947 N.E.2d 655. Duke maintains that the FRR capacity service is not subject to regulation under R.C. Chapter 4928. Pointing to the *AEP Capacity Case*, Duke offers the Commission has concluded that, where capacity service is not supplied directly to retail customers, it is neither a retail electric service nor a deregulated service. FRR capacity service is provided directly to suppliers. Thus, while the FRR capacity service ultimately benefits customers, it is characterized as a wholesale matter between the FRR entity and suppliers, which is not subject to R.C. Chapter 4928. In addition, R.C. 4928.143 does not authorize, for inclusion in an ESP, the approval of a state mechanism for capacity service provided by an FRR entity. (Duke Br. at 30-33; OCC Ex. 3 at 29.)

With regard to Joint Movants' assertions referencing the *Duke BTR/RTO Case*, Duke concedes that it agreed in the BTR/RTO Stipulation not to seek approval from FERC of a wholesale capacity charge based on cost, and Duke has not done so. The provision in the BTR/BTO Stipulation was a restriction on the venue for a filing on this topic, not a substantive prohibition to any such filing. (Memo Contra at 6.)

Duke argues that R.C. Chapter 4928 is not applicable to these proceedings; therefore, the state policies set forth in that chapter should not influence these proceedings. However, even if the Commission does consider these policies, as it did in the *AEP Capacity Case*, Duke's application is consistent with those policies. Duke submits that, because the charge will be passed on to all customers, regardless of their LSE, the recovery will not result in discriminatory treatment to any customer or supplier. Duke insists that, contrary to the arguments of the opposing parties, the requested cost-based capacity charge will not have a deleterious impact on the CRES market. Moreover, Duke states that the recovery of its embedded costs of its legacy generating assets will not distort competitive outcomes in the regional wholesale market. Duke rationalizes that, because the requested recovery will be implemented through a nonbypassable charge to all customers, it will affect all customers equally and cause no distortion. Rather, charging customers an artificially low price would be distortionary. (Duke Br. at 29-30, 47; Duke Ex. 3 at 21; Duke Ex. 35 at 34-35.)

As to the public policy arguments, Duke states that, while it is cognizant of the additional dollars that would be required from customers, it is also imperative that the public utility serving the customers has the opportunity to remain financially viable. Duke insists that public policy should not be so narrowly applied as to deny a utility the compensation it is lawfully due for fulfilling it obligations and rendering service. Without approval of this application, Duke loses money every day that it remains in operation while fulfilling its FRR obligation, *i.e.*, Duke will be operating with a substantial loss of an estimated annual average ranging from (13.5) percent to (3.6) percent ROE through May 31, 2015. (Memo Contra at 7, 18; Duke Ex. 7 at 5-6; Duke Ex. 2 at 13.) Such a loss could trigger unfortunate outcomes, such as loss of Ohio jobs and tax revenues. In addition, while Duke agrees with the principle of consistency and strong precedents, in order to avoid the unintended consequence of discriminatory treatment, one can not focus only on one precedential decision, while ignoring others. According to Duke, the Commission has acknowledged the unique position of FRR entities in providing a nonretail service for which just and reasonable compensation is owed. Further, the Commission has established, pursuant to the RAA, a state compensation mechanism for FRR entities, which should apply to Duke just as it would to any FRR entity in Ohio. (Memo Contra at 7-8; Duke Br. at 22-23.)

c. Conclusion on Duke's Application and the ESP Stipulation and the BTR/RTO Stipulation

The question before the Commission at this juncture is whether the application proposed by Duke is in violation of the ESP and the BTR/RTO Stipulations, as well as our Orders approving those stipulations. Upon our review of the record in theses cases, as well as the stipulations and our decisions on the *Duke ESP Case* and the *Duke BTR/RTO Case*, the Commission finds that Duke's application contravenes the terms of the stipulations, the testimony and tariffs filed in support of those stipulations, and our understanding and approval of those stipulations.

Initially, the Commission notes that both the ESP and BTR/RTO Stipulations contain provisions in which the signatory parties agreed to support the reasonableness of the stipulations and enforce their provisions. However, it is clear that approval of Duke's request herein would be directly contrary to the ESP Stipulation and would, in the interest of due process, result in the need to reopen the evidentiary considerations in the *Duke ESP Case* in order to afford all signatory parties, not just Duke, the opportunity to revise or litigate other terms in that stipulation.

Contrary to Duke's assertions, our approval of the ESP Stipulation relied, inter alia, on the premise that the signatory parties had come to an agreement on all necessary terms and conditions to ensure the provision of adequate and reliable capacity to retail customers in Duke's service territory, including the appropriate charge for the provision by Duke of capacity service through the end of the ESP, May 31, 2015. Therefore, it was our understanding, based on our reading of the ESP Stipulation and the evidence and tariffs in that case, that the issue of just and reasonable compensation for Duke's FRR capacity obligations and Duke's recovery of costs had been resolved.

As detailed by the opposing parties, numerous provisions in the ESP Stipulation clearly depict the agreed upon process for the pricing and compensation of capacity. While we were aware of the fact that paragraph I.B. of the ESP Stipulation begins with a phrase ensuring that the provisions set forth thereafter apply in the event the Commission rejected or substantially modified Duke's next SSO application, the remainder of that paragraph sets forth, in detail, the process agreed to in the *Duke ESP Case, i.e.*, the auction process and Duke's agreement to, for so long as it is an FRR entity, provide capacity at the FZCP. Paragraph I.B, in conjunction with the other provisions of the stipulation, unambiguously resolves all capacity issues, including that the current process and the provision of capacity at the FZCP will persist until such time as a subsequent SSO is approved. As for Duke's argument that the ESP Stipulation provided for the pricing of capacity, but not the compensation for capacity, the Commission finds that even Duke's own witness testified in support of the ESP

Stipulation acknowledging that Duke "***will be compensated for capacity resources based on the competitive PJM prices" (IEU Ex. 6 at 5).

Moreover, it is undisputed that paragraph VII.A. of the ESP Stipulation provided for Duke to recover $110 million annually from retail customers through a nonbypassable Rider ESSC charge in order "***to provide stability and certainty regarding Duke Energy Ohio's provision of retail electric service *as an FRR entity****" during the term of the ESP (Emphasis added.) (IEU Ex. 5 at 16). As noted by the opposing parties, these agreed to ESSC revenues are in addition to the capacity revenues Duke would receive from CRES providers and SSO customers through retail capacity and energy riders, Riders RC and RE, which were included in the ESP Stipulation so that Duke could recover the costs for serving the SSO load. We continue to find that the ESP Stipulation appropriately provided for Duke's recovery from customers for the costs of providing FRR wholesale capacity service. While Duke is factually correct that the ESP Stipulation does not contain a provision prohibiting the filing of an application for a cost-based capacity charge, as evidenced by the all encompassing and unambiguous provisions of the ESP Stipulation, there was no need for such a provision, as the stipulation covered and resolved all issues pertaining to Duke's recovery for capacity service through May 31, 2015. Therefore, the additional compensation requested in the instant application is without merit.

In addition, as pointed out by the opposing parties, at the time the parties were finalizing the ESP Stipulation, October 2011, Duke and the other signatory parties to the stipulation were fully aware of the proceedings involving the AEPSC capacity cases pending at FERC, which began in 2010. As the record in the instant cases reflects, Duke was and is a party to those AEPSC cases. However, it was not until after the Commission issued our Order in the *AEP Capacity Case* that Duke filed this application requesting additional compensation for its capacity service agreed to in the ESP Stipulation.

As for Duke's argument that it is not in violation of the BTR/RTO Stipulation because it did not file with FERC, the Commission agrees that this contention is misleading. While it may appear that the BTR/RTO Stipulation language permitted a filing with the Commission, while barring a filing with FERC, taken in the correct context, such is not the case. Our consideration and approval of the ESP and BTR/RTO Stipulations rested on the fact that all applicable capacity pricing and compensation issues were resolved in their entirety at the state level. Therefore, there was no need for the BTR/RTO Stipulation to forestall further filings with the Commission. Accordingly, Duke's rationale that its filing of this application does not contravene and attempt to circumvent the agreed upon intent of the stipulations and our subsequent approvals is unfounded.

While the parties debated these issues in depth, we find that there is no need to determine if the ESP Stipulation created a state compensation mechanism, or if the service contemplated by Duke's application in these cases is or is not a noncompetitive service. The bottom line is: Duke agreed to the pricing and compensation for capacity service in the ESP Stipulation and Duke should not, at this late date, be permitted to renege on the package deal approved by the Commission. Therefore, the Commission finds that Duke has failed to sustain its burden of proof and this application should be denied and dismissed.

As a final matter on this issue, the Commission notes that Duke filed this application pursuant to R.C. 4909.18, under the guise that it is an application for a new service and a new charge, because the Commission had not previously set any charge for Duke pursuant to what Duke terms is the new state compensation mechanism adopted in the *AEP Capacity Case*. Duke contends that, because it seeks only the establishment of the level of the charge, deferral authority, and approval of the mechanism by which the collection would be made, this application seeks no increase in the amounts to be paid by customers. The Commission disagrees. As we previously found herein, the ESP Stipulation, as supported by the evidence and tariffs in that case, resolved all issues related to Duke's provision of capacity in Ohio, including: all necessary terms and conditions to ensure the provision of adequate and reliable capacity to retail customers in Duke's service territory; the appropriate charge for the provision by Duke of capacity service through the end of the ESP; the issue of just and reasonable compensation for Duke's FRR capacity obligations; and Duke's recovery of costs. Therefore, Duke's assertion that its application in the instant cases should be considered as an application not for an increase in rates under R.C. 4909.18 is unfounded, as both the service and the charge were authorized in the *Duke ESP Case*. Therefore, any proposed revision to the capacity service and charge would be considered an increase in rates and would have to be filed under the appropriate statutory mechanism for the Commission's review of such a rate increase.

2. Argument 2: Application for Rehearing of the Order in the *Duke ESP Case*.

a. Opposing Parties' Arguments on the Application for Rehearing

Joint Movants believe that, in reality, Duke is now seeking rehearing of the Commission's Order in the *Duke ESP Case* that adopted the ESP Stipulation. However, Duke did not apply for rehearing of the Commission's November 22, 2011 Order in the *Duke ESP Case* within the 30-day time period required by R.C. 4903.10. According to Joint Movants, Duke seeks rehearing on the basis that the capacity should be priced on an embedded cost basis, rather than the capacity pricing methodology based on RPM pricing Duke agreed to in the ESP Stipulation. Joint Movants assert that this application

should be treated as a late-filed application for rehearing and, because it is not filed in accordance with R.C. 4903.10, the Commission lacks jurisdiction to consider the application. (Jt. Mot. at 17-18.) Staff agrees that this application should be rejected because Duke failed to timely apply for rehearing of the Commission's Order approving the ESP Stipulation and failed to timely file an appeal. Therefore, the Commission lacks jurisdiction to entertain this belated request. (Staff Br. at 22-23.)

b. Duke's Arguments on the Application for Rehearing

According to Duke, this application addresses an issue that was not raised in the ESP Stipulation; it is not contrary, just not included. The ESP Stipulation covers the amount for capacity that auction winners and CRES providers will be charged. However, it does not cover the cost to Duke for providing wholesale capacity consistent with its FRR obligations or the recovery of such costs. Therefore, this application cannot be considered to be an application for rehearing of the Order in the *Duke ESP Case*. (Memo Contra at 9.)

c. Conclusion on the Application for Rehearing

As we stated previously, at the time Duke agreed to the ESP Stipulation, it was fully cognizant and involved in proceedings at FERC wherein the issue involved a request to implement cost-based pricing for capacity, at the utility's fully-embedded costs. However, even with that knowledge, Duke negotiated and signed off on a three-year, five-month ESP which addressed and resolved capacity pricing and compensation for its Ohio service territory. Duke now comes before the Commission in what can only be termed a request for reconsideration, or rehearing, of our Order approving the ESP Stipulation. Therefore, we find that Duke's application should be denied and dismissed as it is a late-filed application for rehearing of our November 22, 2011 Order in the *Duke ESP Case*, in contravention of the requirements mandated by R.C. 4903.10.

3. Argument 3: The Doctrines of Res Judicata and Collateral Estoppel

a. Opposing Parties' Arguments on Res Judicata and Collateral Estoppel

Joint Movants argue, and Staff agrees, that the doctrine of res judicata precludes relitigation of issues raised and decided in a prior action. *See Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464; 38 S.Ct. 566; 62 L.Ed. 1215 (1917); *Grave v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). According to Joint Movants, the doctrine also applies to instances where a party is prepared to present new evidence or new causes of action, or new forms of relief, not sought in the first action. *See, e.g., American Home Products Corp. v. Roger W. Tracy*, 152 Ohio App. 3d 267, 787 N.E.2d 658 (10th Dist.) (2003);

Ron Thomas Sr. v. Restaurant Developers Corp., 1997 Ohio App. LEXIS 3962 (1997). In addition, Joint Movants and Staff point to precedent that provides that, if a party fails to introduce matters that the party might have in the first case, the party will be presumed to have waived the right to do so. *See Covington and Cincinnati Bridge Co. v. Sargent*, 27 Ohio St. 233, 1875 Ohio LEXIS 298 (1875). (Jt. Mot. at 19-20; Reply Memo Contra at 19; Staff Br. at 24-25). In *National Amusements, Inc. v. City of Springdale*, 53 Ohio St.3d 60, 558 N.E.2d 1178 (1990), Joint Movants note the Supreme Court found that, "[t]he doctrine of res judicata 'encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes***[i]ts enforcement is essential to the maintenance of social order*** (Jt. Mot. at 21-22). Moreover, OCC submits that the doctrine rests on the judicial ground that the party affected has litigated or had the opportunity to litigate the same matter. *See Postal Telegraph Cable Co.* (OCC Br. at 32.)

In addition, Joint Movants and Staff cite *New Winchester Gardens, Ltd. V. Franklin Cty. Bd. of Revision*, 80 Ohio St.3d 36, 684 N.E.2d 312 (1997), to support their argument that collateral estoppel precludes the relitigation of an issue that has been litigated and determined in a prior proceeding. They advocate that both the doctrine of res judicata and collateral estoppel apply to Commission proceedings, where the proceeding is judicial in nature and the parties have had ample opportunity to litigate the issues. *See Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 475 N.E.2d 782 (1985); *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980). Joint Movants argue the *Duke ESP Case* was judicial in nature because the Commission acted in its judicial capacity to resolve the ESP proceeding by providing notice, holding an evidentiary hearing, and providing litigants an opportunity to introduce evidence; therefore, the parties were given an opportunity to litigate the issues. (Jt. Mot. at 19-20; Staff Br. at 25-26; Reply Memo Contra at 18.) Joint Movants assert Duke was given a fair opportunity to litigate how its capacity should be priced in the *Duke ESP Case*, pointing out that the facts, the law, and the parties in the *Duke ESP Case* are the same as in these cases; therefore, these cases should be dismissed on res judicata and collateral estoppel grounds. Moreover, they note that the doctrine of res judicata can be applied to cases that are concluded in a settlement. *See Scott v. East Cleveland*, 16 Ohio App. 3d 429 (Ct. App.) (1984). (Jt. Mot. at 21-22.)

b. Duke's Arguments on Res Judicata and Collateral Estoppel

Duke asserts that the doctrine of res judicata and collateral estoppel cannot be applied to deny a litigant of its due process rights. *See Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 443 N.E.2d 978 (1983); *Armeigh v. Baycliffs Corp.*, 81 Ohio St.3d 247, 690 N.E.2d 872 (1998). Duke submits that the doctrine of res judicata cannot be applied in connection with all proceedings before the Commission; rather, it applies to those administrative proceedings that are of a judicial nature and where the parties have ample opportunity to litigate the issues. Duke asserts that the prior

proceedings relied on by Joint Movants for purposes of seeking to collaterally estop these proceedings were not judicial in nature. Rather, Duke asserts the Commission has acknowledged that ratemaking is a legislative function. *See State of Ohio ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 135 Ohio St3d 367, 2013-Ohio-1472, 987 N.E.2d 645, Motion to Dismiss (Sept. 25, 2012) at 5-6. Therefore, Duke maintains that the *Duke ESP Case* and the *Duke BTR/RTO Case* cited by Joint Movants involve orders approving SSO rates or transmission riders, which reflect legislative powers and not judicial or quasi-judicial authority. Therefore, such cases are not ones where the principles of res judicata or collateral estoppel can be applied. (Memo Contra at 9-10; Duke Br. at 40.)

To successfully assert collateral estoppel, Duke states a party must prove that: the party against whom estoppel is sought was a party or in privity with a party to the prior action; there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; the issue was admitted or tried and decided and was necessary to the final judgment; and the issue is identical to the issue involved in the prior suit. *See Fort Frye Teachers Assn. v. State Employee Relations Bd.*, 81 Ohio St.3d 392, 692 N.E.2d 140 (1998). According to Duke, collateral estoppel requires a determination, in a subsequent action between the same parties, that a fact or point that was actually and directly at issue in the previous action was passed upon and actually determined. *See Fort Frye Teachers Assn; McCabe Corp. v. Ohio Environmental Protection Agency*, 2012-Ohio-3643, 2012 Ohio Misc. LEXIS 89. (Memo Contra at 10; Duke Br. at 43.) When the issue is not actually litigated and decided in the previous proceeding, collateral estoppel does not preclude the issue from being litigated in a subsequent proceeding. *See Thompson v. Wing*, 70 Ohio St.3d 176, 637 N.E.2d 917 (1994). Moreover, Duke maintains that decisions adopting stipulations are not determinations on the underlying issues and do not give rise to claims of collateral estoppel. *See State ex rel. Davis, v. Pub. Emp. Retirement Bd.*, 120 Ohio St.3d 386, 899 N.E.2d 975 (2008); *Consolo, v. City of Cleveland*, 103 Ohio St.3d 362, 815 N.E.2d 1114 (2004). In applying these cases to the cases at bar, Duke asserts that, in the *Duke ESP Case*, there was no issue that was actually passed upon and actually determined on the merits that would collaterally estop Duke from pursuing this application. Duke insists that its wholesale price for capacity as an FRR entity was not part of the *Duke ESP Case*; therefore, its due process would be violated if the Commission finds that the issue was litigated, directly determined, and essential to the judgment in the prior action. (Memo Contra at 11, 13; Duke Br. at 39, 43.)

Duke also asserts that the doctrine of res judicata is not applicable in these proceedings. Under res judicata, a valid, final judgment rendered on the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *See Grava c. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). According to Duke, in assessing the applicability of res judicata, the determining factor is whether the same evidence would sustain both

causes of action. If the causes of action rely on different evidence, res judicata does not bar the second action. *See Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599 (2007). Duke alleges that its costs of providing the wholesale capacity service under a state compensation mechanism, and the recovery of such costs, were not addressed in the ESP Stipulation. Therefore, Duke did not have an opportunity to fully and fairly litigate the claim of just and reasonable compensation for the provision of nonretail services. Moreover, Duke avers the evidence to support its requests and claims in the instant application is not the same as that needed to approve a stipulation of an SSO for CRES. Therefore, res judicata cannot apply. In further support of this contention, Duke notes that R.C. 4928.143(B)(2) is permissive, in that it does not require a utility to include all matters affecting its provision of service in its ESP application or forever lose the right to include such matters in a separate proceeding. Therefore, by using the word "may" in this section of the code, Duke asserts the General Assembly afforded the Commission broad discretion in exercising its regulatory authority. Moreover, Duke offers that the Supreme Court has instructed that res judicata should not be applied so rigidly that it defeats the ends of justice. *See Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St. 3d 488, 756 N.E.2d 657 (2001). (Memo Contra at 14-16; Duke Br. at 38.)

In response to both the collateral estoppel and the res judicata arguments of Joint Movants, Duke notes that the *Duke ESP Case* was resolved through a stipulation and the Commission utilized the three-prong test to consider whether the ESP Stipulation should be adopted and did not determine the issue of the just and reasonable compensation to which Duke is entitled to under R.C. Chapters 4905 and 4909 for fulfilling its FRR obligations. According to Duke, the ESP Stipulation involved the SSO, pursuant to R.C. 4928.143 and the applicable Ohio Adm.Code provisions, under which Duke would provide CRES. However, Duke filed the instant application under the authority of R.C. Chapters 4905 and 4909. Moreover, Duke contends the provision of capacity under the FRR obligation is not a CRES; rather, as the Commission confirmed in the *AEP Capacity Case*, it is a wholesale service to which the market-based pricing contemplated under R.C. Chapter 4928 is inapplicable. Therefore, the services at issue in these proceedings are not the same as those that were at issue in the *Duke ESP Case*. (Memo Contra at 11-12, 14-15; Duke Br. at 44.)

c. Conclusion on Res Judicata and Collateral Estoppel

At the outset of these proceedings, the Commission determined that, given the proposal set forth in Duke's application, it was appropriate to provide Duke the opportunity to present its arguments, both substantive and legal, prior to determining whether the factual and legal basis for Duke's claims had merit. Accordingly, rather than summarily dismiss these cases, as the Joint Movants requested, we proceeded with the evidentiary process to ensure that we fully considered the issues presented by Duke and the opposing parties prior to issuing our decision. After consideration of the

evidence presented during the 11 days of hearing, including almost 3,000 pages of transcript, and almost 200 exhibits, not to mention the extensive briefs, the Commission finds that Duke has raised nothing new that had not already been considered, addressed, and open for litigation through our review and consideration of the application and the ESP stipulation in the *Duke ESP Case*. Therefore, the Commission finds that, even if Duke were to sustain its burden of proof in these proceedings, the doctrine of res judicata and collateral estoppel would preclude us from approving Duke's application.

There is no dispute that the doctrine of res judicata, through the form of collateral estoppel, precludes the relitigation in a second action of an issue that has been actually and necessarily determined in a prior action. In addition, it is undisputed that collateral estoppel applies to administrative proceedings before the Commission. While Duke argues that collateral estoppel is not applicable to these cases, because the *Duke ESP Case* was a legislative, rather than a judicial proceeding, and it resulted in a stipulated agreement between the parties in the case and was not fully litigated, these arguments are without merit. The record in the *Duke ESP Case* reflects that, in Duke's original application, Duke requested authority to collect its embedded costs of providing capacity, plus a reasonable rate of return, with the cost of capacity being based on Duke's election to provide capacity in PJM as an FRR entity that self-supplies all of the capacity in its footprint (Kroger Ex. 5). However, after negotiations, the signatory parties proposed, and the Commission approved, a wholesale capacity charge for CRES providers that would be priced at the RPM prices, not Duke's initially-proposed embedded costs. Therefore, while the *Duke ESP Case* was not resolved through a protracted litigious process, it is evident from a review of the ESP Stipulation, as compared to Duke's initially-proposed application in that case, that the parties fully negotiated the ultimate outcome. The success of the settlement process in such a contentious proceeding as an ESP proceeding, wherein 35 diverse and knowledgeable parties came together and resolved the issues, cannot be discounted by the mere fact that a prolonged evidentiary hearing was not conducted. Based on the results found in the ESP Stipulation compared to Duke's original proposal, the Commission has no doubt that the issues of capacity pricing and compensation were disputed and copiously debated by the parties during the negotiations preceding the filing of the stipulation in the *Duke ESP Case*.

The Commission further disagrees with Duke's attempt to limit the application of the doctrine of res judicata in Commission cases to ratemaking proceedings. Branding the *Duke ESP Case* as purely a ratemaking or legislative proceeding, rather than a judicial proceeding, Duke advocates that the doctrine of res judicata does not apply. As Duke correctly points out, it is the Commission's statutory responsibility to review and consider stipulations in cases such as the *Duke ESP Case* to ascertain whether the settlement was the product of serious bargaining among knowledgeable

parties, whether, as a package, the settlement benefits ratepayers and the public interest, and to ensure that the settlement does not violate any regulatory principle or practice. In arriving at our decision in the *Duke ESP Case*, the Commission convened a hearing for the purpose of reviewing the proposed ESP Stipulation, providing the signatory parties the opportunity to present the stipulation, and providing any party wishing to litigate any issues in the stipulation the opportunity to do so. Contrary to Duke's efforts to discount the Commission's evidentiary process in the *Duke ESP Case*, the Commission did not merely sign off on the signatory parties' proposed stipulation, we provided the opportunity for all parties to litigate the issues resolved in the stipulation. After considering the entire record, including the local public hearings, the ESP Stipulation, and the evidence presented at the evidentiary hearing, the Commission issued its 52-page Order thoroughly considering all of the evidence of record and, ultimately, approving the ESP Stipulation. Therefore, we find that, upon review of the evidence presented in the instant cases, Duke has presented no evidence or argument to support its claim that the issues raised herein were not fully considered and resolved in the *Duke ESP Case*.

4. Argument 4: Commission's Authority, S.B. 221, and FERC

a. Opposing Parties' Arguments on the Commission's Authority

IEU states that the Commission does not have authority under its general supervisory jurisdiction, its traditional ratemaking authority, or the RAA to approve the additional compensation for wholesale capacity service that Duke seeks (IEU Br. at 25). FES agrees that nothing in R.C. Chapters 4905 or 4909 provide the Commission with authority to regulate wholesale transactions. Since the wholesale transfer of capacity is beyond the Commission's authority, Duke cannot seek the approval of the state compensation mechanism. FES argues Duke has already stipulated to the price to be charged to all relevant parties for capacity, the Commission does not have jurisdiction to set Duke's proposed cost-based rate. (FES Br. at 23.)

OCC notes that both R.C. 4905.13 and 4909.18 require the same standard of review, *i.e.*, under R.C. 4905.22, all charges for any service rendered, or to be rendered, shall be just and reasonable. The Commission must apply this standard in its review of these cases. Moreover, OCC posits that the burden of proof lies with Duke, noting that, when a utility files an application for a rate increase, it must prove its current rates are unreasonable because those rates fail to provide sufficient compensation for the services it renders. OCC points out that Duke filed its application under R.C. 4905.04, 4905.05, 4905.06, and 4909.18. According to OCC, outside of an ESP proceeding under R.C. Chapter 4928, there are only two types of proceedings where rates can be changed: a rate case under R.C. 4909.18, if the applicant proves the proposals are just and reasonable; or a complaint proceeding, under R.C. 4905.26, if reasonable grounds for

complaint are found and the complainant proves that the existing rate complained of is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. (OCC Br. at 5-7, 21-22, 46-48.) OCC and RESA/IGS assert that Duke failed to meet its burden of proof under these statutes (OCC Br. at 6; RESA/IGS Br. at 16). OCC submits that Duke did not prove that it is just and reasonable to collect $729 million, plus carrying charges, of wholesale capacity charges from its retail end-use customers. In addition, Duke did not state reasonable grounds for complaint under R.C. 4905.26, and sustain its burden to prove that the existing capacity revenues it collects from CRES providers are unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. (OCC Br. at 6-7, 47-48.) In addition, FES states that reliance on R.C. 4905.26 is misplaced, as nothing in this section authorizes the Commission to establish a cost-based rate not in compliance with R.C. Chapters 4905 and 4909. R.C. 4905.26 authorizes the Commission to investigate and set a hearing to review a potentially unjust or unreasonable rate; however, it is silent as to any authority to set a rate as a result of a hearing. Rather, R.C. Chapter 4909 sets the parameters and procedures for ratemaking in any case, including cases under R.C. 4905.26. (FES Br. at 25-26.)

Furthermore, OCC notes that neither R.C. Chapter 4905 nor 4909 applies to generation service provided by an electric distribution utility (EDU) under R.C. 4928.05. Therefore, Duke has chosen the wrong statute to pursue a rate increase. (OCC Br. at 44.) Duke did not comply with the rate change statutes, R.C. 4905.26 and 4909.18; therefore, according to OCC, the Commission is without jurisdiction to change the wholesale capacity rate. In addition, nothing in Ohio law allows the Commission to change the wholesale capacity rate under R.C. Chapter 4905 or 4909. (OCC Br at 48-49.) Moreover, under R.C. 4909.15, a utility must be rendering a public utility service for the Commission to consider the fixation of reasonable rates. However, in these cases, Duke is not rendering a public utility service to retail customers for the charge it seeks; rather, the shopping customers are one step removed from the transaction, as Duke sells capacity to CRES providers who, in turn, sell to shopping customers. (OCC Br. at 24.)

Likewise, noting that the only statutory authority the Commission has to establish a cost-based rate is R.C. Chapter 4909, FES and IEU assert that Duke has not complied with this chapter to establish its proposed cost-based rate, because Duke has not provided record evidence to establish the value of Duke's property as of a date certain, a reasonable rate of return, or a cost of service analysis for a test period. Moreover, FES, IEU, and GCHC/CBI point out that, contrary to Duke's assertion, this is not a new rate for a new service, stating that Duke already has a Commission-approved state compensation rate; thus, Duke is requesting an increase in rates. Therefore, FES argues the expedited process under R.C. 4909.18 does not apply. (FES Br. at 24-25; IEU Br. at 32-37; GCHC/CBI Br. at 14-15.)

In addition, IEU and Kroger assert that the application is unlawful and unreasonable because Duke seeks an increase in SSO compensation for a competitive service that is being provided under an ESP. However, they note that Duke has not: established that the charge may be lawfully included in a provision of an ESP; demonstrated that the resulting ESP is more favorable in the aggregate than a market rate offer (MRO); or demonstrated that the delayed collection of the increase is lawful, in accordance with R.C. 4928.141 to 4928.143. (IEU Br. at 37-38; Kroger Br. at 21-22.)

Kroger argues that Duke's request to create a regulatory asset amounts to a request for impermissible retroactive ratemaking, and Duke has failed to establish undue harm under R.C. 4909.16. *See Columbus S. Power Co.* While Duke's requested increase in compensation may be based in theory on its embedded costs, Kroger opines that Duke is really asking to defer the additional revenue that Duke could receive under a cost-based compensation mechanism. (Kroger Br. at 26-28.)

IEU states that, as the service for which Duke is seeking increased compensation is a wholesale service, the Commission does not have the power to authorize the proposed higher charge under R.C. 4905.04, 4905.05, 4905.06, 4905.13, 4905.22, and 4909.18. These sections apply to a public utility engaged in the business of supplying electricity to consumers, *i.e.*, retail service. (IEU Br. at 26-27.)

Furthermore, GCHC/CBI argue R.C. 4905.33, 4905.35, and 4928.02(A) prohibit rate discrimination and preclude Duke from imposing additional capacity charges on shopping customers. They submit it would be patently discriminatory to require CRES customers, who have absolutely no generation connection to Duke, to pay extra for capacity under the guise of a belatedly constructed state compensation mechanism when SSO customers cannot be subjected to anything other than the PJM FZCP rates as converted into Rider RC in Duke's retail SSO tariffs. (GCHC/CBI Br. at 18.)

Joint Movants state that, in this application, Duke is attempting to mimic the phase-in structure the Commission approved in the *AEP Capacity Case* and in *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Aug. 8, 2012) (*AEP ESP Case*). The Commission's ability to phase-in capacity charges emanates from its explicit authority under R.C. 4928.144, which allows a just and reasonable phase-in of any EDU's rate or price established under R.C. 4928.141 to 4928.143. However, Joint Movants note that the state compensation mechanism requested by Duke in these proceedings has not been established under the Commission's authority pertaining to Duke's ESP and the nonbypassable charge being requested has not been established under the Commission's authority to approve an ESP. Therefore, they assert the Commission has no authority to grant this application. (Jt. Mot. at 24; OCC Br. at 22-23, 33; IEU Br. at 39.)

OCC asserts, and OEG agrees, that Duke's application seeks to reregulate generation service, which was deregulated by the General Assembly under Senate Bill (S.B.) 221, stating that it is contrary to the General Assembly's directive that Duke be fully on its own in the competitive market after its market development period in 2005. *See Cincinnati Gas & Electric Co.*, Case No. 99-1658-EL-ETP, et al., Opinion and Order (Aug. 31, 2000) at 55 (*CG&E ETP Case*) (OCC Br. at 2, 49; OEG Br. at 13). RESA/IGS agree that this application is contrary to the statutory framework established in R.C. Chapter 4928, when generation assets were deregulated (RESA/IGS Br. at 24-25). Thus, the supply and pricing of generation service must be established under an ESP or MRO under R.C. 4928.141 to 4928.144. Duke's application was not made as part of and ESP or MRO. Rather, Duke speculates the Commission can regulate the wholesale component of its competitive retail generation rate by other means, the provision of R.C. Chapters 4905 or 4909. OCC avers Duke's theory is unfounded and contrary to law. (OCC Br. at 45, 49.)

In addition, OCC asserts that, in contravention of R.C. 4928.39, approval of this application would allow Duke to recover above-market costs associated with generation assets, in exchange for the value it received from customers. According to OCC, Duke cannot collect transition charges in perpetuity. OCC notes that, pursuant to R.C. 4928.03, Duke's generation is a competitive electric service that is subject to the forces of competition. Therefore, as noted by OCC and IEU, in accordance with R.C. 4928.17, Duke has been required, since 1999, to separate its business enterprises. However, Duke did not do so, and now, 14 years later, Duke's generation business is the source of its financial woes. Therefore, OCC contends that, under the law, Duke is wholly responsible for the success of its competitive generation operations and the Commission should protect customers from paying for Duke's loss in the marketplace. Under R.C. Chapter 4928, once the market development period is concluded, the Commission shall not authorize the receipt of transition revenues or any equivalent revenues. (OCC Br. at 2, 4, 49; OCC Ex. 23 at 15; IEU Br. at 50, 55-56.)

OCC also states that Duke's application is, in effect, a request to recover stranded costs. When the embedded cost for generation capacity exceeds the market price, which Duke asserts in this case, that is essentially the definition of stranded costs. (OCC Br. at 16, 52: OCC Ex. 23 at 15; FES Br. at 21; FES Ex. 1 at 35; IEU Br. at 52). Thus, according to OCC and FES, this application is inconsistent with the stipulation in the *CG&E ETP Case,* wherein Duke agreed to forego recovery of its generation-related stranded costs in return for authority to recover regulatory assets, the approval of additional regulatory assets, and certain deferrals (OCC Br. at 16; IEU Ex. 13; FES Br. at 21; IEU Br. at 53). In addition, R.C. 4928.38 requires that, once a utility's market development period is over, which for Duke was December 2005 for residential customers, the utility must be fully on its own in the competitive market (OCC Br. at 51; FES Br. 4; IEU Br. at 52). FES states that, because Duke is prohibited by R.C. 4928.38 from recovering any post-2000 costs

and is barred from recovering for any pre-2001 costs by the stipulation in the *CG&E ETP Case,* Duke is not entitled to cost-based recovery for its legacy generating units (FES. Br. at 22; FES Ex. 1 at 36-38).

FES explains that, if the market value of an asset is greater than its net generating plant in service, there are no stranded costs associated with that assert. According to Duke's witness, Duke has already recovered its stranded costs. Therefore, even if Duke was entitled to recover its costs, Duke's stranded costs from its legacy generating units have been fully recovered and any remaining costs of these units must be recovered through market prices. (FES Br. at 22; FES Ex. 1 at 35, 37-45.)

In addition, OCC states that permitting Duke to collect its embedded cost of capacity would violate several state policies in R.C. 4928.02, as amplified by R.C. 4928.06(A), including the prohibition against anticompetitive subsidies and the assurance of reasonably priced retail electric service. OCC explains that, to allow Duke to collect embedded capacity costs from customers would give Duke an unfair advantage, because it would provide Duke a subsidy of its generation service from its distribution customers. Moreover, OCC and FES note that R.C. 4928.02(H) prohibits the recovery of generation-related costs through distribution rates. (OCC Br. at 54-55; FES Br. at 19.) In addition, OCC maintains Duke's proposal would be inconsistent with the regulatory principle of not insulating a regulated utility from incurring losses due to normal business operations. *See Fed. Power Comm. v. Natural Gas Pipeline Co.*, 315 U.S. 575; 62 S.Ct. 736; 86 L.Ed. 1037 (1942). Duke cannot collect fully-embedded costs of capacity to compensate it for its lost opportunity to earn a return on SSO service offerings; loss that is from the fact that Duke bids out 100 percent of its SSO load is not a loss that is compensable. The risk of losing revenues from customers exercising their right to switch and obtain generation service from an alternate supplier is not a risk for which an EDU can be compensated. *See In re Columbus S. Power Co.*, Case No. 08-917-EL-SSO, et al., Order on Remand (Oct. 2, 2011) at 31. (OCC Br. at 57.) Moreover, FES points out that, in accordance with R.C. 4928.02(H), the Commission is to encourage competition and the Commission has no authority to authorize a cost-based rate of return for a competitive service like generation capacity (FES Br. at 19). Moreover, OCC avers that Duke's comments suggest generation energy and capacity can be separated and sold in separate markets; they are not. Both energy and capacity, as well as ancillary services, are generation services. (OCC Br. at 53.)

b. Duke's Arguments on the Commission's Authority

Duke states that R.C. 4905.04, 4905.05, 4905.06, and 4905.26 provide that the Commission has an obligation to ensure that jurisdictional entities receive just and reasonable compensation for services they render. To carry out this obligation, Duke argues the Commission has the authority to establish a cost-based state compensation mechanism for the FRR capacity service that Duke must provide. Duke explains that

these proceedings do not implicate the Commission's jurisdiction over retail electric services. Rather, capacity service pursuant to an FRR obligation is a wholesale matter. Duke believes the traditional ratemaking standards are applicable to the Commission's obligation of ensuring appropriate compensation for these services. Thus, the capacity service provided by an FRR entity, pursuant to its obligation under the RAA, are wholesale services and are, therefore, subject to traditional regulatory standards. Therefore, the provisions of R.C. Chapter 4928 pertaining to retail electric service, whether competitive or noncompetitive, are irrelevant. (Duke Br. at 3-5; OCC Ex. 1 at 12-13; OCC Ex. 2 at 28.)

Duke responds that, while it does not dispute that R.C. 4928.144 addresses the ability of the Commission to authorize the phase-in of a utility's SSO rate, the instant application does not seek a phase-in of rates previously approved under an SSO. Rather, it seeks the establishment of a charge, in accordance with R.C. Chapters 4905 and 4909, and consistent with the state compensation mechanism, for its costs in supplying capacity pursuant to Duke's FRR obligations. Referring to the *AEP Capacity Case*, Duke states the Commission has found that its authority to establish a cost-based compensation mechanism for FRR entities arises under traditional ratemaking principles, under R.C. Chapters 4905 and 4909. In addition, Duke contests Joint Movants' refusal to acknowledge the Commission's established precedent of approving deferrals and riders for subsequent recovery (Memo Contra at 16-17).

Duke notes that, in the *AEP Capacity Case*, the Commission found that a two-part compensation structure was allowed under the authority granted by R.C. 4905.13. Thus, a state compensation mechanism with two sources of compensation is also appropriate for Duke. A structure comprised of market-based prices and a deferral applicable to all retail customers who indirectly benefit from the service, ensures consistent treatment of FRR entities, as well as suppliers and retail customers. (Duke Br. at 45.)

With regard to its request for deferral authority, Duke maintains that such authority would not constitute impermissible retroactive ratemaking. Where the Commission has not exercised its ratemaking authority there cannot be, as a matter of law, retroactive rates. These proceedings do not include a request to set retail rates, according to Duke. Duke also notes the Commission has rejected the notion that it engages in impermissible retroactive ratemaking when approving a deferral request, and the Supreme Court has agreed. *See In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 07-294-GA-AAM, Finding and Order (Dec. 19, 2007); *River Gas Co. v. Pub. Util. Comm. of Ohio*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982). In addition, Duke points to numerous cases where the Commission has authorized the deferral of expenses for a period of time that commences prior to both the filing of an application for deferral authority and a Commission order establishing deferral authority. *See, e.g., In re Dayton*

Power & Light Co., Case No. 07-1287-EL-AAM, Finding and Order (Aug. 20, 2008). (Duke Br. at 48-49.)

Concerning the requested start of the deferral authority, Duke argues that, if it is not the first month after similar cost-based recovery was allowed in the *AEP Capacity Case*, Duke would be denied the equal protection of the laws. With regard to the end date of the requested authority, May 2015, which intervenors note includes a period after Duke has transferred its legacy generating assets, Duke states that its entitlement to a cost-based charge does not depend on legal ownership of the generating assets included in Duke's FRR plan. Consistent with its obligation to function as an FRR entity through May 2015, Duke has dedicated capacity from its legacy generating assets to its Ohio load zone. Therefore, even after the transfer, Duke will rely on the capacity from those assets to meet its obligations. In addition, without the certainty of this revenue, there is no assurance the transferee will have the financial support necessary to enable the provision of capacity service to meet Duke's obligations. (Duke Br. at 49-50.)

c. Conclusion on the Commission's Authority

In that we have determined that the ESP Stipulation addressed the price to be charged to all relevant parties for capacity, as well as the compensation for capacity, the Commission finds that it is unnecessary for us to deliberate and make a determination as to whether the Commission does or does not have the authority pursuant to R.C. Chapters 4905, 4909, or 4928 to consider Duke's application. However, we note that many of the arguments raised by the opposing parties were fully considered and addressed by the Commission in the *AEP Capacity Case*.

5. Argument 5: *AEP Capacity Case* and FERC

a. Duke's Arguments Regarding *AEP Capacity Case* and FERC

Duke explains that, under the PJM tariffs, the FRR entity is responsible for satisfying its FRR obligation. To do so, the FRR entity may use designated resources from its own fleet, bilateral contracts, or a combination thereof. (Duke Br. at 7-8; Duke Ex. 3 at 10.) According to Duke's witness, FRR entities face substantially different and more significant risks from those faced by entities that participate in the BRAs (Duke Br. at 8; Duke Ex. 3 at 4-5, 12; Duke Ex. 35 at 5). Duke argues the FRR obligation is a regulatory service obligation, not unlike the historic service obligation of Ohio utilities prior to restructuring; these utilities are entitled to recover their embedded cost of service, as full recovery is thought necessary to avoid a confiscatory rate (Duke Br. at 8; Duke Ex. 3 at 5, 12-13). Duke states that, while PJM's RAA makes the RPM auction price the default rate for compensation for FRR capacity service, the RAA provides two forms of compensation, a state-compensation mechanism, and a rate through the

Federal Power Act that may be based on the FRR entity's cost or some other just and reasonable method. (Duke Br. at 8-9.)

Duke states that, in the *AEP Capacity Case*, the Commission confirmed that FRR capacity services are not CRES; therefore, they are not subject to regulation under R.C. Chapter 4928. Rather, FRR capacity services remain subject to traditional regulation under R.C. Chapters 4901 through 4909, which reflect an obligation on the part of the Commission to ensure that jurisdictional utilities are fairly and reasonably compensated for the regulated services they provide. In the *AEP Capacity Case*, the Commission found that PJM's auction-based rates for capacity resources through the 2014/2015 delivery year did not provide just and reasonable compensation to AEP-Ohio for its capacity service, because PJM auction-based rates are projected to yield positive ROEs for AEP-Ohio of only 7.6 percent and 2.4 percent, respectively. Therefore, the Commission established a cost-based compensation mechanism for AEP-Ohio. (Duke Br. at 10; OCC Ex. 1 at 12-13, 36, 23; OCC Ex. 3 at 28-29.)

Duke asserts that it should be compensated for its obligation to ensure availability of adequate capacity resources in its footprint analogous to the compensation authorized for AEP-Ohio in the *AEP Capacity Case*. According to Duke, the legal and factual similarities between the circumstances of Duke and AEP-Ohio are remarkable, noting that both: have binding self-supply obligations; are the only entity in their footprint providing capacity resources for all LSEs; have FRR obligations that terminate May 31, 2015; have insufficient returns under the PJM auction-based pricing; have generating assets that have previously been included in rate base; have committed many of the same jointly-owned generating assets to meet their FRR reliability requirements; and will transfer their generating assets, which are committed to their FRR plan, to an affiliate prior to the expiration of their FRR service obligations. However, Duke contends there is one compelling difference, AEP-Ohio is recovering its embedded costs of providing FRR capacity service, including an ROE of 11.15 percent, Duke is not. (Duke Br. at 15-16; Duke Ex. 3 at 5, 11-13; Duke Ex. 2 at Duke Ex. 36 at 5-6, 12-13; Tr. VII at 1632, 1798-1799.)

Duke acknowledges that the specific dollar amount of the resultant charge determined in the *AEP Capacity Case* is appropriately limited to AEP-Ohio, given that the Commission was reviewing AEP-Ohio's costs. However, Duke argues that the rationale underlying the decision cannot be limited to that specific entity. It would be improper to conclude that only one FRR entity is entitled to just and reasonable compensation for the wholesale service it is providing, to the exclusion of another FRR entity providing the same obligatory jurisdictional service. (Duke Br. at 36.)

b. Opposing Parties' Arguments Regarding *AEP Capacity Case* and FERC

Joint Movants explain that, in the July 2, 2012 Order in the *AEP Capacity Case*, the Commission determined that AEP-Ohio should be compensated for its FRR obligation to supply capacity to CRES providers based on its determination of AEP-Ohio's embedded cost of capacity, rather than RPM-based pricing. It was determined that AEP-Ohio's embedded cost of capacity is $188.88/MW-day. However, the Commission concluded that, in order to stimulate competition among competitive suppliers, AEP-Ohio would provide capacity to CRES providers at RPM. Therefore, AEP-Ohio was authorized by the Commission to defer the difference between $188.88/MW-day and the RPM-based cost of capacity for subsequent collection through a rider. (Jt. Mot. at 11.)

Joint Movants, the Universities, OCC, and RESA/IGS assert that, contrary to Duke's belief, the *AEP Capacity Case* decision was not a generic decision that would apply to all EDUs. The Commission explicitly limited its review and its holding on a state compensation mechanism in that case to AEP Ohio, as evidenced in the December 8, 2010 Entry initiating the case, as well as in the Order and October 17, 2012 Entry on Rehearing. Joint movants argue Duke settled the matters it now seeks to address in these proceedings; however, the *AEP Capacity Case* does not serve as a basis to permit Duke to reopen these matters. (Reply Memo Contra at 14-15; Universities Br. at 9; RESA/IGS Br. at 15-16; OCC Ex. 3 at 32; Duke Ex. 13 at 2; OCC Ex. 1 at 38; OCC Br. at 7, 10-12; OEG Br. at 16; IEU Br. at 47).

OCC notes that the *AEP Capacity Case* was initiated by the Commission in response to the filing of the *AEPSC Application Case* with FERC, which requested changes to AEP-Ohio's capacity charges. OCC further explains that the RAA specifies the mechanism through which an entity, such as Duke, can recover the costs associated with its FRR obligation from its wholesale customers or LSEs. The RAA does not address the mechanisms through which the FRR entity or the LSEs ultimately recover those FRR obligation costs from retail customers, because the rates of retail customers are not within FERC's jurisdiction. The RAA states that, where there is a state compensation mechanism in place that method prevails. Otherwise, an FRR entity is compensated in accordance with the PJM tariff, which specifies market-based capacity prices set in the PJM-administered forward auction process. Under the RAA, the FRR entity may file with FERC proposing to change the basis for compensation to a method based on its embedded costs. OCC points out that AEPSC sought a cost-based capacity charge with FERC in its *AEPSC Application Case*; Duke did not. (OCC Br. at 7-9, 27, 109; OCC Ex. 22 at 24.)

Moreover, OCC emphasizes that Duke initiated its move to PJM as an FRR in June 2010; however, unlike AEPSC, at no point between that time and shortly after the Commission's decision in the *AEP Capacity Case* in July 2012, did Duke attempt to exercise its right under the RAA to pursue a capacity charge to collect its fully-embedded costs. In fact, during that time period, Duke entered into both the ESP Stipulation and the BTR/RTO Stipulation. OCC submits that Duke made this decision even though it knew, or should have known, that its embedded costs of capacity would exceed the revenues it would receive for that capacity at market-based rates. According to OCC, it was not until Duke saw the outcome of the *AEP Capacity Case* that it decided to fight for a cost-based capacity charge. (OCC Br. at 35-37, 108-109; OCC Ex. 22 at 20). Staff agrees, noting that the ESP Stipulation and the BTR/RTO Stipulation were reached well after AEP-Ohio and AEPSC filed at the state and federal levels regarding the exact same issue. Through those stipulations, Duke chose regulatory certainty and resolved the wholesale capacity pricing issue by accepting RPM priced capacity, plus the $330 million ESSC, forgoing any challenges to the wholesale capacity pricing at the state and federal levels. (Staff Br. at 11.)

Moreover, OCC submits that the RAA does not limit a state to having just a single state compensation mechanism and it does not say that an FRR entity is entitled to recover its costs. According to OCC, as a result of the ESP Stipulation, there is already a state compensation mechanism in place for Duke, which calls for Duke collecting the market price. (OCC Br. at 18- 19; Tr. VIII at 1954; OCC Ex. 22 at 17.)

OCC asserts that Duke's contention in these cases that the Commission, in the *AEP Capacity Case*, found that capacity service is noncompetitive is erroneous. Rather, in that case, the Commission held that capacity service is a wholesale service and that the Commission has jurisdiction to establish wholesale rates pursuant to the RAA. The Commission, in the *AEP Capacity Case* Order found that it was unnecessary to determine whether capacity service is considered competitive or noncompetitive under R.C. Chapter 4928. OCC notes that the reason Duke wants capacity service to be noncompetitive is because the instant application was filed under R.C. Chapter 4909, which regulates noncompetitive service, not R.C. Chapter 4928, which has limited regulation over competitive service, including the Commission's general supervisory powers under R.C. 4905.04 through 4905.06. (OCC Br. at 15 17, 53; IEU Br. at 30.)

OEG, IEU, and RESA/IGS offer that there are distinguishing factors between the *AEP Capacity Case* and the state compensation mechanism approved in that case, and what Duke is proposing in these cases. These differences include: AEP-Ohio's was adopted as a result of litigation, Duke's from a stipulation; AEP-Ohio's generating assets are still regulated and committed to provide capacity to serve SSO customers until June 1, 2015, Duke's generating assets are effectively unregulated and are no longer committed to provide capacity to serve SSO customers; AEP-Ohio cannot divest

its generating assets immediately, Duke has approval from the Commission and FERC to divest; AEP-Ohio's mechanism is calculated based on all generating assets owned by it and all revenues from those assets, Duke's proposed mechanism is calculated based on a subset of the generating assets and excludes revenues from gas generating assets; AEP-Ohio's does not include costs of bilateral contracts for a portion of its FRR capacity, Duke's does; AEP-Ohio's applies prospectively after the date of the *AEP Capacity Case* Order, Duke's proposes retroactive approval back to August 1, 2013. (OEG Br. at 17; IEU Br. at 48-49; RESA/IGS Br. at 23-24.)

Another distinguishing factor between these cases and the AEP-Ohio case, according to OCC, is that, while the Commission approved the accounting for the capacity deferrals in the *AEP Capacity Case*, the mechanism to collect the deferrals from customers was approved in the *AEP ESP Case*, in accordance with R.C. Chapter 4928. In contrast, the *Duke ESP Case* has been settled, and now Duke is asking to establish a new rate for its capacity services under traditional ratemaking statutes, R.C. Chapters 4905 and 4909. Thus, even if the Commission approves the instant application, it does not have the authority under R.C. Chapters 4905 and 4909 to approve a collection mechanism to charge retail customers wholesale rates, because, under those chapters, the Commission is barred from using its supervisory powers or regulatory authority to address pricing for any generation service from the point of generation to the point of consumption. R.C. 4928.141 to 4928.144 set forth the means by which the Commission may regulate and establish rates for CRES; the Commission can not bypass those requirements by relying on its general supervisory powers. IEU points out that, while Duke did not invoke the Commission's authority under R.C. 4928.141 to 4928.144, even if it had, those sections do not authorize the Commission to apply a cost-based ratemaking methodology to increase Duke's compensation for capacity service declared competitive by R.C. 4928.03. (OCC Br. at 21, 23-24; IEU Br. at 28-30.)

FES agrees that these cases do not have the same legal underpinnings as the AEP-Ohio case because: AEP-Ohio had the right to file a complaint with FERC, Duke waived that right in the BTR/RTO Stipulation; AEP-Ohio never expressly agreed to charge only market rates, Duke did in the ESP Stipulation; AEP-Ohio sought the establishment of a state compensation mechanism under the RAA for a service specifically contemplated for such compensation, *i.e.*, capacity provided by an FRR entity to a CRES provider, Duke does not. Rather, Duke seeks costs and compensation for all capacity provided in Duke's territory (FES Br. at 15; IEU 6 at 4-5).

FES argues that the Commission does not have the authority to regulate competitive generation service or wholesale transactions. Thus, contrary to the Commission's finding in the *AEP Capacity Case*, the Commission does not have the authority to regulate competitive wholesale service based on the terms of the RAA. (FES Br. at 21.) FES notes that, in the *AEP Capacity Case*, the Commission relied on the

terms of the RAA to hold that it had authority to regulate wholesale capacity pricing. Thus, because Duke does not rely on the RAA in these proceedings, this authority is not available to the Commission. (FES Br. at 23.)

OMA argues that Duke's application is distinguishable from the *AEP Capacity Case*, noting that, in the *AEP Capacity Case*, the Commission determined that RPM-based pricing would prove insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations. In the *AEP Capacity Case*, AEP-Ohio specifically stated it would suffer financial harm if required to provide capacity at PJM's RPM-based pricing. Conversely, Duke supported the compensation mechanism included in its ESP Stipulation on the basis that Duke would receive just and reasonable compensation through an RPM-based capacity pricing mechanism. (OMA Br. at 7.)

FES points out Duke admits that capacity is a noncompetitive wholesale service and that Duke's wholesale customer is PJM, not CRES providers or wholesale suppliers. As Duke claims that capacity is a noncompetitive wholesale service it is providing to PJM, the Commission has no authority to review or grant Duke's application, because the noncompetitive wholesale transaction between Duke and PJM is subject to FERC's exclusive jurisdiction, in accordance with the Federal Power Act, 16 U.S.C. 824(b)(1). FERC has not delegated its authority in the case of this transaction. No Ohio statute gives the Commission authority to regulate an interstate wholesale transaction between Duke and PJM. (FES Br. at 5-6; Duke Ex. 2 at 5; Tr. II at 351.) In the *AEP Capacity Case*, FES notes that the Commission exercised its jurisdiction for the sole purpose of establishing an appropriate state compensation mechanism for AEP-Ohio, consistent with the RAA that was approved by FERC. However, the RAA does not authorize a state compensation mechanism for capacity sold to PJM. The option of a state compensation mechanism under Schedule 8.1, Section D.8 of the RAA, exists only in a retail choice jurisdiction, only for switched load in that jurisdiction, and only where the state requires switching customers or LSEs, CRES providers, to compensate the FRR entity for its FRR capacity obligations. If there is not a state compensation mechanism, then the default is that CRES providers compensate the LSE at the PJM RTO price. The RAA does not defer to state regulation jurisdiction over capacity pricing for anything other than what shopping customers or CRES providers pay to the LSE and it does not authorize the Commission to fix capacity pricing for a noncompetitive wholesale service provided by Duke to PJM. The only authority given to the Commission relates to the charge to CRES providers for switched load, and the Commission already approved such a charge in the ESP Stipulation. (FES Br. at 6-7.)

FES states that there is no difference between the capacity used to satisfy an FRR election and market capacity bid into the BRA or which can be sold in a bilateral transaction, as evidenced by Duke's capacity purchases to meet its FRR obligation for

each of the three delivery years at issue. FES points out that Duke never explains exactly how the capacity sold to PJM is different from the market capacity that is freely available in PJM and the MISO. (FES Br. at 20-21; FES Exs. 27A, 28A.)

c. Conclusion Regarding *AEP Capacity Case* and FERC

As noted by Duke and the opposing parties, there are both similarities and dissimilarities between Duke's proposal in these cases and the *AEP Capacity Case*. However, the Commission emphasizes that the record in each proceeding stands on its own merits and our determinations within each docket, likewise, rest on the evidence presented therein. Through our determination in the instant cases, we have found that the ESP Stipulation precludes Duke's application in these cases. However, our determination herein should not be interpreted as our agreement with or disagreement with the arguments raised by the parties in the instant cases concerning the applicability of our decision in the *AEP Capacity Case* to the circumstances of Duke or any other EDU. Rather, the Commission finds that, given our previous finding herein in support of the ESP Stipulation, it is unnecessary for the Commission to resolve the contention between the parties' arguments on these issues.

CONCLUSION:

Duke has filed the instant application citing authority under R.C. 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18 and related sections. However, upon review of the evidence of record and the arguments presented by the parties in these cases, the Commission finds that Duke has not sustained its burden of proof. The evidence and arguments presented by the opposing parties far outweigh Duke's assertions to the contrary.

Upon our review of the record in theses cases, as well as the stipulations and our decisions on the *Duke ESP Case* and the *Duke BTR/RTO Case*, the Commission finds that Duke's application contravenes the terms of the stipulations, the testimony and tariffs filed in support of those stipulations, and our understanding and approval of those stipulations. Moreover, contrary to Duke's assertions that the application is for a new service and charge, not for an increase in rates under R.C. 4909.18, the Commission finds that the application constitutes a request for an increase in rates and would require the filing of a request for such under the appropriate statutory mechanism. In addition, we find that Duke's application should be considered a late-filed application for rehearing of our November 22, 2011 Order in the *Duke ESP Case* and should, therefore, be dismissed. Finally, we conclude that, even if this application would have been properly before the Commission and Duke would have sustained its burden of proof, the doctrine of res judicata and collateral estoppel would have precluded us from approving Duke's application.

Accordingly, the Commission concludes that it is unnecessary for us to determine an appropriate revenue requirement, Duke's application should be denied, and these cases should be dismissed and closed of record. Having made this determination based on the evidence of record, the Commission finds that Joint Movants' motion to dismiss is moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) Duke is an electric company, as defined by R.C. 4905.03, and a public utility, as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06.

(2) Duke filed this application pursuant to R.C. 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18 and related sections.

(3) On August 29, 2012, Duke filed this application for authorization to: establish the amount of a cost-based charge for the provision of capacity services at $224.15/MW-day; establish a deferral to account for the difference between the amounts being recovered by Duke for the provision of capacity and Duke's cost of providing capacity, plus carrying costs; and implement Rider DR-CO.

(4) By Entry issued February 13, 2013, IEU, OCC, OEG, OPAE, GCHC, CBI, Kroger, Cincinnati, FES, OMA, AEP Energy, Exelon, AEP-Ohio, IGS, the Universities, RESA, DPLER, DP&L, Walmart, and Dominion Retail were granted intervention in these cases.

(5) A prehearing conference was held on March 7, 2013.

(6) The final procedural schedule was as follows: comments and reply comments were due on January 2, 2013, and February 1, 2013, respectively; Duke's testimony was due by March 1, 2013; intervenor testimony was due by March 26, 2013; Staff testimony was due by April 9, 2013; and the hearing was to commence on April 15, 2013, at the offices of the Commission.

(7) The hearing commenced as rescheduled on April 15, 2013, and direct testimony was concluded on April 25, 2013. Rebuttal testimony was filed on May 13, 2013, and the hearing was reconvened on May 20 and 21, 2013.

(8) Initial and reply briefs were filed on June 28, 2013, and July 30, 2013, respectively.

(9) On May 4, 2012, OCC, OEG, Cincinnati, OPAE, GCHC, OMA, Kroger, IEU, CBI, and Walmart filed a joint motion to dismiss these cases. Duke filed a memorandum contra on October 19, 2012. Joint Movants filed a reply on October 26, 2012.

(10) Based on the evidence of record and the arguments presented by the parties, Duke has not sustained its burden of proof.

(11) Duke's application contravenes the terms of the ESP and BTR/RTO Stipulations, constitutes a late-filed application for rehearing of the Commission's Order in the *Duke ESP Case*, and the Commission is precluded from approving this application under the doctrine of res judicata and collateral estoppel.

ORDER:

It is, therefore,

ORDERED, That the motions for protective orders are granted and the Commission's docketing division maintain, under seal, the documents listed in Attachment A to this Order, which were filed under seal in these dockets on the dates set forth in Attachment A, until February 16, 2016. It is, further,

ORDERED, That Duke's motion to strike IEU's notice of additional authority filed on October 18, 2013, is granted. It is, further,

ORDERED, That Duke's application is denied, and these cases are dismissed and closed of record. It is, further,

ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Opinion and Order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

CMTP/sc

Entered in the Journal
FEB 13 2014

Barcy F. McNeal
Secretary

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 Section 4909.18, Revised Code.	))))	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

CONCURRING OPINION OF COMMISSIONER LYNN SLABY

While I concur with the Opinion and Order adopted today and furthermore concur and agree with the facts, law, and analysis, I respectfully submit this concurring opinion explaining that, as Duke's appearance before the Commission can best be characterized as a request for reconsideration, or rehearing, of the *Duke ESP Case*, these cases should have been summarily dismissed. R.C. 4903.10 mandates that any party "may apply for rehearing in respect to any matters determined in the proceeding" provided the application is "filed within thirty days of the entry." The Order in the *Duke ESP Case* was entered upon the journal of the Commission on November 22, 2011. This being the case, had Duke's August 29, 2012 application been summarily dismissed as an untimely application for rehearing, it would have been unnecessary to consider the other arguments of the parties, as they would have been moot.

Lynn Slaby

Lynn Slaby, Commissioner

LS/sc

Entered in the Journal FEB 13 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary

Attachment A

Confidential Document List

Party/Document	Description	Date Filed or Submitted on the Record
Duke Ex. 1A	Application	August 30, 2012 May 6, 2013
Duke Ex. 7A	Direct Brian D. Savoy	March 1, 2013
Duke Ex. 12A	Direct William Don Wathen	March 1, 2013
Duke Ex. 35A	Rebuttal Scott Niemann	May 13, 2013
Duke Ex. 36A	Rebuttal William Don Wathen	May 13, 2013
Staff Ex. 1A	Direct Ralph L. Luciani	April 9, 2013 May 9, 2013
FES Ex. 1A	Direct Jonathan A. Lesser	March 26, 2013 May 8, 2013
FES Ex. 4A	Discovery Item Case No. 10-2586-EL-SSO Dated November 17, 2010	May 22, 2013
FES Ex. 21A	Discovery Item Dated March 13, 2013	May 2, 2013
FES Ex. 27A	Discovery Item Dated March 8, 2013	May 6, 2013
FES Ex. 28A	Discovery Item	May 6, 2013
OCC Ex. 6A	Discovery Item	May 2, 2013
OCC Ex. 7A	Discovery Item Dated April 1, 2013	May 2, 2013
OCC Ex. 8A	Discovery Item	May 2, 2013
OCC Ex. 9A	Discovery Item Dated March 19, 2013	May 2, 2013
OCC Ex. 11A	Discovery Item	May 2, 2013 May 22, 2013
OCC Ex. 12A	Discovery Item Dated April 8, 2013	May 2, 2013
OCC Ex. 13A	Discovery Item Dated March 18, 2013	May 2, 2013
OCC Ex. 14A	Discovery Item Dated March 26, 2013	May 3, 2013
OCC Ex. 15A	Discovery Item	May 3, 2013
OCC Ex. 22A	Direct J. Richard Hornby	March 26, 2013 May 7, 2013
OCC Ex. 25A	Direct David J. Effron	March 26, 2013
OCC Ex. 25B	David J. Effron Schedules	May 9, 2013
OCC Ex. 25C	David J. Effron Schedules	May 9, 2013
OCC Ex. 26A	Marked not Admitted Supplemental David J. Effron	April 9, 2013
OCC Ex. 27A	Ralph L. Luciana Workpapers	May 9, 2013
IEU Ex. 8	Scott Niemann Workpapers	May 1, 2013
OEG Ex. 1A	Direct Lane Kollen	March 27, 2013 May 7, 2013
OEG Ex. 4A	Discovery Item Dated February 6, 2013	April 30, 2013
OEG Ex. 7A	Exhibit RLL -3	May 1, 2013
OEG Ex. 8A	Discovery Item	May 1, 2013

OEG Ex. 11A	Discovery Item Dated December 21, 2012	May 1, 2013 May 2, 2013
OEG Ex. 15A	Calculation	May 9, 2013
OEG Ex. 16A	Calculation	May 9, 2013
Tr. II		April 30, 2013
Tr. III		May 1, 2013
Tr. IV		May 2, 2013
Tr. V		May 3, 2013
Tr. VI		May 6, 2013
Tr. VII		May 7, 2013
Tr. IX		May 9, 2013
FES	Initial Brief	June 28, 2013
OCC	Initial Brief	June 28, 2013
OEG	Initial Brief	July 1, 2013
Duke	Reply Brief	July 30, 2013
OEG	Reply Brief	July 31, 2013