Before

**The Public Utilities Commission of Ohio**

In the Matter the Application of Duke Energy )

Ohio, Inc., for the Establishment of a Charge ) Case No. 12-2400-EL-UNC

Pursuant to Revised Code Section 4909.18 )

In the Matter of the Application of Duke Energy )

Ohio, Inc., for Approval to Change Accounting ) Case No. 12-2401-EL-AAM

Methods )

In the Matter of the Application of Duke Energy )

Ohio, Inc., for the Approval of a Tariff for a ) Case No. 12-2402-EL-ATA

New Service )

**REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

February 1, 2013 Attorneys for Industrial Energy Users-Ohio

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**REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

# Introduction

On January 2, 2013, Commission Staff (“Staff”) and intervenors filed Initial Comments concerning the Application of Duke Energy Ohio, Inc. (“Duke”) for the Establishment of a Charge Pursuant to Revised Code Section 4909.18 (“Application”). The Initial Comments uniformly urge the Public Utilities Commission of Ohio (“Commission”) to dismiss the Application. The reasons supporting dismissal are clear: the Commission lacks the authority to grant any of the relief Duke seeks in the Application; the Application violates Duke’s Electric Security Plan (“ESP”) Stipulation; Duke currently is charging the lawful and reasonable price for generation-related capacity service and cannot lawfully secure additional compensation for that service through a non-bypassable charge; and any reduction in total company earnings Duke is anticipating is caused by Duke’s decision to retain generation assets when it may divest those assets under existing authorizations from this Commission and the Federal Energy Regulatory Commission (“FERC”). The Initial Comments, thus, demonstrate that the relief Duke seeks is unlawful and unreasonable. As a result, the Commission should dismiss the Application as requested in the Joint Motion to Dismiss[[1]](#footnote-1) filed on October 4, 2012 and as supported by the Initial Comments.

# The Commission Lacks Jurisdiction to Approve an Increase in Duke’s Compensation for the Provision of Generation-Related Capacity Service

In its Application, Duke seeks three forms of relief: authorization to increase its total compensation for providing generation-related capacity service; authorization to modify its accounting practices so as to defer for future collection and financial reporting the increase in compensation; and authorization of a non-bypassable rider to recover the deferred amount with the amount of the rider to be determined in a separate proceeding. Although it claims it is seeking additional compensation for a wholesale service, the provision of generation-related capacity service, it invokes the Commission’s jurisdiction under the general supervisory provisions of Chapter 4905, Revised Code, and the cost-based ratemaking provisions of Chapter 4909, Revised Code, that apply to retail electric services.

As Industrial Energy Users-Ohio (“IEU-Ohio”) demonstrated in its Initial Comments, the Commission lacks the authority to increase Duke’s compensation for generation-related capacity service. If, as Duke asserts, generation-related capacity service is “wholesale,” then the Commission does not have general supervisory jurisdiction over the service and cannot apply its cost-based ratemaking authority to set the price of that service.[[2]](#footnote-2) If Duke’s Application is seeking increased compensation for a competitive retail electric service, the Commission does not have authority to increase Duke’s total compensation under Chapter 4905[[3]](#footnote-3) or Section 4909.18, Revised Code, and Duke’s Application fails to satisfy the statutory procedural and substantive requirements that must be satisfied before the Commission can authorize an electric distribution utility (“EDU”) to collect compensation for competitive retail services.[[4]](#footnote-4) Finally, if generation-related capacity service is a non-competitive retail electric service, Duke has failed to comply with the statutory requirements that apply to an application to increase rates for non-competitive services.[[5]](#footnote-5)

Second, the Commission cannot approve Duke’s request to modify its accounting to defer the difference between what it claims to be the cost-based revenue requirement and the revenue it is currently authorized to recover under Sections 4909.13 or 4928.144, Revised Code. The Commission has no authority to approve accounting changes to defer revenue, to authorize accounting changes for a competitive service except as specifically set out in Section 4928.144, Revised Code, or to authorize accounting changes to permit the deferred recovery of generation-related transition revenue. Additionally, the modifications that Duke is seeking do not comply with generally accepted accounting principles.[[6]](#footnote-6)

Third, the Commission lacks the authority to approve Duke’s Application because it seeks to bill and collect from retail customers additional generation-related transition revenue or its equivalent. Duke’s claim for generation-related transition revenue is barred by statute and its settlement in its Electric Transition Plan (“ETP”) case.[[7]](#footnote-7) Under Ohio law, Duke’s generation-related capacity service is “fully on its own in the competitive market.”[[8]](#footnote-8)

# The Commission Should dismiss the application because it violates the terms of duke’s ESP Settlement

As IEU-Ohio demonstrated in its Initial Comments, the Commission lacks legal authority to approve Duke’s Application. Approval of the Application would also upset the careful balancing of interests contained in Duke’s ESP Stipulation that the Commission approved on November 22, 2011.[[9]](#footnote-9) As part of its ESP Stipulation, Duke agreed to charge Reliability Pricing Model (“RPM”)-Based Prices[[10]](#footnote-10) for generation-related capacity service supplied to CRES providers and winning bidders of its SSO auction. Duke also received authorization to bill and collect $110 million annually under a non-bypassable rider, the Electric Service Stability Charge Rider (“ESSC”). Despite the fact that it resolved its compensation for generation-related capacity pricing in the ESP Stipulation, Duke seeks authorization to increase its compensation for this service by $776 million over the term of its current ESP. As demonstrated in the Joint Motion to Dismiss filed on October 4, 2012, Duke’s Application violates the terms of the ESP Stipulation approved by the Commission.[[11]](#footnote-11)

Staff agrees that “Duke’s new proposal ignores prior settlement agreements, defies state policies supporting settlements, and undermines the finality of the [Commission’s] orders.”[[12]](#footnote-12) Pointing to Duke’s ESP Stipulation (and the stipulation settling Duke’s application to establish a base transmission rider (“BTR”) in which Duke agreed to refrain from seeking approval of a wholesale capacity charge based on its costs as a Fixed Resource Requirements (“FRR”) entity at FERC),[[13]](#footnote-13) the Staff correctly concludes that Duke “chose to resolve the wholesale capacity pricing issue by accepting RPM priced capacity plus the $330 million ESSC, foregoing any challenges to the wholesale capacity pricing at the state and federal level.”[[14]](#footnote-14) As FirstEnergy Solutions Corp. (“FES”) and Kroger Co. (“Kroger”) state, Duke has not offered any legitimate basis for reopening the ESP Stipulation that specifically and comprehensively addressed Duke’s compensation for generation-related capacity service.[[15]](#footnote-15) To prevent Duke from undermining the integrity of the ESP (and BTR) Stipulation, the Commission must dismiss Duke’s Application.[[16]](#footnote-16)

# Duke’s Application Would Unreasonably Increase its Compensation for Generation-related Capacity Service

In addition to violating the terms of its ESP Stipulation, Duke is also seeking an increase in capacity compensation that is unreasonable. As FES points out, FERC has concluded RPM establishes a just and reasonable rate in order to ensure that PJM is able to meet resource requirements.[[17]](#footnote-17) This Commission repeatedly has approved the use of RPM to set the compensation of an EDU for the provision of generation-related capacity service to winning bidders of auctions and CRES providers.[[18]](#footnote-18)

The determination that RPM establishes a just and reasonable rate provides another ground for dismissing the Application. RPM-Based Pricing is based on a FERC-approved contract binding on Duke. Additionally, Duke has entered into an ESP Stipulation that contractually sets Duke’s compensation for generation-related capacity service supplied to CRES providers and winning SSO auction bidders at the RPM-Based Price. Under applicable federal and state law, Duke would be required to demonstrate that its current compensation under these agreements is not in the public interest if it sought to increase its compensation for providing generation-related capacity service under those agreements.[[19]](#footnote-19) Even though Duke is not attempting to directly increase its compensation by altering the RAA or the ESP Stipulation, it is proposing to increase indirectly its compensation for generation-related capacity service through non-bypassable retail charges. Duke should not be permitted to do indirectly what it could not do directly. Thus, Duke should be held to the standard of demonstrating that its compensation based on RPM-Based Prices is not in the public interest before it may proceed on its Application to increase its total compensation for generation-related capacity service.

Duke’s Application, however, does not demonstrate that RPM-Based Prices are not in the public interest. Instead, Duke’s Application states that Duke is entitled to a “cost-based charge”[[20]](#footnote-20) and that it will be operating at a loss unless the Commission approves an increase in compensation.[[21]](#footnote-21) These allegations fall short of the demonstration that RPM-Based Prices adversely affect the public interest that Duke must make to increase its compensation for the provision of generation-related capacity service that is governed by the RAA and its ESP Stipulation.[[22]](#footnote-22)

Duke’s demand for additional generation-related compensation also is undermined by the fact that the reduced return on investment it alleges it will incur is temporary[[23]](#footnote-23) and the result of its own failure to use existing authority to improve the EDU’s financial condition. As the Ohio Consumers’ Counsel (“OCC”) and the Ohio Energy Group (“OEG”) correctly explain, “any temporary reduction in generation earnings as a result of it retaining its legacy generation assets is self-inflicted since the regulated utility’s earnings problem can be cured by simply transferring the assets to its unregulated affiliate.”[[24]](#footnote-24) Duke already possesses the necessary authority to transfer the generation assets.[[25]](#footnote-25) Because Duke has not taken available steps that would reduce its alleged financial concerns, Duke’s self-inflicted injury to earnings cannot be the basis for a finding that the increase in compensation it is seeking is in the public interest.[[26]](#footnote-26)

# Conclusion

Duke’s Application does not demonstrate a lawful basis on which the Commission can grant the relief that Duke is requesting. Furthermore, the Commission should not permit Duke to violate its ETP, ESP and BTR Stipulations. Finally, increasing Duke’s compensation from retail customers is not a reasonable solution for Duke’s self-inflicted financial problem (if it exists). Because Duke cannot demonstrate any lawful basis for approving the relief it seeks, the Commission should summarily dismiss Duke’s Application.

Respectfully submitted,

/s/ Frank P. Darr

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

**Certificate Of Service**

I hereby certify that a copy of the foregoing *Reply* *Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 1st day of February 2013, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

/s/ Frank P. Darr

Frank P. Darr

Amy B. Spiller

Rocco D’Ascenzo

Jeanne Kingery

Elizabeth Watts

Duke Energy Business Services LLC

139 East Fourth Street

1303 Main

Cincinnati, Ohio 45202

amy.spiller@duke-energy.com

rocco.dascenzo@duke-energy.com

jeanne.kingery@duke-energy.com

elizabeth.watts@duke-energy.com

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

Bruce J. Weston

Consumers’ Counsel

Maureen R. Grady (Counsel of Record)

Kyle L. Kern

Office of the Ohio Consumers’ Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215

grady@occ.state.oh.us

kern@occ.state.oh.us

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

David F. Boehm

Michael L. Kurtz

Jody M. Kyler

Boehm, Kurtz & Lowry

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

dboehm@bkllawfirm.com

mkurtz@bkllawfirm.com

jkyler@bkllawfirm.com

**On Behalf of the Ohio Energy Group**

Colleen L. Mooney

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, Ohio 45839-1793

Cmooney2@columbus.rr.com

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

Douglas E. Hart

411 Vine Street, Suite 4192

Cincinnati, Ohio 45202

dhart@douglasehart.com

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

Kimberly W. Bojko (Counsel of Record)

Mallory M. Mohler

Carpenter Lipps & Leland LLP

280 North High Street

Suite 1300

Columbus, Ohio 43215

bojko@carpenterlipps.com

mohler@carpenterlipps.com

**On Behalf of Kroger Co.**

Jay E. Jadwin

Yazen Alami

American Electric Power Service Corporation

155 Nationwide Ave.

Columbus, Ohio 43215

jejadwin@aep.com

yalami@aep.com

**On Behalf of AEP Energy**

Thomas J. O’Brien

J. Thomas Siwo

Matthew W. Warnock

Bricker & Eckler, LLP

100 South Third Street

Columbus, Ohio 43215

tobrien@bricker.com

tsiwo@bricker.com

mwarnock@bricker.com

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

Mark A. Hayden

FirstEnergy Service Company

76 South Main Street

Akron, Ohio 44308

haydenm@firstenergycorp.com

James F. Lang

Laura C. McBride

N. Trevor Alexander

Calfee, Halter & Griswold LLP

1405 East Sixth Street

Cleveland, Ohio 44114

jlang@calfee.com

lmcbride@calfee.com

talexander@calfee.com

**On Behalf of FirstEnergy Solutions Corp.**

M. Howard Petricoff

Stephen M. Howard

Lija Kaleps-Clark

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street, P.O. Box 1008

Columbus, Ohio 43216-1008

mhpetricoff@vorys.com

smhoward@vorys.com

lkalepsclark@vorys.com

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

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

Mr. Thomas W. Craven

Vice President – Supply Chain Management

Wausau Paper Corp.

200 Paper Place

Mosinee, Wisconsin 54455-9099

tcraven@wausaupaper.com

Mr. Lawrence W. Thompson

Energy Consultant

Energy Strategies, Inc.

525 South Main Street, Suite 900

Tulsa, Oklahoma 74103-4510

lthompson@energy-strategies.com

Ms. Karen Campbell

Energy Consultant

Energy Strategies, Inc.

525 South Main Street, Suite 900

Tulsa, Oklahoma 74103-4510

kcampbell@energy-strategies.com

**On Behalf of Wausau Paper Towel & Tissue, LLC**

Steven T. Nourse

Matthew J. Satterwhite

American Electric Power Service Corp.

1 Riverside Plaza 29th Floor

Columbus, Ohio 43215

stnourse@aep.com

mjsatterwhite@aep.com

**On Behalf of Ohio Power Company**

Joseph G. Strines

DPL Energy Resources Inc.

1065 Woodman Drive

Dayton, Ohio 45432

Jospeh.strines@DPLINC.com

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

Judi L. Sobecki

Randall V. Griffin

The Dayton Power and Light Company

1065 Woodman Drive

Dayton, Ohio 45432

judi.sobecki@DPLINC.com

randall.griffin@DPLINC.com

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

Kevin J. Osterkamp

Roetzel & Andress LPA

PNC Plaza

Twelfth Floor

155 East Broad Street

Columbus, Ohio 43215

kosterkamp@ralaw.com

Rick D. Chamberlain

Behrens, Wheeler & Chamberlain

6 N.E. 63rd Street, Suite 400

Oklahoma City, Oklahoma 73105

Rdc\_law@swbell.net

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

Barth E. Royer

Bell & Royer Co., LPA

33 South Grant Ave.

Columbus, Ohio 43215

barthroyer@aol.com

Gary A. Jeffries

Dominion Resources Services, Inc.

501 Martindale Street, Suite 400

Pittsburgh, Pennsylvania 15212-5817

Gary.a.jeffries@dom.com

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

Steven Beeler

John Jones

Assistant Attorneys General

Public Utilities Section

180 East Broad Street

Columbus, Ohio 43215

[steven.beeler@puc.state.oh.us](mailto:steven.beeler@puc.state.oh.us)

john.jones@puc.state.oh.us

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

Christine Pirik

Katie Stenman

Attorney Examiners

Public Utilities Commission of Ohio

180 East Broad Street

Columbus, Ohio 43215

Christine.pirik@puc.state.oh.us

Katie.stenman@puc.state.oh.us

**Attorney Examiners**

1. Joint Motion to Dismiss by Signatory Parties (Oct. 4, 2012) (“Joint Motion”). [↑](#footnote-ref-1)
2. Initial Comments of Industrial Energy Users-Ohio at 9-11 (Jan. 2, 2013) (“IEU-Ohio Initial Comments”). [↑](#footnote-ref-2)
3. In regard to competitive retail generation service, the Commission recently confirmed that Section 4928.05(A)(1), Revised Code, limits the Commission’s supervision and regulation of a competitive retail electric service, such as retail generation service declared competitive by Section 4928.03, Revised Code, to the authority provided by the Revised Code Sections enumerated in Section 4928.05(A)(1), Revised Code. *In the Matter of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Second Entry on Rehearing at 26 (Jan. 30, 2013). The only section relied upon by Duke that is enumerated in Section 4928.05(A)(1), Revised Code, is Section 4905.06, Revised Code. Application at 2. Section 4905.06, Revised Code, however, authorizes the Commission to act on matters “only to the extent related to service reliability and public safety.” Duke’s Application does not seek Commission relief related to either service reliability or public safety. [↑](#footnote-ref-3)
4. Duke has not filed an application for a standard service offer (“SSO”), its application does not meet the filing requirements of an SSO in the form of an ESP, and the ESP could not meet the requirements applicable to an ESP, its current form of SSO. IEU-Ohio Initial Comments at 9-16 and FirstEnergy Solutions Corp.’s Initial Comments at 5-6 (Jan. 2, 2013) (“FES Initial Comments”). [↑](#footnote-ref-4)
5. IEU-Ohio Initial Comments at 16-22. Other commenters also noted that Duke has not complied with the statutes applicable to a request for an increase in compensation under the Commission’s cost-based ratemaking authority. Although it claims that the Commission can approve its Application under Section 4909.18, Revised Code, Duke has not complied with the statutory and administrative filing requirements that would be applicable to a filing under that Section. FES Initial Comments at 3; Comments of the Office of the Ohio Consumers' Counsel and the Ohio Energy Group at 4 (Jan. 2, 2013) (“OCC/OEG Initial Comments”).

   Duke also is seeking to circumvent a hearing that is mandatory if Section 4909.18, Revised Code, did apply. Duke claims that its Application may be approved without a hearing because it is seeking authorization for a new charge for a new service. As IEU-Ohio and others demonstrated, however, Duke’s Application seeks increased compensation for the provision of generation-related capacity service, an existing service it provides to competitive retail electric service (“CRES”) providers and winning bidders of the SSO auctions. Because Duke is seeking an increase in compensation for an existing service, a hearing is required if the Commission has jurisdiction under Sections 4909.18 and 4909.19, Revised Code (which it does not). IEU-Ohio Initial Comments at 22; Comments on Duke Energy Ohio, Inc.’s Application by The Kroger Co. at 4 (Jan. 2, 2013) (“Kroger Initial Comments”). [↑](#footnote-ref-5)
6. IEU-Ohio Initial Comments at 24 and 34-38. [↑](#footnote-ref-6)
7. Section 4928.38, Revised Code; *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case Nos. 99-1658-EL-ETP, *et al*., Opinion and Order at 23 (Aug. 31, 2000) (hereinafter “*Duke ETP Case*”); IEU-Ohio Initial Comments at 28-34. [↑](#footnote-ref-7)
8. Section 4928.38, Revised Code. [↑](#footnote-ref-8)
9. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, *Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al*., Stipulation and Recommendation (Oct. 24, 2011) (“*Duke ESP Proceeding*”), approved, Opinion and Order (Nov. 22, 2011). [↑](#footnote-ref-9)
10. RPM-Based Price refers to the price of capacity resulting from the auction processes established by PJM Interconnection LLC (“PJM”) pursuant to the Reliability Assurance Agreement (“RAA”). [↑](#footnote-ref-10)
11. Joint Motion, *passim*. In their initial comments, IEU-Ohio and most of the commenters again urged the Commission to grant the Joint Motion. *See, e.g*., IEU-Ohio Initial Comments at 6-7; Comments of the Ohio Manufacturers’ Association (Jan. 2, 2013) (“OMA Initial Comments”); Ohio Partners for Affordable Energy’s Comments (Jan. 2, 2013) (“OPAE Initial Comments”). [↑](#footnote-ref-11)
12. Initial Comments on Behalf of the Staff of the Public Utilities Commission of Ohio at 3 (Jan. 2, 2013) (“Staff Initial Comments”). [↑](#footnote-ref-12)
13. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariff Approval*, Case Nos. 11-2641-EL-RDR, *et al*., Stipulation (Apr. 26, 2011). [↑](#footnote-ref-13)
14. Staff Initial Commentsat 9. [↑](#footnote-ref-14)
15. FES Initial Comments at 1, 3-5; Kroger Initial Comments at 2-3. [↑](#footnote-ref-15)
16. In several recent cases, the Commission has either ignored or refused to enforce settlements that would prevent an increase in compensation of an EDU. For example, the Commission did not address the effect of AEP-Ohio’s ETP Stipulation and the Commission’s approval of the ETP Stipulation in its decision authorizing AEP-Ohio to increase its compensation for generation-related capacity service supplied to CRES providers. *See In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Industrial Energy Users-Ohio’s Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support, Memorandum in Support at 59-60 (Aug. 1, 2012). The Commission has also permitted parties to rely on terms of stipulations as precedent in direct violation of the terms of those same stipulations. *See, e.g., In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al*., Opinion and Order at 10 (Aug. 2, 2012). In this proceeding, the Commission has an opportunity to re-establish the integrity of stipulations it has approved by dismissing this patent violation of Duke’s ETP, BTR, and ESP Stipulations. [↑](#footnote-ref-16)
17. FES Initial Comments at 9, *citing* 121 FERC ¶ 61,173 (2007). [↑](#footnote-ref-17)
18. The Commission approved RPM-Based Pricing for generation-related capacity service when it approved Duke’s ESP Stipulation. The Commission also approved the use of RPM-Based Prices in AEP-Ohio’s Capacity Case. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at 2 (Dec. 8, 2010) (“*AEP-Ohio Capacity Case*”). In its Opinion and Order, the Commission concluded that AEP-Ohio could charge CRES providers only the RPM-Based Price for the capacity service AEP-Ohio supplied to those providers. *Id*., Opinion and Order at 23 (July 2, 2012). [↑](#footnote-ref-18)
19. *FPC v. Sierra Pacific Power Co*., 350 U.S. 348 (1956); *United Gas Co. v. Mobile Gas Corp*., 350 U.S. 332 (1956).  *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, Case No. 75-161-EL-SLF, Opinion and Order at 6 (Aug. 4, 1976). [↑](#footnote-ref-19)
20. Application at 2. Duke relies extensively on the Commission’s decisions affording AEP-Ohio increased compensation for the provision of generation-related capacity service to CRES providers. *See, e.g*. *id*. at 2 n.1. AEP-Ohio, however, disagrees that the relief it received from the Commission is also available to Duke. Initial Comments of Ohio Power Company (Jan. 2, 2013). [↑](#footnote-ref-20)
21. Application at 8-9. [↑](#footnote-ref-21)
22. Besides failing to demonstrate that its contractual arrangements should be revised, Duke has not sought to invoke the Commission’s authority to increase rates based on Section 4909.16, Revised Code, and an emergency claim based on the allegations contained in the Application would fail. IEU-Ohio Initial Comments at 38-40. [↑](#footnote-ref-22)
23. OCC/OEG Initial Comments at 16. [↑](#footnote-ref-23)
24. *Id*. at 9. [↑](#footnote-ref-24)
25. *Id*. (citing relevant FERC decision and ESP Stipulation). [↑](#footnote-ref-25)
26. *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 88-170-EL-AIR, Opinion and Order at 15-16 (Aug. 23, 1988). *See, also,* *FPC v. Sierra Pacific Power Co*., 350 U.S. at 355 (“it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility”). [↑](#footnote-ref-26)