**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 )

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**INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO**

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**June 28, 2013 Attorneys for Industrial Energy Users-Ohio**

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**INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO**

# Duke’s opportunistic application to raise its compensation for generation-related capacity service should not be approved

In this Application, Duke Energy Ohio, Inc. (“Duke”) asks the Public Utilities Commission of Ohio (“Commission”) to invent and apply a cost-based ratemaking methodology to increase its compensation for “wholesale” generation-related capacity services (“Capacity Service”). If authorized, Duke would defer and collect $257 million annually through nonbypassable charges.[[1]](#footnote-1) To support its claim, Duke points to its status as a Fixed Resource Requirement (“FRR”) Entity under PJM Interconnection, LLC’s (“PJM”) Reliability Assurance Agreement (“RAA”).[[2]](#footnote-2) Relying on the Commission’s decisions in the Columbus Southern Power Company and Ohio Power Company (“AEP-Ohio”) Capacity Case (“*AEP-Ohio Capacity Case”)*[[3]](#footnote-3) and 2011 Electric Security Plan Case (“*AEP-Ohio ESP II Case*”)[[4]](#footnote-4) Duke claims that the Commission “has an obligation to ensure that an FRR entity receives just and reasonable compensation for the services it renders” and has “adopted a methodology, in reliance upon traditional rate-making principles, to establish a just and reasonable cost for the provision of capacity by an FRR entity.”[[5]](#footnote-5)

Duke’s Application seeks three categories of relief and asserts that the relief requested is permissible based on Sections 4905.04, 4905.05, 4905.06, 4905.13, 4905.22, and 4909.18, Revised Code.[[6]](#footnote-6) First, it seeks what it calls a “charge.”[[7]](#footnote-7) Applying “the formulaic methodology recently approved by the Commission for establishing a cost-based state compensation mechanism” for AEP-Ohio, Duke alleges that the total Capacity Service revenue requirement to achieve an 11.15% return on common equity is $364.9 million annually.[[8]](#footnote-8) Netting the revenue Duke is already collecting for Capacity Service “via the [Final Zonal Capacity Price]”, Duke’s Application asserts that the Commission must authorize Duke to collect $257 million in additional annual compensation for such service.[[9]](#footnote-9) Second, Duke seeks accounting authority to defer the difference between the current capacity compensation and $364.9 million ($257 million annually) beginning on August 1, 2012 through May 31, 2015.[[10]](#footnote-10) Duke also proposes to add a carrying charge to the deferred balance at a long-term debt rate.[[11]](#footnote-11) Third, Duke’s Application seeks authority to amortize the deferred portion of its capacity compensation for Capacity Service (including the carrying charge) through a nonbypassable charge that will be imposed on shopping and non-shopping customers.[[12]](#footnote-12)

Duke’s Application does not identify the level of this proposed future nonbypassable charge. According to the Application, the level of the charge will be set in a separate future proceeding.[[13]](#footnote-13) Duke’s Application requests that the Commission authorize Duke to make a separate application filed annually beginning on March 1, 2013 to set the level of this future nonbypassable charge.[[14]](#footnote-14) To assure that it captures all of the additional compensation it seeks, Duke’s Application also requests that the Commission authorize Duke to establish a reconciliation mechanism that will become effective on June 1, 2015 to “true up the total collected amount.”[[15]](#footnote-15) Finally, Duke states that it expects “that portion of the recovery attributable to the time period during which assets were owned by the affiliate [after generation assets have been transferred as approved by the Commission] should then be passed through to such affiliate.”[[16]](#footnote-16)

Duke is currently securing compensation for its provision of Capacity Service based on the prices produced by the Reliability Pricing Model (“RPM-Based Prices”), and it receives a “stability charge” under its approved Electric Security Plan (“ESP”). The combined compensation is the product of extensive negotiations resulting in the settlement of Duke’s last ESP application that the Commission approved on November 22, 2011.[[17]](#footnote-17)

The additional compensation for Capacity Services that Duke is seeking through this unilateral and opportunistic Application is not lawful or reasonable. The Application is an attempt to secure authority to reopen the terms of Duke’s most recent ESP stipulation in violation of the terms of that stipulation. Further, the Commission does not have the legal authority to approve Duke’s Application because Duke seeks cost-based recovery for a competitive service and additional transition revenue for its legacy generation assets.[[18]](#footnote-18) Approval of Duke’s Application also would authorize an unlawful cross-subsidy and undue preference for Duke’s competitive generation business and that of its competitive affiliate. Finally, Duke is seeking authorization for additional compensation that would result in retroactive ratemaking for a portion of the relief sought by Duke, and the accounting modifications that Duke is seeking are unlawful. For these reasons, the Commission should deny Duke’s Application.

# Ohio law and FERC policy favor the use of competitive discipline of electric generation service pricing

Duke’s Application for above-market compensation for Capacity Service stands in stark contrast to the efforts of the General Assembly and the Federal Energy Regulatory Commission (“FERC”) to impose market-based discipline on prices that may be charged for competitive services. Long in coming, the organized wholesale market’s prices for energy and capacity are finally providing retail customers with the benefits of “customer choice” that were promised with Ohio’s electric restructuring legislation.

## RPM-Based Pricing assures reliability within a competitive pricing framework

To assure the stability and reliability of the electric grid, FERC and the states have mandated the transfer of control of transmission facilities from the Electric Distribution Utilities (“EDUs”) to Regional Transmission Organizations (“RTOs”).[[19]](#footnote-19) The RTO in which the Ohio EDUs participate is PJM, which includes members from 13 states and the District of Columbia. PJM is responsible for the bulk power system,[[20]](#footnote-20) conducts long-term transmission planning, and operates markets for energy, ancillary services, and capacity.[[21]](#footnote-21)

The PJM markets are structurally complicated and mutually supporting. In particular, “[t]he capacity market is designed to assure that capacity resources cover their fixed and variable costs from a combination of energy and ancillary market net revenues and capacity market revenues.”[[22]](#footnote-22)

The process for securing capacity resources to serve the PJM footprint is governed by comprehensive FERC-approved documents including PJM’s RAA and provisions of the Open Access Transmission Tariff (“OATT”).[[23]](#footnote-23) Under the RAA, PJM’s capacity market is intended to ensure the availability of resources that can be called upon to maintain the necessary supply and demand balance for the entire footprint of PJM, not just the distribution service area of Duke.[[24]](#footnote-24) Each LSE within PJM is responsible for contributing owned or controlled capacity resources to the common pool of resources that are available to PJM to satisfy PJM’s reliability mission.[[25]](#footnote-25) These capacity resources include electric generating plants, eligible energy efficiency resources, and demand response resources.[[26]](#footnote-26)

### RPM and FRR

As discussed above, PJM requires each LSE to obtain and dedicate a certain level of capacity resources to a region-wide pool to maintain reliability. Under the RAA, there are two means for LSEs to satisfy their capacity resource obligations. The first and default means of doing so is to secure the required amount of capacity through the market-based RPM.[[27]](#footnote-27) RPM relies upon auctions to procure a sufficient level of capacity resource commitments from the auction participants and to establish prices for those resource commitments.[[28]](#footnote-28) Auctions are held for each PJM delivery year, which runs from June 1 through the following May 31.[[29]](#footnote-29) For each delivery year, PJM conducts a Base Residual Auction (“BRA”) three years in advance of the delivery year and subsequent Incremental Auctions that allow capacity suppliers to offer to shed, or bid to acquire, a capacity delivery obligation.[[30]](#footnote-30) PJM then uses the auction process to select the least-cost set of capacity resources and determines the prices that will be paid to suppliers of the capacity resources.[[31]](#footnote-31)

As an alternative to participating in the RPM auctions, LSEs may elect to satisfy their capacity resource obligations to the PJM pool through a method known as the FRR Alternative.[[32]](#footnote-32) An LSE electing the FRR Alternative is an FRR Entity.[[33]](#footnote-33) Under the FRR Alternative, the FRR Entity must submit a plan for an initial term of five years and identify the fixed generating resources and demand resources that will be relied upon to satisfy its capacity obligation.[[34]](#footnote-34) The resources identified to satisfy the plan need not be assets owned by the FRR Entity. The FRR Entity’s capacity plan must meet the resource needs of all load served through its distribution system.[[35]](#footnote-35)

### Compensation under the RPM auction process

 As mentioned above, RPM auctions are held to secure sufficient capacity resources to maintain reliability based upon the combined load in PJM that participate in the RPM auctions.[[36]](#footnote-36) Owners of existing capacity resources are subject to a must-offer obligation.[[37]](#footnote-37) Because an independent market monitor has determined that the BRA capacity markets are concentrated, supply offers from existing resources are subject to offer caps.[[38]](#footnote-38) The offer caps limit the bids of sellers of existing resources to a generously calculated to-go price that is based on the Avoidable Cost Rate (“ACR”).[[39]](#footnote-39) “The intent of offer caps in general is to replicate the bidding behavior that would be expected in a competitive environment. In the absence of market power, individual suppliers would be expected to offer capacity resources at their short-term ‘to go’ costs, *i.e*., the costs that could be avoided by either retiring or ‘mothballing’ an existing unit for a year.”[[40]](#footnote-40) Capacity resources that clear in the RPM auctions are compensated at the auction clearing price.[[41]](#footnote-41) If the bid clears at a price sufficiently high to cover the avoidable cost, then the owner will secure a contribution to its fixed costs.[[42]](#footnote-42)

Consistent with the purpose of the RAA,[[43]](#footnote-43) RPM thus provides a competitive solution to the provision and pricing of capacity. The testimony of Duke’s own expert on PJM confirms that the “PJM program” has been demonstrated to be competitive.[[44]](#footnote-44) Duke’s expert further testified that the advantages of a competitive market include incentives to minimize cost and to keep prices low and that the incentives lead to more efficient sellers.[[45]](#footnote-45) In the short run, RPM signals the value of capacity. In the long run, it is designed to provide incentives for the entry of new capacity resources.[[46]](#footnote-46)

### Compensation under the FRR Alternative

In states that have retail choice such as Ohio, an FRR Entity is entitled to receive compensation if an Alternative LSE (in Ohio, an Alternative LSE is a Competitive Retail Electric Service (“CRES”) provider[[47]](#footnote-47)) does not dedicate capacity resources to meet the load served by the Alternative LSE.[[48]](#footnote-48) If the Alternative LSE does not make this election, the FRR Entity remains responsible for satisfying the capacity obligation of all LSEs in its distribution service territory and will be entitled to receive compensation for any load that switches to an Alternative LSE.[[49]](#footnote-49)

The level of compensation an FRR Entity receives for capacity resources for load that switches to an Alternative LSE is governed by Schedule 8.1, Section D.8, of the RAA.[[50]](#footnote-50) RPM-Based Pricing is the default method of compensation; however, there are other methods for establishing compensation. A “state compensation mechanism” will prevail if one exists.[[51]](#footnote-51) In the absence of a lawful state compensation mechanism, the RAA allows an FRR Entity to seek FERC approval to change the methodology of compensation from the default RPM-Based Pricing method to another basis that is “just and reasonable.”[[52]](#footnote-52) The FERC process is initiated by filing an application pursuant to Section 205 of the Federal Power Act (“FPA”).[[53]](#footnote-53) An LSE also may seek to exercise its rights under Section 206 of the FPA to seek revisions to the RAA or OATT.[[54]](#footnote-54)

## The General Assembly restructured regulation and supervision of the retail electric generation market through a systematic and balanced process so as to discipline retail generation service through competition

While PJM and Federal regulators have moved to a competitive model to price wholesale Capacity Service, the Ohio General Assembly has restructured the regulation of retail electric service. In 1999, the General Assembly passed Amended Substitute Senate Bill 3 (“SB 3”). SB 3’s means of restructuring of the electric industry was organized and systematic. It declared retail electric generation service to be competitive and exempted the service from the supervision and regulation of the Commission.[[55]](#footnote-55) It also provided a market development period (“MDP”) during which both retail customers and EDUs were given the opportunity to adjust to the introduction of retail electric generation competition.

With the declaration that retail electric generation is a competitive retail service in SB 3, customers were given the right to obtain electric generation supply from a CRES provider.[[56]](#footnote-56) The generation supply function of an EDU such as Duke was confined by operation of law to meeting the needs of customers that are not receiving generation supply from a CRES provider. Specifically, SB 3 required:

After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and non-discriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.[[57]](#footnote-57)

(In 2008, the General Assembly passed SB 221. Although the General Assembly changed the options available to establish pricing for the standard service offer (“SSO”), SB 221 retained the obligation of EDUs to provide all consumers in their certified service area “a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.”[[58]](#footnote-58))

SB 3 also included a requirement that owners of transmission facilities transfer control of such facilities to an RTO.[[59]](#footnote-59) Additionally, the law required incumbent vertically-integrated electric utilities to separate competitive lines of business from non-competitive lines of business through a corporate separation plan approved by the Commission.[[60]](#footnote-60)

SB 3 also established a “transition period” beginning on January 1, 2001 and ending on December 31, 2010.[[61]](#footnote-61) Within this transition period, SB 3 created a five-year MDP during which incumbent investor-owned utilities and customers had the opportunity to prepare for and transition to a competitive market.[[62]](#footnote-62) SB 3 directed the Commission to structure transition plans with the objective of obtaining at least 20% customer switching by the mid-point of the MDP which could end no later than December 31, 2005.[[63]](#footnote-63)

The evolutionary approach to restructuring the retail investor-owned electric industry in Ohio, accompanied by the completion of the transitional tasks, served two important objectives. The first objective was to provide customers with certain price protections from the dysfunction that is often associated with new and immature markets until such time as the retail market was mature enough to produce “reasonable” prices. The General Assembly protected customers by specifying that the total price of electricity in effect in October 1999 would define the total price envelope within which the unbundled generation, transmission, and distribution prices would be established through the transition plan process.[[64]](#footnote-64) SB 3 also provided residential customers an immediate benefit in the form of a 5% discount on the unbundled generation price.[[65]](#footnote-65)

The second objective of the SB 3 restructuring was to protect incumbent EDUs during the MDP from potential revenue loss that might otherwise be caused by an abrupt exposure to a new and immature market where customers had the ability to obtain generation supply from a CRES provider. SB 3 provided each EDU with the opportunity to protect itself in the event the EDU judged its unbundled generation prices to be in excess or above the generation service prices that would result from the forces of effective competition. The opportunity to pursue this protection required an EDU to file a claim with the Commission for “transition revenue” (*i.e.*, the positive difference between existing unbundled generation prices and the unbundled prices attributed by the utility to effective competition—sometimes called “stranded costs”) as part of the electric transition plan (“ETP”) filings.[[66]](#footnote-66)

SB 3 contains the criteria that the Commission applied to determine how much, if any, of the transition revenue claim was eligible for recovery.[[67]](#footnote-67) A transition revenue claim was eligible for collection through transition charges if the revenue claim was limited to: (1) costs that were prudently incurred; (2) costs that were legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (3) costs that were unrecoverable in a competitive market; and (4) costs that the utility would otherwise have been entitled an opportunity to recover.[[68]](#footnote-68) All four of the criteria had to be satisfied for the transition revenue claim to be recoverable from shopping and non-shopping customers.[[69]](#footnote-69)

When the Commission approved a transition revenue claim, it also approved transition charges that the EDU could then charge shopping customers for the period specified by the Commission.[[70]](#footnote-70) For non-shopping customers, the transition charges were embedded in the default generation supply SSO price and were equal to the portion of the applicable default generation supply price that was not avoidable by shopping customers.[[71]](#footnote-71)

The total allowable amount of any transition revenue claim was separated if a portion of that total claim involved generation-related regulatory assets[[72]](#footnote-72) and shown a separate regulatory asset charge.[[73]](#footnote-73) SB 3 limited the Commission’s ability to make adjustments to the regulatory asset portion of an allowed transition charge and also required the regulatory asset portion of a transition charge to end no later than December 31, 2010.[[74]](#footnote-74) The non-regulatory asset portion of any transition charge which was associated with above-market generating plants had to end by no later than December 31, 2005 or the end of the MDP, whichever occurred first.[[75]](#footnote-75) Section 4928.141, Revised Code, which was added by SB 221, excluded any previously authorized allowances for transition costs with the exclusion becoming effective on and after the date the allowance was scheduled to end under the prior rate plan.

If an EDU wanted to make a claim for transition revenue, it had to include the claim in its proposed ETP.[[76]](#footnote-76) A proposed ETP had to be filed 90 days after the effective date of SB 3.[[77]](#footnote-77) The statutory criteria discussed above were then used to determine how much of the transition revenue claim was eligible for collection through transition charges.

For the generation plant-related portion of the transition revenue claim, the net book value of generating assets at December 31, 2000 was used as the baseline to determine how much, if any, of the net, verifiable, prudently incurred book value was not recoverable in the market and, in this context, the market included the entire market, including the wholesale and retail segments.[[78]](#footnote-78)

Various methods were used by EDUs to forecast how much transition revenue they might experience as a result of customers being able to select their generation service supplier.[[79]](#footnote-79) The most popular approach was a revenue-based approach. Generally, the revenue-based approach projected revenue streams for the various generating plants and computed a present value of the future estimated revenue streams. The present value of the estimated future revenue streams was then compared to the net book value of the generating plants on December 31, 2000. Generation plant-related transition costs were deemed to be positive (and potentially eligible for recovery through transition charges) if the present value of the projected revenue streams was, in the aggregate, less than the net book value of the generating plants at December 31, 2000.

Following the MDP, the General Assembly declared that EDUs’ “receipt of transition revenues shall terminate. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market.”[[80]](#footnote-80) Moreover, the Commission is prohibited from authorizing “the receipt of transition revenues or any equivalent revenues by an electric utility” except as authorized as part of an ETP.[[81]](#footnote-81)

## Duke’s ETP and RSP Stipulations

With the adoption of SB 3, Duke’s predecessor, The Cincinnati Gas and Electric Company (“CG&E”), began the process of adapting to Ohio’s “customer choice” structure with its ETP case in 1999.[[82]](#footnote-82) In its ETP application and testimony, CG&E sought transition revenue for its competitive generation business segment. In its supporting testimony, it defined transition costs as “the difference between the revenue requirements a utility would have under regulation and the revenues it likely will receive in a competitive market.”[[83]](#footnote-83) Choosing to calculate its “stranded costs” on a unit-by-unit basis,[[84]](#footnote-84) CG&E provided an estimate of the market revenue and the incremental production expenses for each CG&E unit from 2001 to the retirement of the unit.[[85]](#footnote-85) Its calculation adjusted generation output for constraints on generation due to more stringent environmental rules and the likelihood that gas-fired generation would increasingly set the marginal price of generation.[[86]](#footnote-86) Based on its calculation of the anticipated market value of its units, CG&E sought transition cost recovery of $1.518 billion, including generation plant related transition costs of $563 million.[[87]](#footnote-87)

CG&E entered a stipulation in which it resolved its claims for transition revenue. It agreed to forego a generation transition charge,[[88]](#footnote-88) but was permitted to collect regulatory asset transition revenue of $884 million.[[89]](#footnote-89) (The ETP Stipulation increased the total recovery for regulatory assets from $364 million to $401 million and allowed for new regulatory assets of at least $483 million.[[90]](#footnote-90)) Over the objection of AK Steel Corporation and Shell Energy Services Company, LLC, that CG&E had stranded benefits (*i.e*., no generation transition costs), the Commission found that the ETP Stipulation provided an equitable resolution of the stranded generation cost matter.[[91]](#footnote-91) As the Commission explained, “[t]he Company has agreed to forego asserting a claim for stranded generation costs that they calculate on brief to be approximately be (*sic*) $470 million on a netted basis [citation omitted].”[[92]](#footnote-92)

In January 2004, CG&E filed its Rate Stabilization Plan (“RSP”) application that was resolved by a stipulation (“RSP Stipulation”).[[93]](#footnote-93) The RSP Stipulation provided that it did not amend or supersede any provision of the ETP Stipulation, except as expressly stated.[[94]](#footnote-94) There was no provision in the RSP Stipulation modifying CG&E’s commitment to forego imposition of a generation transition charge.

The RSP Stipulation also affirmed the ending dates of CG&E’s MDP. For residential customers, the MDP ended December 31, 2005. For non-residential customers, the MDP ended December 31, 2004.[[95]](#footnote-95)

## Duke’s move to PJM and commitment to RPM-Based Prices

Duke was a member of in the Midwest Independent Transmission Operator (“MISO”) until 2012. Recognizing the benefits of the PJM capacity market,[[96]](#footnote-96) in 2010, Duke initiated a move from MISO to PJM.[[97]](#footnote-97) In November 2010, it considered a move as late as January 1, 2014.[[98]](#footnote-98) It subsequently moved that date forward to June 1, 2012.[[99]](#footnote-99) By the time it made its application to FERC, Duke settled on January 1, 2012.[[100]](#footnote-100)

When Duke voluntarily decided to complete the move to PJM in 2012, the move required Duke to make a temporary FRR election for the period of 2012 to June 2015. “By migrating into PJM prior to June 2015, [Duke] was foreclosed from offering and procuring capacity through [the PJM capacity auctions] for the 2012/13, 2013/14 and 2014/15 delivery years because those auctions had already been held and were closed.”[[101]](#footnote-101) As a result, Duke was required to satisfy its capacity obligation through an FRR Election.[[102]](#footnote-102) Having made an election to migrate to PJM on January 1, 2012, Duke was also responsible for including in its plan capacity resources sufficient to satisfy the capacity requirements of CRES providers. With full knowledge of the results of the BRAs, Duke represented to FERC that it would “deliver the load at the RPM price.”[[103]](#footnote-103)

Duke also filed an application with the Commission seeking approval of its move to PJM on April 26, 2011.[[104]](#footnote-104) In a stipulation resolving the application, Duke committed that it would not seek FERC approval (under Section 8.1 of the RAA) of a wholesale capacity charge based upon its costs as an FRR Entity.[[105]](#footnote-105) Duke’s commitment to forego seeking a cost-based rate for capacity from FERC lasts for the period between January 1, 2012 and May 31, 2016. The Commission approved the Stipulation, finding it to be reasonable and further finding that it met the three prong settlement criteria.[[106]](#footnote-106)

## Duke’s ESP Stipulation

Duke filed its application for an ESP in June 2011. That ESP application sought a nonbypassable charge for capacity.[[107]](#footnote-107) Duke proposed that the capacity charge would be based on the fixed cost of production established through a formulaic rate using information derived from Duke’s 2010 FERC Form 1 and include a “reasonable rate of return.”[[108]](#footnote-108)

Duke’s ESP case was resolved by a Stipulation and Recommendation (“ESP Stipulation”). Duke agreed to provide Capacity Service to PJM for the load of CRES providers and successful bidders in SSO full requirements auctions with the charge for that load to be based on RPM-Based Prices.[[109]](#footnote-109) Staff understood that Duke was committing to provide Capacity Service at the “prevailing market price.”[[110]](#footnote-110)

Additionally, Duke agreed it would secure generation service for the SSO through a competitive bidding process (the “CBP”) and it would transfer its “legacy” generation to an affiliate.[[111]](#footnote-111)

Further, the ESP Stipulation recommended that the Commission authorize a nonbypassable charge, the Electric Service Stability Charge (“ESSC”), that would produce $110 million annually.[[112]](#footnote-112) Duke acknowledged that the ESSC was intended to protect Duke’s financial integrity and ensure that the overall revenue under the ESP was adequate to compensate Duke for providing its SSO.[[113]](#footnote-113) Duke also justified the ESSC on the basis that it was authorized under Section 4928.143, Revised Code, because it related to the supply and pricing of retail electric generation service.[[114]](#footnote-114) In testimony supporting the ESP Stipulation, Duke further explained:

*From the Company’s perspective, the need of Rider ESSC is simple. Duke Energy Ohio is required to supply capacity for the Company’s entire footprint until at least the 2015/2016 PJM planning year.* And Duke Energy Ohio will satisfy this obligation, in part, with its Legacy Generation Assets because the BRAs to procure capacity in PJM have already occurred through the 2014/2015 planning year, which extends to the end of the ESP as provided for the Stipulation. *Although the ESP contained in this Stipulation will result in a full competitive bid for Duke energy Ohio’s SSO price, and Duke Energy Ohio is committing to transfer its generating assets to an affiliate or subsidiary, that transfer will take time and the Company must continue to meet its PJM capacity obligation.* Moreover, as part of the negotiation in the settlement of this ESP, the Company has agreed not to participate in auctions for its own SSO load with the Legacy Generating Assets as a resource. Accordingly, the Company has agreed that its Legacy Generation Assets will only participate in the wholesale PJM day-ahead and real-time energy markets for the first three calendar years of the ESP. *Rider ESSC is a means of providing economic stability and certainty during the term of the ESP, while recognizing the value of Duke Energy Ohio’s commitment of its capacity and its commitment to legally separate its Legacy Generation Assets so an unfettered and fully competitive market will exist in its service territory*.[[115]](#footnote-115)

Contrary to Duke’s recent assertion that the ESP did not address the total compensation for the provision of Capacity Service it provides as an FRR entity,[[116]](#footnote-116) Duke fully understood that it was settling the issue of its compensation for the provision of Capacity Service as an FRR Entity when it entered the ESP Stipulation.

When Duke entered into the ESP Stipulation terms resolving the issue of capacity pricing, Duke management also was aware that AEP-Ohio was seeking a cost-based capacity charge and that the AEP-Ohio matter remained pending at the Commission.[[117]](#footnote-117) In November 2010, AEP-Ohio, through a filing with FERC by AEP Service Corporation (“AEPSC”), sought a cost-based capacity charge under the RAA.[[118]](#footnote-118) On December 8, 2010, the Commission opened its investigation into AEP-Ohio’s capacity prices.[[119]](#footnote-119) With the *AEP-Ohio Capacity Case* unresolved and as it was negotiating the ESP Stipulation a year later, Duke believed that there was no “clarity” as to the Commission’s position on capacity pricing.[[120]](#footnote-120) Despite the lack of Commission action in the *AEP-Ohio Capacity Case* at that time and Duke’s recognition that the pricing of Capacity Service remained unclear, Duke agreed to the ESP Stipulation including the provisions setting the capacity price at the RPM-Based Price for its entire FRR load.[[121]](#footnote-121) Further, Duke agreed that the provisions concerning capacity compensation were part of a broader settlement that resolved all open issues raised by Duke’s ESP application.[[122]](#footnote-122)

Duke also was sensitive to the financial consequences of its decision to settle the ESP case by agreeing to be compensated at the RPM-Based Price for capacity plus the ESSC. When Duke settled its ESP case, PJM had concluded the auctions for the relevant PJM planning years,[[123]](#footnote-123) and the BRA results of the RPM auction process were known through the 2014-2015 planning year.[[124]](#footnote-124) Duke understood that the returns it would receive for Capacity Service would be poor.[[125]](#footnote-125)

# The Application must be rejected as an unlawful attempt to violate the ESP STIPULATION[[126]](#footnote-126)

The ESP Stipulation resolved Duke’s claims for compensation for Capacity Service while it remained an FRR Entity. Duke now seeks to increase that compensation by claiming it has some special right to additional compensation due to its status as an FRR Entity. The Commission must reject that claim because it violates the terms of ESP Stipulation.

Under the terms of the ESP Stipulation, “[a]t any hearing and in any documents or briefs filed with the commission in respect of the Stipulation, each Signatory Party agrees to support the Stipulation and do nothing, directly or indirectly, to undermine the Stipulation.”[[127]](#footnote-127) The Stipulation also requires that each Signatory Party support the reasonableness of the Stipulation and “take no position contrary to the support for the reasonableness of the ESP and this Stipulation in any appeal from the Commission’s adoption and/or enforcement of this ESP and this Stipulation.”[[128]](#footnote-128) As a Signatory Party, Duke is bound by these terms.

Duke’s Application seeks a result that is clearly contrary to its commitments in the ESP Stipulation. In the ESP Stipulation, Duke agreed to compensation at the RPM-Based Price for load served by CRES providers operating in its service territory and for load served by successful bidders in the SSO auctions. It also agreed to additional compensation of $330 million. In this Application, however, Duke seeks to increase its compensation by $729 million for the provision of Capacity Service based on the invention and application of a cost-based ratemaking methodology. Duke’s Application, therefore, directly conflicts with the terms of the ESP Stipulation. As the Commission has done in the past,[[129]](#footnote-129) it must reject Duke’s Application because approval of it would violate the terms of ESP Stipulation.

Further, the ESP Stipulation is to be viewed not as individual provisions, but as a settlement “package.”[[130]](#footnote-130) The ESP Stipulation specifically states that it represents “an agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions included within the Stipulation.”[[131]](#footnote-131) Simply put, Duke cannot separate the capacity price provision of the ESP Stipulation from the rest of the settlement package. To alter one provision of the ESP Stipulation undermines and destroys the entire agreement bargained for by the parties.

Duke seeks to avoid the obvious violation of the ESP Stipulation by insisting that the ESP Stipulation did not “in any way address the total compensation that Duke Energy Ohio should receive for providing noncompetitive Capacity Service consistent with its obligation as an FRR entity through the term of its current ESP.”[[132]](#footnote-132) As one of its witnesses, Mr. Trent, further explained, Duke “does not have *any* existing Commission-approved rate or charge that compensates it for the provision of noncompetitive, wholesale Capacity Service. In this regard, Rider ESSC (Electric Service Stability Charge) does not provide the Company with compensation for such services.”[[133]](#footnote-133)

Duke’s assertions that the ESP Stipulation and related testimony supporting the ESP Stipulation do not address Duke’s total compensation for Capacity Service are nonsense. As the record of this hearing abundantly demonstrates, Duke sought a cost-based capacity charge in its ESP application; Duke was aware of the pending *AEP-Ohio Capacity Case*; and Duke clearly agreed that its compensation for Capacity Service was addressed by the ESP Stipulation.[[134]](#footnote-134) The claim that the ESP Stipulation did not address Duke’s compensation for providing Capacity Service is meritless.

In summary, Duke seeks to increase its compensation for Capacity Service in violation of the terms of the ESP Stipulation. Accordingly, Duke’s Application should be rejected.

# The Commission has no authority to increase Duke’s total compensation for Capacity Service under Sections 4905.04, 4905.05, 4905.06, or 4909.18, Revised CODE, or the RAA

Duke seeks authorization to bill and collect an additional $257 million annually for the provision of “wholesale”[[135]](#footnote-135) Capacity Service because it is an FRR Entity.[[136]](#footnote-136) Citing the Commission’s decision in the *AEP-Ohio Capacity Case*, Duke claims that the Commission can authorize the “charge” under Sections 4905.04, 4905.05, 4905.06 and 4909.18, Revised Code.[[137]](#footnote-137) The Commission, however, 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.

## The Commission lacks jurisdiction to increase compensation for “wholesale” Capacity Service

 Duke’s Application seeks authorization to collect increased compensation through what it terms a “charge” for providing Capacity Service that it states is “not a retail electric service, as defined by Ohio law.”[[138]](#footnote-138) In its testimony at hearing, Duke once again confirmed that it was seeking compensation for what it deemed to be a wholesale service.[[139]](#footnote-139) Having described the underlying service as “wholesale,” Duke’s Application nonetheless points to Sections 4905.04 to 4905.06, 4905.13, 4905.22, and 4909.18, Revised Code, as the source of the Commission’s authority to grant the requested relief.[[140]](#footnote-140)

Because 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 Sections 4905.04, 4905.05, 4905.06, 4905.13, and 4905.22, Revised Code. These sections apply to a “public utility” as that term is defined in Sections 4905.02[[141]](#footnote-141) and 4905.03,[[142]](#footnote-142) Revised Code. They specify that a public utility subject to the Commission’s jurisdiction must be a company engaged in the business of supplying electricity *to consumers*, *i.e.,* it must be supplying a retail service. The definition of “public utility” also specifically exempts RTOs, such as PJM, the entity that actually bills CRES providers and SSO auction winners for wholesale Capacity Service.

The Commission also does not have authority to increase the charge for Capacity Service under Section 4909.18, Revised Code. Section 4909.18, Revised Code, provides that a “public utility” must file an application to establish or modify a rate. As Section 4909.01, Revised Code, makes clear, the terms “public utility” and “electric light company” used in Chapter 4909, Revised Code, have the same meanings as in Sections 4905.02 and 4905.03, Revised Code. By the definitions contained in Chapter 4905 and Section 4909.01, Revised Code, therefore, the authority provided in Section 4909.18, Revised Code, extends to only retail electric utility services.[[143]](#footnote-143) There is nothing in Section 4909.18, Revised Code, that provides the Commission with authority to authorize rates for a wholesale generation service such as Capacity Service.

Because Chapter 4905 and Section 4909.18, Revised Code, do not provide the Commission with jurisdiction over wholesale Capacity Service, Duke cannot rely on those provisions to support this Application. Thus, the Commission must reject the Application.

## The Commission lacks authority to authorize cost-based compensation for Duke’s provision of competitive Capacity Service

As discussed above, retail electric generation service has been declared competitive under Ohio law since January 1, 2001. Because generation service, including Capacity Service, is declared competitive, it is not subject to the Commission’s traditional price regulation. As Duke’s competitive affiliates (collectively “DECAM”) argued in response to AEP-Ohio’s request for a cost-based capacity charge, “It is critical … to recognize that, pursuant to Ohio’s two deregulation bills, generation services are not permitted to be priced on the basis of cost. Although certain portions of an electric distribution utility’s costs may be passed through to its customers (such as fuel and purchased power costs), the overall rate plan must be based on market.”[[144]](#footnote-144) DECAM concluded, “While the [*AEP-Ohio Capacity Case*] is certainly not an application for approval of a standard service offer, it is imperative to understand that generation services are *never*, in Ohio, authorized on the basis of cost. Nothing in SB 221 or SB 3 empowers the Commission to allow a utility to charge for capacity on the basis of its embedded costs.”[[145]](#footnote-145)

The definitions in Section 4928.01, Revised Code,[[146]](#footnote-146) in combination with the declaration in Section 4928.03, Revised Code, make it clear that the Commission may not lawfully supervise or regulate “any service” [[147]](#footnote-147) involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio, from the point of generation to the point of consumption, once such service is declared competitive except in narrowly defined circumstances.[[148]](#footnote-148) From these definitions, this conclusion holds regardless of whether the service is called wholesale or retail.

Section 4928.05, Revised Code, makes it clear that the removal of the Commission’s supervisory and regulatory powers extends to the service component or function (generation, transmission, distribution) if the service component is declared competitive. Pursuant to Section 4928.03, Revised Code, the General Assembly has declared that retail electric generation service is a competitive retail electric service:

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services[[149]](#footnote-149) that the consumers may obtain subject to this chapter from any supplier or suppliers.

Because retail electric generation service has been declared competitive, by operation of Section 4928.05, Revised Code, any generation service from the point of generation to the point of consumption is not subject to the Commission’s regulation except as may be specifically allowed under Section 4905.06, Revised Code,[[150]](#footnote-150) and Sections 4928.141 to 4928.144, Revised Code (which relate exclusively to the establishment of an SSO for *retail* electric customers). Section 4928.05(A), Revised Code, also specifically precludes the Commission from regulating such a service under Chapter 4909, Revised Code.

The declaration that electric generation service is competitive and not subject to the various sections noted above is fatal to Duke’s application. Duke cannot rely on the general supervisory authority of the Commission under Chapter 4905, Revised Code, or Section 4909.18, Revised Code, to increase its compensation for Capacity Service since those provisions cannot be applied to any competitive service.

The Commission’s remaining authority over the pricing of an EDU’s generation service is under Sections 4928.141 to 4928.144, Revised Code. Duke, however, has not invoked the Commission’s authority under these Sections, and even if it had, they do not authorize the Commission to apply a cost-based ratemaking methodology to increase Duke’s compensation for Capacity Service declared competitive by Section 4928.03, Revised Code.

Under Section 4928.141 to 4928.143, Revised Code, the Commission may authorize the prices, terms, and conditions of an SSO. An SSO’s default competitive supply price is market-based or tested, not cost-based.[[151]](#footnote-151) Because Sections 4928.141 through 4928.143, Revised Code, specifically identify the means by which the Commission may regulate and supervise an EDU’s pricing for default supply of any competitive retail electric service, the Commission must follow these specific statutory requirements when addressing EDU compensation for any competitive service. The Commission is prohibited from resorting to the general supervisory powers contained in Sections 4905.04, 4905.05, and 4909.06, Revised Code, in such circumstances.[[152]](#footnote-152)

Thus, the Commission is powerless to entertain Duke’s Application. DECAM was correct when it stated that the Commission has no authority to increase the compensation of an EDU for Capacity Service based on the basis of cost.[[153]](#footnote-153) The declaration that retail electric generation service is a competitive service removes from the Commission the authority to set or regulate the price, terms, and conditions of that service under its traditional ratemaking authority.

## The Application seeks a rate increase under Section 4909.18, Revised Code, but fails to comply with the statutory requirements for a rate increase

 Duke’s Application claims that the Commission has authority under Section 4909.18, Revised Code, to authorize a new tariff, Rider DR-CO, to allow Duke to collect, in the future, higher compensation for Capacity Service.[[154]](#footnote-154) Citing several Supreme Court opinions,[[155]](#footnote-155) Duke’s Application alleges that it is seeking approval of a new charge for a “new service,”[[156]](#footnote-156) and therefore asserts that the requirements of Sections 4909.18 and 4909.19, Revised Code, which are applicable to applications seeking an increase of any rate or charge, do not apply. As explained above, however, Section 4909.18, Revised Code, authorizes the Commission to approve a new charge or service in the case of an EDU’s noncompetitive retail services. Section 4909.18, Revised Code, is not available to the Commission to authorize a charge which an EDU may collect from retail customers for any competitive service (including a new service) which is provided by an EDU. Sections 4928.141 through 4928.143, Revised Code, are the only sources of the Commission’s authority to approve rates, charges, terms, and conditions for a competitive generation service available from an EDU.

Even if the Commission could address Duke’s Application under Section 4909.18, Revised Code, Duke would be subject to extensive procedural requirements applicable to a request to increase rates with which Duke admits it has not complied.[[157]](#footnote-157) Duke attempts to avoid the mandatory requirements of Sections 4909.18 and 4909.19, Revised Code, by asserting that the Commission may approve the increase in compensation because it is seeking approval of a tariff applicable to a new service and not seeking an increase in compensation from its customers.[[158]](#footnote-158) The Application’s assertions that it is proposing a charge for a “new service” and not seeking an increase in compensation for an existing service are meritless.

### Duke is currently providing Capacity Service

Although Duke argues otherwise, Duke’s Application seeks an increase in the compensation it receives for Capacity Service it currently supplies to CRES providers and successful SSO auctions bidders.[[159]](#footnote-159) The Application confirms that Duke is currently collecting compensation for the Capacity Service it provides in accordance with RPM-Based Pricing and requests that the Commission increase that compensation by $729 million.[[160]](#footnote-160) The deferral proposed in Duke’s Application is the accounting host for the increased compensation and an explicit admission that Duke is already receiving compensation for generation Capacity Service, albeit at a level that is less than Duke now wants.

Attempting to avoid the obvious conclusion that it is seeking an increase in compensation for an existing service, Duke also alleges that it is seeking a new charge because Duke “has never before had a tariff for the collection of the costs incurred by it in fulfilling its obligations as an FRR entity.”[[161]](#footnote-161)

Duke’s testimony, however, confirms that it is seeking to increase its compensation for its existing Capacity Service. As Mr. Trent admitted, “I guess I would distinguish between the service we are providing and the payment, the wholesale service is not being provided to the retail customer, but we are collecting for that in two forms. You know, one, we’re collecting the market price ultimately, and that flows through the PJM; and then the second component is a retail payment, which is the deferral amount.”[[162]](#footnote-162) Thus, Duke understands that it is increasing its compensation for an existing service.

Further, Duke’s assertion that it did not have a state compensation mechanism is wrong. Duke in its Commission-approved ESP Stipulation agreed to ESP rates based on RPM-Based Prices.[[163]](#footnote-163) Duke’s allegation that it is seeking a new charge on the ground that the Commission had not previously set a state compensation mechanism for it at the RPM-Based Price defies fact.[[164]](#footnote-164)

Thus, Duke is seeking to increase the total compensation it is currently receiving for the provision of Capacity Service. Under the terms of the ESP Stipulation, Duke is collecting the RPM-Based Price for the Capacity Service it provides.[[165]](#footnote-165) The charge Duke is seeking is for the same service it is supplying to CRES providers and successful auction bidders at the RPM-Based Price.[[166]](#footnote-166) As one Duke witness conceded, “there would be an *additional* payment involved here.”[[167]](#footnote-167)

### Duke has not attempted compliance with requirements to increase the rates for a service

If, as Duke claims, the Commission has jurisdiction to increase Duke’s compensation for the provision of Capacity Service and that service has not been declared competitive, Duke, the Commission Staff, and the Commission itself must comply with detailed procedural and substantive requirements under Sections 4909.18 and 4909.19, Revised Code, and related sections before the Commission can authorize the relief Duke seeks. Duke, however, admits it has not complied with those requirements.

Under Ohio’s traditional ratemaking process, an application to increase compensation filed under Section 4909.18, Revised Code, must contain: a “complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;” “a statement of the income and expense anticipated under the application filed;” and “a statement of financial condition summarizing assets, liabilities, and net worth.”[[168]](#footnote-168)

Additionally, the electric utility must provide a valuation of the property used and useful for purposes of providing service to the public. Section 4909.04, Revised Code, provides that “the reasonableness and justice of rates and charges” are based on the value of the public utility’s property as set forth in Section 4909.05, Revised Code. Section 4909.05, Revised Code, contains a detailed list of how to value the various types of public utility property that are “used and useful” in providing “service and convenience” to the public.

The Commission may also designate additional information that must be filed with an application to increase compensation.[[169]](#footnote-169) The Commission has done so with the adoption of standard filing requirements.[[170]](#footnote-170)

When a proper application seeking Commission approval of an increase in cost-based compensation for retail service is filed with the Commission, the requirements of Section 4909.19, Revised Code, also attach and must be satisfied before the Commission may act on the application. That section requires the Commission to initiate an investigation; a report of the investigation must be prepared and issued by the Commission’s Staff; and the report of investigation must be circulated to the applicant, the mayor of any municipal corporation affected by the application, and any other person the Commission deems interested.[[171]](#footnote-171) Parties must be afforded time to file objections, and if objections are filed, the application must be set for hearing. Only after a complete record is prepared and submitted to the Commission may the Commission rule on an application seeking authority to increase cost-based compensation for service provided by an EDU to the public.[[172]](#footnote-172)

Duke’s Application and the supporting testimony fail to provide the information required to perfect an application to increase compensation for an existing service under Section 4909.18, Revised Code.[[173]](#footnote-173) Instead, Duke points to data contained in Duke’s Annual Report (“FERC Form 1”) and other internal sources, some of which it deems confidential and has redacted from its publicly filed application,[[174]](#footnote-174) but does not suggest how the referenced data satisfy the statutory requirements applicable to applications to secure Commission approval of an increase in compensation for retail or any service.

Duke further admitted that the procedural requirements applicable to a request to increase rates were not satisfied. Mr. Wathen conceded that the Staff did not perform an audit of Duke’s application,[[175]](#footnote-175) Duke did not publish notice of its application,[[176]](#footnote-176) the Staff did not prepare a Staff Report,[[177]](#footnote-177) and the application and a Staff Report were not served on municipalities.[[178]](#footnote-178) No property report was prepared.[[179]](#footnote-179) The Commission did not establish a date certain or test year.[[180]](#footnote-180)

In short, Duke has failed to comply with the requirements applicable to a request to increase rates. Instead, it is seeking to have the Commission invent and apply a cost-based ratemaking methodology to produce a uniquely defined compensation mechanism. Nothing in Chapter 4909, Revised Code, provides the Commission with the authority to increase Duke’s rates in such an arbitrary manner.

## Duke’s Application is unlawful and unreasonable because it seeks an increase in SSO compensation for a competitive service that is being provided under the ESP option without establishing that the charge may be lawfully included as a provision of an ESP, demonstrating that the resulting ESP is more favorable in the aggregate than an MRO, or demonstrating that the delayed collection of the increase is lawful

 Because Duke, an EDU, is seeking to increase its compensation for the provision of Capacity Service through the Application, the Commission’s authority to authorize Duke to collect such compensation is confined to Sections 4928.141 to 4928.143, Revised Code.[[181]](#footnote-181) Section 4928.143, Revised Code, provides the Commission authority to approve an ESP, the type of SSO that is currently in place for Duke. An ESP may contain only those provisions that are set out in the list contained in Section 4928.143(B), Revised Code.[[182]](#footnote-182) Additionally, under Section 4928.143(C)(1), Revised Code, the EDU has the burden of demonstrating that its proposed ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate than an MRO available under Section 4928.142, Revised Code. The requirements of Section 4928.143, Revised Code, also apply when the EDU seeks to subsequently increase those rates during the term of the ESP.[[183]](#footnote-183) Additionally, the Commission’s authority to approve a deferred compensation collection mechanism for an EDU and its provision of any SSO-related offering is limited to the authority delegated to the Commission in Section 4928.144, Revised Code.

Duke did not demonstrate that the proposed charge, a charge designed to increase Duke’s (an EDU) compensation for Capacity Service, can be lawfully authorized by the Commission pursuant to Section 4928.143(B), Revised Code. That Section, and that Section alone, dictates how and when the Commission may authorize an EDU to obtain retail compensation for any competitive service.[[184]](#footnote-184)

Although Duke is seeking to increase its total compensation through a retail charge,[[185]](#footnote-185) Duke also did not demonstrate that the requested increase in compensation for Capacity Service can be authorized by the Commission in accordance with the requirements of Section 4928.143(C)(1), Revised Code. Duke admitted that it had not provided supporting testimony that the increase in its retail compensation would result in rates that would pass the ESP versus MRO test.[[186]](#footnote-186) In contrast, FES demonstrated that the increased retail charge for Capacity Service would result in an ESP that would fail the test.[[187]](#footnote-187) Because Duke has not and cannot satisfy its burden of proof to demonstrate that its increased retail charges satisfy the ESP versus MRO test, the Commission does not have authority to increase the compensation Duke is seeking.

 The Application’s proposal to defer, for future collection, the increase in compensation for Capacity Service is also unlawful. Any authority the Commission may have to allow Duke to defer and “phase-in” an increase in compensation for any competitive service that Duke supplies as a default provider is contained in Section 4928.144, Revised Code. That Section requires that the compensation which is eligible to be deferred for future collection or “phased-in” must be authorized pursuant to a proceeding under Sections 4928.141 through 4928.143, Revised Code. Since Duke is not seeking to increase its compensation for Capacity Service through an MRO or ESP, the Commission may not authorize the deferral Duke is seeking under Section 4928.144, Revised Code.[[188]](#footnote-188)

 In summary, the authority of the Commission to set the retail generation compensation of Duke is limited to setting the terms of the SSO. Duke has made no attempt to demonstrate that its Application complies with the requirements of Section 4928.143, Revised Code. That failure is fatal to Duke’s Application.

## The Commission may not lawfully or reasonably rely on the RAA to authorize Duke to collect higher compensation for Capacity Service through nonbypassable charges imposed on shopping and non-shopping customers

Duke’s Application asserts that the increase in compensation for Capacity Service can be authorized by the Commission pursuant to the terms of the RAA and the prevailing state compensation mechanism.[[189]](#footnote-189) This assertion is wrong. The RAA cannot extend the Commission’s statutory jurisdiction. Even if the Commission had authority to regulate Capacity Service pricing based on the RAA, Duke’s Application does not seek a state compensation mechanism that could be authorized under the terms of the RAA. Finally, the Commission does not have authority to determine what, if any, rights Duke may have under the RAA to collect higher compensation for Capacity Service from retail customers through nonbypassable charges.

Although the Commission noted in the *AEP-Ohio Capacity Case* that its assertion of jurisdiction was “consistent with the governing section of the RAA”,[[190]](#footnote-190) the RAA does not authorize the Commission to invent and apply a cost-based ratemaking methodology to compensate Duke for its FRR obligations. The section of the RAA relied upon by Duke (and the Commission in the *AEP-Ohio Capacity Case*) states only that a state compensation mechanism will prevail “where the state regulatory jurisdiction requires the switching customer or the LSE to compensate the FRR Entity for its FRR capacity obligations.”[[191]](#footnote-191) As noted above, the RAA does not state in any way that the Commission has authority to invent and apply a cost-based ratemaking methodology to increase Duke’s compensation for providing Capacity Service.

Even if the RAA contained terms that suggested that the Commission could authorize an increase in Duke’s compensation, the RAA could not expand the Commission’s jurisdiction to grant the relief sought by Duke. The Commission’s subject matter jurisdiction is set by statute.[[192]](#footnote-192) The RAA, however, is a contract among PJM members and is approved as a tariff by FERC.[[193]](#footnote-193) Thus, the RAA cannot extend the jurisdiction of the Commission.[[194]](#footnote-194)

 Additionally, the “charge” sought by Duke is not one authorized by the RAA. Section D.8 of Schedule 8.1 of the RAA sets out the compensation which an FRR Entity is entitled to receive from a CRES provider or switching customer in a state that provides for retail competition.[[195]](#footnote-195) The state compensation mechanism is defined as the compensation from the CRES provider or the switching customer—and no one else.

 Rather than a charge between it and the CRES provider or switching customer, Duke is seeking a nonbypassable charge, *i.e.,* a charge that it can collect from both shopping and non-shopping customers. Because this charge applies to all retail customers, it does not fall into the definition of the state compensation mechanism contained in the RAA—the charge “the state regulatory jurisdiction requires of *switching customers* or *the [alternative retail] LSE* to compensate the FRR entity.” Thus, 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.

Additionally, the Commission is without authority to “adjudicate controversies between parties as to contract rights.”[[196]](#footnote-196) The RAA is a contract among its members and is to be interpreted, construed, and governed by the state law of Delaware.[[197]](#footnote-197) As a result, the Commission is without jurisdiction to determine what, if any, rights Duke may have under the RAA. This is particularly true in this case since the RAA is subject to the exclusive jurisdiction of FERC: it is a FERC approved tariff.[[198]](#footnote-198)

The determination that RPM establishes a just and reasonable rate provides another ground for rejecting Duke’s Application.[[199]](#footnote-199) 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 Capacity Service supplied to PJM for the load served by CRES providers and winning SSO auction bidders at the RPM-Based Price. Under applicable federal and state law, Duke is required to demonstrate that its current compensation under these agreements is not in the public interest before it can secure compensation in excess of that provided by the agreements.[[200]](#footnote-200) Even though Duke claims it 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 Capacity Service through nonbypassable retail charges. Duke should not be permitted to do indirectly what it could not do directly. Thus, if the Commission could entertain Duke’s Application, the Application must be held to the standard of proof that requires Duke to demonstrate that its current compensation for Capacity Service is not in the public interest.

Duke has not attempted to make that demonstration. Duke’s Application and testimony claim only that Duke is entitled to a “cost-based charge”[[201]](#footnote-201) and that it will be operating at a loss unless the Commission approves an increase in compensation.[[202]](#footnote-202) These allegations fall short of the demonstration that RPM-Based Prices adversely affect the public interest that Duke must make to justify breaking its commitment to supply Capacity Service on the terms stated in the ESP Stipulation.

## Summary

 The Commission has no authority under Ohio law or the RAA to approve the increase in nonbypassable compensation or the delayed collection that Duke has proposed. If, as Duke assumes, the service is a wholesale service, the Commission has no jurisdiction to authorize an increase in the compensation for the service.

Further, as a result of changes effected by SB 3 and SB 221, whatever remaining authority the Commission has to set prices for retail generation service is limited to authorization of the terms of an SSO. Duke has not shown that the charge can be authorized under Section 4928.143(B), Revised Code, and even if it could, the resulting ESP would fail the ESP versus MRO test.

Even if generation Capacity Service was deemed noncompetitive, Duke has ignored the statutory requirements applicable to an increase in charges for a noncompetitive service.

Finally, the RAA cannot provide any independent basis for the Commission to approve Duke’s Application.

Because there is no legal basis for the Commission to authorize the increase in retail rates Duke is seeking, the Commission must deny the Application.

# Duke’s voluntary FRR election does not justify increased compensation

Apart from its meritless claims that it is not seeking to undermine the ESP Stipulation and that the Commission may approve its Application based on its general supervisory authority, Duke is also proposing a result that it claims is consistent with its status as an FRR Entity. Duke’s multi-step argument that it is entitled to additional compensation due to its FRR election, however, is nonsense.

According to Duke, its claim for increased revenue is justified because it provides Capacity Service as an FRR Entity. Asserting that Duke “was required to be an FRR entity” on entering PJM on January 1, 2012,[[203]](#footnote-203) Duke concludes that it “had a fixed, binding obligation to supply capacity for the Duke Energy Load Zone.”[[204]](#footnote-204) Duke then points to the RAA and the Commission’s decision in the *AEP-Ohio Capacity Case* as the basis for its claim that RPM-Based Prices for Capacity Service are insufficient to yield adequate compensation to Duke for the “unique service” it provides as an FRR Entity.[[205]](#footnote-205) Duke further argues that an FRR Entity has greater responsibilities to plan to satisfy load obligations than non-FRR entities.[[206]](#footnote-206) As a result, Duke asserts that the FRR responsibility is “similar to the traditional, pre-restructuring resource planning responsibility of vertically integrated utilities. Typically, utilities operating in such environments are entitled to recover their embedded cost of service.”[[207]](#footnote-207)

Duke’s starting point is that it was forced to make an FRR election, but that claim is misleading. The effect of transferring to PJM on January 1, 2012 without participating in the BRAs applicable through the 2014/2015 delivery year did require it to make an FRR Election, but Duke was in control of the timing of its transfer to PJM. “Duke had the option of staying in the Midwest ISO until June of 2015, and still participating in the RPM auctions held in 2012, 2013 and 2014 for delivery years 2015/16, 2016/17 and 2017/18 respectively. This would have allowed [Duke] to meet its capacity obligations entirely through the RPM auctions once it migrated to PJM. [Duke] did not pursue this option and instead voluntarily elected to become an FRR entity when it joined PJM in January 2012.”[[208]](#footnote-208)

Additionally, Duke agreed to be compensated for the provision of Capacity Service at RPM-Based Prices. Duke “had full knowledge of any risk associated with recovery of capacity revenue when it signed the ESP and PJM [*i.e*., BTR] Stipulations and chose to transition to PJM at the time and in the manner that [Duke] did.”[[209]](#footnote-209) In its FRR Plan application to FERC, it stated that it would be compensated under the RAA at the default RPM-Based Prices.[[210]](#footnote-210) It then waived the right to file an application at FERC for a cost-based capacity price as part of its BTR Stipulation. It subsequently agreed to the known RPM-Based Prices and the ESSC as compensation for Capacity Service supplied to PJM to serve the load of successful auction bidders and CRES providers in the ESP Stipulation.[[211]](#footnote-211)

Duke’s claim that it has special risks and responsibilities associated with being an FRR Entity is as unsupported as its claim that it was forced to assume those responsibilities. As Dr. Tabor demonstrated, the so-called risks of FRR status that Duke claims justify above-market compensation provide advantages to the FRR Entity. “Once contracted for, the amount and nature of the FRR entity’s obligations are known and the prices and quantities are fixed for the duration of the FRR period. While the FRR entity may see some risk with regard to its customer base and not have the annual flexibility that a capacity supplier in the RPM auctions may have, the FRR entity will not see the price swings that may occur in RPM auctions.”[[212]](#footnote-212) The lack of risk associated with price volatility was particularly true for Duke because Duke’s election to enter PJM in January 2012 came with a full understanding of the compensation it would receive when it elected in its FERC filings to charge RPM-Based Prices for Capacity Service.

Duke also overstates the “specialness” of its FRR obligations relative to those of LSEs subject to RPM. Under the RAA, the desired outcome from RPM and the FRR Alternative is to “ensure that adequate Capacity Resources … to provide reliable service to loads within the PJM Region,” and to do so “in a manner consistent with the development of a robust competitive market place.”[[213]](#footnote-213) To effect that outcome, non-FRR Entities, like FRR Entities, are subject to the PJM pooling requirements including a fixed reserve margin. [[214]](#footnote-214) They are under a similar duty to coordinate and cooperate under the RAA.[[215]](#footnote-215) As LSEs, they must deliver capacity resources that clear the auction or suffer performance penalties.[[216]](#footnote-216) Thus, the non-FRR Entity has similar performance obligations to the FRR Entity.

Moreover, contrary to Mr. Trent’s assertion, the *AEP-Ohio Capacity Case* did not clear a path for the approval of additional capacity compensation for Duke due to its FRR status. According to Mr. Trent, “Prior to this decision [*i.e*., the *AEP-Ohio Capacity Case*], the Commission had never before provided that the state compensation mechanism for determining the price of FRR Capacity Service was anything other than the RPM rate.”[[217]](#footnote-217) The Commission itself, however, has found that the *AEP-Ohio Capacity Case* is expressly limited to AEP-Ohio. In an Entry on Rehearing in the *AEP-Ohio Capacity Case*, the Commission stated, “The Commission initiated this proceeding solely to review AEP-Ohio’s capacity costs and determine an appropriate capacity charge for its FRR obligations.”[[218]](#footnote-218)

Additionally, the Commission set the level of compensation for Capacity Service in the *AEP-Ohio Capacity Case*, but left to *the AEP-Ohio ESP II Case* the determination of the mechanism to recover amounts that AEP-Ohio was authorized to defer. In this proceeding, Duke seeks to establish the level of compensation and the recovery mechanism outside an ESP proceeding in which the effects of the mechanism would be subject to the ESP versus MRO test. Once again, Duke is not asking the Commission to follow the process the Commission followed to establish AEP-Ohio’s compensation.[[219]](#footnote-219)

Additionally, Duke and AEP-Ohio are not similarly situated (even if Mr. Trent’s assertion that both are FRR Entities is assumed to be true.[[220]](#footnote-220)) Unlike AEP-Ohio, Duke agreed to the level of compensation it would receive for Capacity Service in a FERC proceeding and through its ESP Stipulation.[[221]](#footnote-221) Additionally, Duke, when it sought additional capacity compensation, had already secured approval to transfer its generation assets.[[222]](#footnote-222) Any injury the EDU was incurring because of the financial performance of its “legacy” generating assets could have been resolved: Duke, the EDU, can transfer or sell the assets or otherwise separate (as required by Ohio law) its competitive and noncompetitive business segments.[[223]](#footnote-223) Finally, Duke has no remaining generation responsibility for its default service customers; default generation service is secured through an auction. Thus, there are significant differences between Duke and AEP-Ohio.

Further, Duke seeks a result the Commission did not sanction in the *AEP-Ohio Capacity Case*. The *AEP-Ohio Capacity Case* addressed solely the compensation that AEP-Ohio should receive for capacity of the load served by CRES suppliers. As part of its opportunistic Application in this case, Duke asserts the much broader claim that all Capacity Service under its FRR Plan should be compensated through an invented cost-based ratemaking methodology. Also, AEP-Ohio did not seek to retroactively apply its invented cost-based formula to increase its compensation for Capacity Service it had previously provided. Duke, however, seeks to increase back to August 1, 2012 the compensation it receives for Capacity Service that wholesale and retail customers have already bought and paid for.

Finally, Duke’s claim that it has an entitlement to embedded cost recovery because it is an FRR Entity is based on an erroneous view of Ohio law. Retail electric generation service in Ohio has been declared competitive and is no longer subject to the cost-based regulatory regime applicable to noncompetitive electric services.[[224]](#footnote-224) Regardless of how Duke seeks to name and rename the Capacity Service it provides, the Commission is without legal authority to invent and apply a cost-based ratemaking methodology to increase Duke’s compensation for supplying Capacity Service.[[225]](#footnote-225)

Because Duke’s justification for its Application premised on the special obligations it has as an FRR Entity is groundless, it does not provide Duke or this Commission a basis to reopen the ESP Stipulation and increase Duke’s compensation for Capacity Service.

# Duke seeks transition revenue which the Commission is without authority to grant

Duke has previously recognized that “transition revenue” is the difference between the revenue that Duke has an opportunity to receive for the provision of generation-related service and the revenue collection opportunity provided by Ohio’s previously applicable traditional ratemaking methodology.[[226]](#footnote-226) Despite its protest otherwise, Duke is requesting that the Commission permit Duke to collect transition revenue or its equivalent through future nonbypassable charges. Ohio law and Duke’s ETP and RSP Stipulation, however, preclude the Commission from authorizing an electric utility to bill and collect transition revenue or its equivalent after the MDP.

## Duke’s Application asserts a claim for transition or equivalent revenue

In the Application, Duke requests Commission authority to collect transition revenue or its equivalent from retail consumers based on the calculation of the amount it cannot collect at market-based rates. Duke’s Application states that the proposed generation-related compensation increase is based on its “legacy” Ohio generation assets,[[227]](#footnote-227) the assets that Ohio law requires to be fully on their own in the competitive market. The Application further alleges that Duke “has committed owned legacy generation resources to fulfilling its obligation as an FRR entity.”[[228]](#footnote-228) It claims that Duke is recovering “only the [RPM-Based Price] in effect for the rest of the PJM region” and that the pricing structure “applies with regard to all retail load in [Duke’s] service territory.”[[229]](#footnote-229) The RPM-Based Price, Duke alleges, “is significantly less than [its] cost of providing capacity sufficient to meet its FRR obligations.”[[230]](#footnote-230) Duke then seeks to defer and collect the difference in revenue between the proposed “cost-based” compensation and the “significantly less” RPM-Based compensation as computed based on Duke’s “legacy” generating assets.[[231]](#footnote-231)

Duke’s testimony confirms that Duke is seeking above-market revenue based on the difference between the net cost of providing generation service from the legacy generating assets and the RPM-Based Prices for Capacity Resources it agreed to under the ESP Stipulation. Duke’s “rate” witness, Mr. Wathen, states that he attempted to replicate the calculation that the Commission used in the *AEP-Ohio Capacity Case* to produce a “cost-based” revenue requirement.[[232]](#footnote-232) He then subtracted from the revenue requirement the revenue Duke expects to earn from its legacy generation assets through energy and ancillary services. The result is the “net fixed cost of providing capacity service.”[[233]](#footnote-233) The balance of the “net fixed cost of providing capacity service” to be deferred and collected from customers then is reduced by the amounts Duke is recovering through the market-based capacity revenue it receives from PJM.[[234]](#footnote-234) Based on the descriptions provided by the Application and Mr. Wathen of the amounts Duke is seeking to collect if the Commission approves Duke’s Application, Duke will recover an amount in excess of what it collects through the market-based RPM-Based Price for capacity.

The difference in revenue that Duke seeks to collect in this case through a nonbypassable charge from all retail customers is transition revenue or its equivalent. As defined by statute, it is the amount in revenue “not otherwise recoverable in a competitive market.”[[235]](#footnote-235) As defined by Duke in its *ETP Case*, it is “the difference between the revenue requirements a utility would have under regulation and the revenues it likely will receive in a competitive market”[[236]](#footnote-236)

## Ohio law precludes Duke from billing and collecting and the Commission from authorizing transition revenue after the conclusion of the MDP

Ohio law precludes the Commission from authorizing additional transition revenue. “With the termination of the approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenue or any equivalent revenues by an electric utility except as expressly authorized in section 4928.31 to 4928.40 of the Revised Code.”[[237]](#footnote-237) Further, “[a] standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility’s rate plan.”[[238]](#footnote-238)

Under Duke’s ETP, the MDP ended for nonresidential customers on December 31, 2004. For residential customers, the MDP ended on December 31, 2005.[[239]](#footnote-239) Thus, the Commission is without statutory authority to consider or approve Duke’s Application and the request for transition revenue contained in it.

## Duke’s Application requests relief precluded by its Commission-approved ETP and RSP Stipulations

Additionally, the presentation of a transition or equivalent revenue claim in Duke’s Application and any action by the Commission that would grant such claim would violate the terms of the Commission-approved ETP and RSP Stipulations. The ETP Stipulation resolved issues arising from the mandatory application CG&E made following the passage of SB 3. In the ETP Stipulation, CG&E gave up any claim to a generation transition charge. The RSP Stipulation did not alter or amend CG&E’s agreement to forego a generation transition charge.

In violation of its commitment in the ETP and RSP Stipulations, Duke, CG&E’s successor, seeks in this Application to recover transition or equivalent revenue of $257 million annually. To prevent a violation of the ETP and RSP Stipulations, the Commission must hold Duke to the bargain CG&E made with its customers and that the Commission approved as being in the public interest.

# Duke’s Application seeks an unlawful subsidy and violates corporate separation requirements

As discussed above, it is the policy of the State to rely upon competition to discipline generation-related electricity prices in Ohio. To that end, the Commission “shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.”[[240]](#footnote-240) As provided by Section 4928.02(H), Revised Code, it is the State’s policy to:

Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

Because state policy precludes anticompetitive subsidies and prohibits the recovery of generation-related costs through distribution or transmission rates, the Commission previously refused to authorize nonbypassable charges to collect embedded generation-related costs. In AEP-Ohio’s *Sporn* *Case*, the Commission held that Section 4928.02(H), Revised Code, “requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. [AEP-Ohio] seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the [requested charge]. Approval of such a charge would effectively allow the Company to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of the statute.”[[241]](#footnote-241)

Duke’s Application presents a similar violation of state policy because it seeks a determination that Duke is entitled to increase its compensation for Capacity Service above a market-based amount and to impose the burden of this higher amount on distribution service customers through nonbypassable charges. Because all retail customers will be required to pay the charge to fund the higher level of compensation for Capacity Service, Duke’s competitive generation business will effectively receive a preference and subsidy from its distribution customers in violation of the requirements of Section 4928.02(H), Revised Code. The preference and subsidy work to unlawfully insulate Duke’s generation business from the market discipline that the General Assembly inserted to displace the dysfunction of traditional cost-based economic regulation.

Because approval of the Application will produce an unlawful subsidy, it will also result in a violation of Section 4928.17, Revised Code. Under that Section, “no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service … unless the utility implements and operates under a corporate separation plan that … is consistent with the policy specified in section 4928.02 of the Revised Code.” Further, the plan must satisfy the public interest and be “sufficient to ensure that the utility will not extend any undue preference or advantage to … part of its own business engaged in the business of supplying the competitive retail electric service.”[[242]](#footnote-242) By providing its “legacy” generation assets with a subsidy, Duke’s proposal violates these requirements for corporate separation.

Duke compounds the violation of Section 4928.17, Revised Code, by proposing to “flow through” the increased revenue to an affiliate once Duke completes the transfer of its legacy generating assets.[[243]](#footnote-243) The flow through of revenue from the nonbypassable charge from Duke to a competitive affiliate would insulate the affiliate from competition and continue the violation of Section 4928.17, Revised Code.[[244]](#footnote-244)

As part of its case, Duke asserts that its proposed increase in compensation will not adversely affect competition,[[245]](#footnote-245) but Duke has not addressed the potential harm to competition caused by its Application.[[246]](#footnote-246) The effect of the subsidies to Duke’s generation business will distort the competitive environment in favor of Duke and its affiliates.[[247]](#footnote-247) Because Duke cannot lawfully secure above-market compensation for its competitive generation assets or flow through that compensation to its affiliate through the proposed nonbypassable charge, the Commission must deny the Application.

# The Commission may not grant Duke authority to retroactively increase its compensation for Capacity Service in violation of law or approve a deferral supporting the retroactive rate increase

Duke’s Application requests that the Commission authorize accounting modifications that would allow it to defer, as of August 1, 2012, an amount of revenue calculated as the difference between RPM-Based Prices and its alleged “cost” of Capacity Service multiplied by its load.[[248]](#footnote-248) Duke’s Application also requests authority to implement a new rider, Rider DR-CO, to collect the revenue it has requested the authority to defer. Because the Commission is prohibited from authorizing a rate increase for Capacity Service already bought and paid for and because the Commission cannot authorize the accounting changes supporting the deferral of revenue that Duke requests, the Commission must reject Duke’s proposal.

 Ohio law requires the Commission to establish rates on a prospective basis.[[249]](#footnote-249) As the Supreme Court of Ohio recently held, neither its precedent nor Title 49, Revised Code, allows the Commission to engage in retroactive ratemaking.[[250]](#footnote-250)

 Approval of Duke’s Application would result in unlawful retroactive ratemaking. Duke requests the Commission set its prospective rates in Rider DR-CO at a level intended to permit Duke to recover its requested revenue increase effective August 1, 2012.[[251]](#footnote-251) Duke thus is clearly seeking to benefit from an increase in compensation that reaches backwards and would increase the cost of Capacity Service that it has already provided.

The only difference between Duke’s proposal in this case and what the Court held unlawful in AEP-Ohio’s initial ESP proceeding is that Duke requests that the Commission first authorize accounting changes to permit it defer the increase in compensation before establishing rates intended to provide Duke with its retroactive rate increase. Duke’s request attempts to avoid the prohibition on retroactive ratemaking by superficially requesting that the Commission defer today, for collection tomorrow, what the Commission unequivocally could not authorize today. Accordingly, Duke’s request must be rejected.

 Furthermore, Duke’s attempt to bypass the prohibition of retroactive ratemaking hinges on the Commission’s ability to authorize the accounting changes. Duke’s Application asserts that the Commission may authorize the accounting changes based on Section 4905.13,[[252]](#footnote-252) Revised Code, but this assertion is wrong.

 Duke’s functionally or structurally separated generation business is, by operation of Ohio law, fully on its own in the competitive market,[[253]](#footnote-253) and the regulatory authority to authorize the deferral accounting peculiar to regulated businesses is not available to Duke for the competitive generation business segment. Since the start of competitive retail electric service in Ohio, competitive electric service has been exempted from the Commission’s supervisory and regulatory authority with narrow exceptions.[[254]](#footnote-254) The Commission’s authority over a public utility’s accounts in Section 4905.13, Revised Code, as it relates to competitive electric services, is not one of those exceptions.[[255]](#footnote-255)

 Further, the accounting authority sought by Duke’s Application violates applicable accounting standards. According to the applicable accounting requirements, the deferral and creation of a regulatory asset must be conditioned on a showing that recovery of the regulatory asset is probable because of regulatory action allowing future cost recovery.[[256]](#footnote-256) In November 2011, however, Duke ended regulatory accounting for its generation business segment because of changes caused by the Commission’s approval of the ESP Stipulation.[[257]](#footnote-257) Thus, under Generally Accepted Accounting Principles (“GAAP”), Duke cannot use regulatory accounting for its competitive generation function.

 Duke, nonetheless, asserts that it may return its generation business to regulatory accounting if the Commission approves its Application and authorizes it to defer, for future recovery, collection of the significant increase in compensation for Capacity Service.[[258]](#footnote-258) Duke’s accounting witness, however, also testified that GAAP recognized that the authority to enter into deferral accounting must be based on a lawful order.[[259]](#footnote-259) In this instance, as noted above, the Commission has no authority to approve the requested accounting authority under Section 4905.13, Revised Code.

 In sum, Duke’s Application would have the Commission retroactively authorize Duke’s requested rate increase effective August 1, 2012. Ratemaking, however, is prospective only. Although Duke attempts to bypass the longstanding prohibition on retroactive ratemaking by introducing the intermediary accounting step (the creation of a regulatory asset), the substance of Duke’s Application works to retroactively increase compensation for service already bought and paid for. Finally, the accounting authority Duke requests is unavailable for competitive retail electric services, such as generation service.

# Conclusion

 Duke’s opportunistic Application has no legitimate legal basis in law or fact. The ESP Stipulation resolved Duke’s compensation for Capacity Service; Duke should be held to its bargain. Further, the Commission lacks the authority to increase Duke’s compensation outside the confines of a traditional rate case or SSO proceeding, but Duke’s Application has not satisfied the requirements of either. Duke’s Application also cannot be approved to provide Duke with transition revenue or unlawful subsidies of its generation business. Finally, the Commission cannot retroactively increase Duke’s compensation. In short, the Application seeks an unlawful and unreasonable result, and the Commission should deny it.

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**Certificate Of Service**

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1. Application of Duke Energy Ohio, Inc. (Aug. 29, 2012) (“Application” or “Duke Ex. 1” as appropriate). [↑](#footnote-ref-1)
2. The RAA is an agreement among load serving entities (“LSE”) in the PJM region that is designed to ensure that adequate capacity resources will be planned and made available to provide reliable service to loads within the PJM region. Under the RAA, the FRR Alternative permits an LSE such as Duke to submit an FRR capacity plan to satisfy the shared responsibility of all LSEs to commit capacity resources and as an alternative to the requirement to participate in the periodic competitive bidding process (“CBP”) or auctions. An LSE that elects the FRR Alternative is an FRR Entity. Industrial Energy Users-Ohio (“IEU-Ohio”) Ex. 9, *passim*. [↑](#footnote-ref-2)
3. *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. [↑](#footnote-ref-3)
4. *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 §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO*, et al.* [↑](#footnote-ref-4)
5. Duke Ex. 1 at 3. [↑](#footnote-ref-5)
6. *Id*. at 1. Duke relies primarily on Sections 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18, Revised Code, to support its Application. It relegates reliance on Section 4905.22, Revised Code, to a footnote. Duke Ex. 1 at 6 n.18. [↑](#footnote-ref-6)
7. *Id*. at 2. [↑](#footnote-ref-7)
8. *Id*. at 7 & 8. [↑](#footnote-ref-8)
9. *Id*. at 8. [↑](#footnote-ref-9)
10. *Id*. at 2, 4-5 & 8. [↑](#footnote-ref-10)
11. *Id*. at 10. [↑](#footnote-ref-11)
12. *Id*. at 9 and Attachment D. [↑](#footnote-ref-12)
13. *Id*. at 9. [↑](#footnote-ref-13)
14. *Id*. [↑](#footnote-ref-14)
15. *Id*. [↑](#footnote-ref-15)
16. *Id*. at 10. Duke does not explain what the “attributable” amount might be. [↑](#footnote-ref-16)
17. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al*., Opinion and Order (Nov. 22, 2011). [↑](#footnote-ref-17)
18. In its Initial Comments, IEU-Ohio also stated that the Commission could not authorize an increase in Duke’s compensation under the Commission’s emergency authority. IEU-Ohio Ex. 17 at 38-40. Duke agrees. Duke Ex. 29 at 30-31. [↑](#footnote-ref-18)
19. *See, e.g.,* Section 4928.12, Revised Code. [↑](#footnote-ref-19)
20. FirstEnergy Solutions Corp. (“FES”) Ex. 16 at 6. [↑](#footnote-ref-20)
21. FES Ex. 2 at 7. [↑](#footnote-ref-21)
22. Monitoring Analytics, Capacity in the PJM Market at 4 (Aug. 20, 2012) (available at http://pjm.com/documents/~/media/documents/reports/20120820-imm-and-pjm-capacity-whitepapers.ashx). [↑](#footnote-ref-22)
23. FES Ex. 16 at 6. [↑](#footnote-ref-23)
24. IEU-Ohio Ex. 9 at 23; FES Ex. 2 at 8. [↑](#footnote-ref-24)
25. IEU-Ohio Ex. 9 at 85. [↑](#footnote-ref-25)
26. *Id*. at 6. [↑](#footnote-ref-26)
27. FES Ex. 2 at 8. [↑](#footnote-ref-27)
28. *Id*. at 8-9. [↑](#footnote-ref-28)
29. *Id.* [↑](#footnote-ref-29)
30. FES Ex. 16 at 8. [↑](#footnote-ref-30)
31. *Id*. at 7. [↑](#footnote-ref-31)
32. *Id.* at 10. [↑](#footnote-ref-32)
33. IEU-Ohio Ex. 9 at 10. [↑](#footnote-ref-33)
34. FES Ex. 2 at 10. [↑](#footnote-ref-34)
35. FES Ex. 16 at 9. A limited exception exists if an LSE within the distribution area also qualifies to be an FRR Entity such as a transmission-dependent municipal utility or cooperative. *Id*. at 9 n.3. [↑](#footnote-ref-35)
36. FES Ex. 2at 8-9. [↑](#footnote-ref-36)
37. FES Ex. 16 at 11. [↑](#footnote-ref-37)
38. *Id*. at 11-12. [↑](#footnote-ref-38)
39. *Id*. at 12 & 15. [↑](#footnote-ref-39)
40. *Id*. at 12. [↑](#footnote-ref-40)
41. FES Ex. 2 at 9. During the periods relevant to this proceeding, the BRA price was $16.46/Megawatt-day (“MW-day”) for the 2012/2013 PJM delivery year, $27.73/MW-day for the 2013/2014 PJM delivery year, and $125.99/MW-day for the 2014/2015 PJM delivery year. Ohio Energy Group (“OEG”) Ex. 5. [↑](#footnote-ref-41)
42. FES Ex. 2 at 15. [↑](#footnote-ref-42)
43. IEU-Ohio Ex. 9 at 23. [↑](#footnote-ref-43)
44. Tr. Vol. II at 463. [↑](#footnote-ref-44)
45. Tr. Vol. II at 468-69. [↑](#footnote-ref-45)
46. FES Ex. 16 at 21. [↑](#footnote-ref-46)
47. FES Ex. 2 at 18. [↑](#footnote-ref-47)
48. IEU-Ohio Ex. 9 at 122. The Alternative LSE must make the election to participate in the RPM process and is responsible for a portion of the FRR Entity’s capacity obligation three years in advance of the PJM delivery year. *Id*. [↑](#footnote-ref-48)
49. *Id.* [↑](#footnote-ref-49)
50. *Id.* Schedule 8.1, Section D.8, of the RAA provides:

In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity’s cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA. [↑](#footnote-ref-50)
51. *Id*. [↑](#footnote-ref-51)
52. *Id*. [↑](#footnote-ref-52)
53. *Id*. [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. Sections 4928.03 & 4928.05(A), Revised Code. [↑](#footnote-ref-55)
56. Section 4928.03, Revised Code. [↑](#footnote-ref-56)
57. Former Section 4928.14(A), Revised Code. Amended Substitute Senate Bill 221 ("SB 221") repealed and replaced the former Section 4928.14(A), Revised Code, which was enacted by SB 3. SB 3, which contains the former Section 4928.14(A), Revised Code, is available at the following link: http://www.legislature.state.oh.us/BillText123/123\_SB\_3\_10\_N.htm. [↑](#footnote-ref-57)
58. Section 4928.141, Revised Code. [↑](#footnote-ref-58)
59. Section 4928.12, Revised Code. [↑](#footnote-ref-59)
60. Section 4928.17, Revised Code. This requirement became effective on January 1, 2001, the start date of competitive retail electric service. The Commission may approve functional separation for an interim period if the Commission finds that such alternative plan will provide for ongoing compliance with the policy specified in Section 4928.02, Revised Code. *Id.* [↑](#footnote-ref-60)
61. Section 4928.40, Revised Code. [↑](#footnote-ref-61)
62. *Id.* [↑](#footnote-ref-62)
63. *Id*. [↑](#footnote-ref-63)
64. The total bundled price for each electric rate schedule established the total rate cap, which was then divided among the functional components (generation, transmission, and distribution). Ohio provided, in Section 4928.34(A)(6), Revised Code, that such rate cap was subject to adjustment for changes in taxes, costs related to the establishment of a universal service fund (“USF”), and a temporary rider established by Section 4928.61, Revised Code. Thus, the rate cap was not an absolute cap on the total charges paid by customers during the MDP. [↑](#footnote-ref-64)
65. Section 4928.40, Revised Code. [↑](#footnote-ref-65)
66. *Id.* [↑](#footnote-ref-66)
67. Section 4928.39, Revised Code. [↑](#footnote-ref-67)
68. *Id*. [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. Section 4928.37(A), Revised Code. [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. Section 4928.39(D), Revised Code. [↑](#footnote-ref-72)
73. Section 4928.40(A), Revised Code. [↑](#footnote-ref-73)
74. *Id*. [↑](#footnote-ref-74)
75. *Id*. [↑](#footnote-ref-75)
76. Section 4928.31(A)(5), Revised Code. [↑](#footnote-ref-76)
77. Section 4928.31(A), Revised Code. [↑](#footnote-ref-77)
78. IEU-Ohio Exs. 12 & 19. [↑](#footnote-ref-78)
79. *Id., passim.* The summary of the calculation of transition costs is drawn from IEU-Ohio Exhibits 12 and 19. [↑](#footnote-ref-79)
80. Section 4928.38, Revised Code. [↑](#footnote-ref-80)
81. *Id*. [↑](#footnote-ref-81)
82. *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan*, Case Nos. 99-1658-EL-ETP, *et al*., Transition Plan of The Cincinnati Gas & Electric Company (Dec. 29, 1999) (“*CG&E* *ETP Case*”). [↑](#footnote-ref-82)
83. IEU-Ohio Ex. 12 at 10. [↑](#footnote-ref-83)
84. *Id.* at 19; Tr. Vol. VI at 1385. [↑](#footnote-ref-84)
85. IEU-Ohio Ex. 12 at 19. [↑](#footnote-ref-85)
86. *Id.* at 20. [↑](#footnote-ref-86)
87. *CG&E ETP Case*, Opinion and Order at 23 (Aug. 31, 2000). [↑](#footnote-ref-87)
88. IEU-Ohio Ex. 13 at 6. [↑](#footnote-ref-88)
89. *CG&E ETP Case*, Opinion and Order at 23. [↑](#footnote-ref-89)
90. *Id.* [↑](#footnote-ref-90)
91. *Id.* at 28. [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, *et al*., Opinion and Order at 5 (Sept. 29, 2004) (“*RSP Case*”). [↑](#footnote-ref-93)
94. IEU-Ohio Ex. 14 at 20. [↑](#footnote-ref-94)
95. *RSP Case*, Opinion and Order at 22-23. [↑](#footnote-ref-95)
96. FES Ex. 4. Duke noted additional “strategic benefits” of its move to PJM. *Id*. & Duke Ex. 36 at 24-25. [↑](#footnote-ref-96)
97. FES Ex. 6. [↑](#footnote-ref-97)
98. FES Ex. 4. [↑](#footnote-ref-98)
99. FES Ex. 5. [↑](#footnote-ref-99)
100. FES Ex. 6. [↑](#footnote-ref-100)
101. FES Ex. 2 at 12. [↑](#footnote-ref-101)
102. FES Ex*. 2* at 12. [↑](#footnote-ref-102)
103. FES Ex. 7 at 12-13. [↑](#footnote-ref-103)
104. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs,* Case Nos. 11-2641-EL-RDR, *et al.,* (Apr. 26, 2011) (“*BTR Case*”) [↑](#footnote-ref-104)
105. *Id*., Stipulation and Recommendation at ¶20 (Apr. 26, 2011). [↑](#footnote-ref-105)
106. *Id*., Opinion and Order at 14-16 (May 25, 2011). [↑](#footnote-ref-106)
107. The Kroger Company (“Kroger”) Ex. 5 at 26-28. [↑](#footnote-ref-107)
108. *Id*. at 26-27. [↑](#footnote-ref-108)
109. *Id*. at 7. [↑](#footnote-ref-109)
110. FES Ex. 23 at 3-4. [↑](#footnote-ref-110)
111. IEU-Ohio Ex. 5 at 7-12 & 25-28. [↑](#footnote-ref-111)
112. *Id*. at 15-16. [↑](#footnote-ref-112)
113. IEU-Ohio Ex. 6 at 14. [↑](#footnote-ref-113)
114. Tr. Vol. II at 253; IEU-Ohio Ex. 6 at 14. [↑](#footnote-ref-114)
115. FES Ex. 22 at 18-19 (emphasis added). [↑](#footnote-ref-115)
116. Duke Ex. 29 at 4. [↑](#footnote-ref-116)
117. Tr. Vol. I at 221; Tr. Vol. II at 327-28. [↑](#footnote-ref-117)
118. *American Electric Power Service Corporation*, FERC Docket No. ER11-2183-000. [↑](#footnote-ref-118)
119. *AEP-Ohio Capacity Case,* Entry (Dec. 8, 2010).Duke Energy Commercial Asset Management, Inc. (“DECAM”) intervened in the AEP-Ohio case. [↑](#footnote-ref-119)
120. Tr. Vol. II at 310. [↑](#footnote-ref-120)
121. IEU-Ohio Ex. 5 at 7 & 12. [↑](#footnote-ref-121)
122. IEU-Ohio Ex. 5 at 4. [↑](#footnote-ref-122)
123. Tr. Vol. I at 218; Tr. Vol. II at 505. [↑](#footnote-ref-123)
124. Tr. Vol. I at 218; Tr. Vol. IV at 953. [↑](#footnote-ref-124)
125. Tr. Vol. I at 100-01. [↑](#footnote-ref-125)
126. As it did in its Comments, IEU-Ohio also incorporates, as if fully stated herein, the grounds for dismissing the Application set out in the Joint Motion to Dismiss. Joint Motion to Dismiss By Signatory Parties, Memorandum in Support of Joint Motion to Dismiss By Signatory Parties (Oct. 4, 2012). Due to the substantial additional record supporting the Joint Motion’s argument that the ESP Stipulation bars the relief sought by Duke, that portion of the motion is addressed more fully herein. [↑](#footnote-ref-126)
127. IEU-Ohio Ex. 5 at 41. [↑](#footnote-ref-127)
128. *Id*. [↑](#footnote-ref-128)
129. *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Energy Efficiency and Peak-Demand Reduction Programs and Portfolio Planning*, Case No. 09-1999-EL-FOR, Opinion and Order at 15 (Dec. 15, 2010); *id*., Entry on Rehearing at ¶9 (Feb. 9, 2011). [↑](#footnote-ref-129)
130. IEU-Ohio Ex. 5 at 3. [↑](#footnote-ref-130)
131. *Id*. at 2. [↑](#footnote-ref-131)
132. Duke Ex. 29 at 4. [↑](#footnote-ref-132)
133. Duke Ex. 2 at 11 (emphasis added). [↑](#footnote-ref-133)
134. FES Ex. 3 at 5-10; Kroger Ex. 1 at 5-14; OEG Ex. 1 at 11-19. [↑](#footnote-ref-134)
135. Duke Ex. 1 at 3. [↑](#footnote-ref-135)
136. *Id*., *passim*. [↑](#footnote-ref-136)
137. *Id.* at 3 & 6. [↑](#footnote-ref-137)
138. *Id*. at 3. [↑](#footnote-ref-138)
139. Tr. Vol. I at 121; Tr. Vol. III at 612-13. [↑](#footnote-ref-139)
140. *See, e.g.,* *id.* at 1, 2, 4, 5, 6 & n.18. [↑](#footnote-ref-140)
141. “As used in this chapter, ‘public utility’ includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit ... .” Section 4905.02(A), Revised Code. [↑](#footnote-ref-141)
142. Section 4905.03, Revised Code, setting out the definitions of public utility, provides that the definition of a public utility includes “[a]n electric light company, *when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state*, including supplying electric transmission service for electricity delivered *to consumers* in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.” Section 4905.03(C), Revised Code (emphasis added). [↑](#footnote-ref-142)
143. As discussed in further detail below, the scope of Section 4909.18, Revised Code, is further narrowed to noncompetitive retail electric services by Section 4928.05(A), Revised Code. [↑](#footnote-ref-143)
144. FES Ex.8 at 8. [↑](#footnote-ref-144)
145. *Id.* at 9 (emphasis added). [↑](#footnote-ref-145)
146. “‘Retail electric service’ means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following 'service components': generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.” Section 4928.01(A)(27), Revised Code.

“Competitive retail electric service” means a component of retail electric service that is competitive as provided under division (B) of Section 4928.01, Revised Code. [↑](#footnote-ref-146)
147. Section 4928.01(A)(27), Revised Code (emphasis added). [↑](#footnote-ref-147)
148. Section 4928.05(A)(1), Revised Code, provides:

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission’s authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission’s authority under sections 4928.141 to 4928.144 of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code. [↑](#footnote-ref-148)
149. The definition of “retail electric service” (in combination with the balance of Chapter 4928) also makes it clear that a service component or function is either competitive or noncompetitive. Because noncompetitive service components are defined to be everything except competitive service components or functions, a service component must be either competitive or noncompetitive. [↑](#footnote-ref-149)
150. Although Section 4928.05(A)(1), Revised Code, allows the Commission to supervise a competitive retail electric service under Section 4905.06, Revised Code, that authority is limited to supervising “the adequacy or accommodation afforded by [the] service, the safety and security of the public and [the utility’s] employees, and [the utility’s] compliance with all laws, orders of the commission, franchises, and charter requirements.” Section 4905.06, Revised Code, does not provide any authority to the Commission to approve Duke’s Application to increase its compensation for Capacity Service. [↑](#footnote-ref-150)
151. Section 4928.142, Revised Code, provides for the introduction of market-based prices through the use of a CBP to set the price of the SSO. Section 4928.143, Revised Code, requires that the resulting ESP be more favorable in the aggregate than the market rate offer (“MRO”). Thus, in each case, the SSO is market-based or tested. [↑](#footnote-ref-151)
152. *Columbus S. Power Co. v. Pub. Util. Comm’n of Ohio,* 67 Ohio St.3d 535, 620 N.E.2d 835, 840 (1993). In this case, the Ohio Supreme Court had to address whether the Commission could use its seemingly broad grant of authority contained in Section 4901.02, Revised Code (“The commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters …”) to promulgate an order that conflicted with other ratemaking statutes. The Court held:

The comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike. *Dayton Power & Light Co. v. Pub. Util. Comm., supra,* 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733. We cannot conclude that it was the General Assembly’s intent under the above enabling statute, R.C. 4901.02(A), to permit the PUCO to disregard *that very formula* in instances in which it simply did not agree with the result. Cf. *Consumers’ Counsel, supra,* 67 Ohio St.3d at 165, 21 O.O.3d at 104, 423 N.E.2d at 828 (“the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the PUCO may effortlessly abrogate that very formula”).

620 N.E.2d at 840. [↑](#footnote-ref-152)
153. FES Ex. 8 at 8. [↑](#footnote-ref-153)
154. Duke Ex. 1 at 4 & 5. [↑](#footnote-ref-154)
155. *Id*. at 5 n.13 & 6 n.14. [↑](#footnote-ref-155)
156. *Id*. at 5. [↑](#footnote-ref-156)
157. See discussion below on the procedural requirements applicable to an application to increase rates. [↑](#footnote-ref-157)
158. Duke Ex. 1 at 6. In the context of a transition plan, the Commission was required to conduct an evidentiary hearing when it reviewed an application for the creation and amortization of additional regulatory assets. Section 4928.40, Revised Code. Because Duke is seeking transition revenue, a complete and public review of Duke’s request is appropriate in this instance as well. [↑](#footnote-ref-158)
159. Duke’s SSO tariff includes a Retail Capacity Rider that is calculated based on the wholesale Final Zonal Capacity Price associated with the annual auctions conducted by PJM. The tariff rate is established for three periods coinciding with the PJM delivery years. Duke Energy Ohio, Tariff Sheet 111 at 1 (viewed at: http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Duke%20Energy%20Ohio/PUCO%2019%20Retail%20Electric%20Service.pdf). [↑](#footnote-ref-159)
160. Duke Ex. 1 at 4 & 8. [↑](#footnote-ref-160)
161. *Id*. at 5. [↑](#footnote-ref-161)
162. Tr. Vol. II at 353. [↑](#footnote-ref-162)
163. IEU-Ohio Ex. 5 at 7 & 12. [↑](#footnote-ref-163)
164. If Duke is correct that there is no current state compensation mechanism, then the RAA directs that it may file an application with FERC under Section 205 of the FPA. IEU-Ohio Ex. 9 at 122. [↑](#footnote-ref-164)
165. Tr. Vol. II at 353-54. [↑](#footnote-ref-165)
166. Tr. Vol. II at 355. [↑](#footnote-ref-166)
167. Tr. Vol. II at 357 (emphasis added). [↑](#footnote-ref-167)
168. Section 4909.18, Revised Code. [↑](#footnote-ref-168)
169. Section 4909.18(E), Revised Code. [↑](#footnote-ref-169)
170. Rule 4901-7-01, Ohio Administrative Code, provides:

All applications for an increase in rates filed under section 4909.18 of the Revised Code, all complaints filed under section 4909.34 of the Revised Code, and all petitions filed by a public utility under section 4909.35 of the Revised Code shall conform to the standard filing requirements, set forth in appendix A to this rule. The commission may, upon timely motion, waive specific provisions of the standard filing requirements, but such waivers must be obtained prior to the time that application, complaint, or petition is filed with the commission. In the absence of such a waiver, the commission may reject any filing which fails to comply with the requirements of this rule. [↑](#footnote-ref-170)
171. Section 4909.19(C), Revised Code. [↑](#footnote-ref-171)
172. *Id*. [↑](#footnote-ref-172)
173. Mr. Wathen conceded that Duke’s application does not comply with the standard filing requirements. Tr. Vol. VI at 1398. [↑](#footnote-ref-173)
174. Duke Ex. 1, Attachment B; Duke Ex. 12. [↑](#footnote-ref-174)
175. Tr. Vol. VI at 1399. [↑](#footnote-ref-175)
176. Tr. Vol. VI at 1399. [↑](#footnote-ref-176)
177. Tr. Vol. VI at 1400. [↑](#footnote-ref-177)
178. Tr. Vol. VI at 1400. [↑](#footnote-ref-178)
179. Tr. Vol. VI at 1400. [↑](#footnote-ref-179)
180. Tr. Vol. VI at 1400-01. [↑](#footnote-ref-180)
181. Section 4928.05(A), Revised Code. [↑](#footnote-ref-181)
182. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519 (2011). [↑](#footnote-ref-182)
183. *AEP-Ohio ESP II Case,* Opinion and Order at 49 (“If, and when, AEP-Ohio seeks recovery under the [Pool Termination Rider], it will maintain the burden set forth in Section 4928.143, Revised Code.”) [↑](#footnote-ref-183)
184. *In re Columbus S. Power Co*, 128 Ohio St.3d at 519-20. [↑](#footnote-ref-184)
185. Tr. Vol. II at 353-55. [↑](#footnote-ref-185)
186. Tr. Vol. VI at 1401-02. [↑](#footnote-ref-186)
187. FES Ex. 1 at 25-34. [↑](#footnote-ref-187)
188. Duke agrees that Section 4928.144, Revised Code, does not apply. Duke Ex. 1 at 30; Tr. Vol. V at 1201. However, Duke claims that it may secure the necessary accounting authority under Section 4905.13, Revised Code. As discussed below, the accounting authority that Duke is seeking under Section 4905.13, Revised Code, also is unlawful. [↑](#footnote-ref-188)
189. Duke Ex. 1 at 10. [↑](#footnote-ref-189)
190. *AEP-Ohio Capacity Case,* Opinion and Order at 13. [↑](#footnote-ref-190)
191. IEU-Ohio Ex. 9 at 122. [↑](#footnote-ref-191)
192. *City of Washington v. Pub. Util.Comm’n of Ohio*, 99 Ohio St. 70, 72 (1918); *see, also, Federal Deposit Insurance Corp. v. Board of Finance and Revenue*, 84 A.2d 495, 499 (Pa. Sup. Ct. 1951) (an agency cannot confer jurisdiction on itself). [↑](#footnote-ref-192)
193. *PJM Interconnection, L.L.C.,* 115 FERC ¶ 61,079 (2006) (finding preexisting pricing model to be unjust and unreasonable); *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331 (2006) (approving, with conditions, the RPM); *PJM Interconnection, L.L.C.,* 119 FERC ¶ 61,318 (2007) (clarifying nature and extent of order approving the RPM). [↑](#footnote-ref-193)
194. *Fox v. Eaton Corp*., 48 Ohio St.2d 236, 238 (1976); *In re Kerry Ford, Inc*., 106 Ohio App.3d 643, 651 (10th Dist. Ct. App. 1995). [↑](#footnote-ref-194)
195. IEU-Ohio Ex. 9 at 122. [↑](#footnote-ref-195)
196. *New Bremen v. Pub. Util. Comm’n of Ohio*, 103 Ohio St. 23, 30-31 (1921). [↑](#footnote-ref-196)
197. IEU-Ohio Ex. 9 at 71. [↑](#footnote-ref-197)
198. *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331 (2006). [↑](#footnote-ref-198)
199. FES Ex. 15. [↑](#footnote-ref-199)
200. *Federal Power Comm’n 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-200)
201. Duke Ex. 1 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-201)
202. *See, e.g.,* Duke Ex. 1 at 8-9. [↑](#footnote-ref-202)
203. Duke Ex. 2 at 7. [↑](#footnote-ref-203)
204. *Id*. at 8. [↑](#footnote-ref-204)
205. *Id*. at 10. [↑](#footnote-ref-205)
206. Duke Ex. 3 at 11-13. [↑](#footnote-ref-206)
207. *Id*. at 12-13. [↑](#footnote-ref-207)
208. FES Ex. 2 at 12. [↑](#footnote-ref-208)
209. *Id*. at 29. [↑](#footnote-ref-209)
210. FES Ex. 7 at 12-13. [↑](#footnote-ref-210)
211. IEU-Ohio Ex. 5 at 7 & 12; Tr. Vol. II at 505. [↑](#footnote-ref-211)
212. FES Ex. 2 at 29. [↑](#footnote-ref-212)
213. IEU-Ohio Ex. 9 at 23. [↑](#footnote-ref-213)
214. Tr. Vol. III at 616-17. [↑](#footnote-ref-214)
215. Tr. Vol. III at 618. [↑](#footnote-ref-215)
216. Tr. Vol. III at 619. [↑](#footnote-ref-216)
217. Duke Ex. 2 at 10. [↑](#footnote-ref-217)
218. *AEP-Ohio Capacity Case*, Entry on Rehearing at 32 (Oct. 17, 2012). [↑](#footnote-ref-218)
219. IEU-Ohio does not support either the process or results of the AEP-Ohio cases on which Duke relies. The lawfulness of the Commission’s decision to afford AEP-Ohio additional compensation remains unsettled, as both cases presently on appeal to the Supreme Court of Ohio. [↑](#footnote-ref-219)
220. In the case of AEP-Ohio, AEPSC is the agent for the AEP generating companies. The FRR Entity, therefore, is not AEP-Ohio. [↑](#footnote-ref-220)
221. OEG Ex. 1 at 20-21. [↑](#footnote-ref-221)
222. *Id*. [↑](#footnote-ref-222)
223. Since this case commenced, the Commission has approved the transfer of AEP-Ohio’s generation assets. *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order (Oct. 17, 2012); FERC also has provided conditional approval. *Ohio Power Company*, FERC Docket No. EC13-26-000, Order Conditionally Authorizing Disposition of Jurisdictional Facilities (Apr. 29, 2013). [↑](#footnote-ref-223)
224. Sections 4928.03 & 4928.05, Revised Code. [↑](#footnote-ref-224)
225. See discussion above. [↑](#footnote-ref-225)
226. See discussion above of the CG&E transition revenue calculation. [↑](#footnote-ref-226)
227. Duke Ex. 1 at 7-8 and Attachment A & B. [↑](#footnote-ref-227)
228. *Id.* at 3. [↑](#footnote-ref-228)
229. *Id.* at 4. [↑](#footnote-ref-229)
230. *Id.* [↑](#footnote-ref-230)
231. *Id.* at 8-9. [↑](#footnote-ref-231)
232. Duke Ex. 12 at 3-13. [↑](#footnote-ref-232)
233. *Id*. at 14. [↑](#footnote-ref-233)
234. *Id.* [↑](#footnote-ref-234)
235. Section 4928.39(C), Revised Code. [↑](#footnote-ref-235)
236. IEU-Ohio Ex. 12 at 10. [↑](#footnote-ref-236)
237. Section 4928.38, Revised Code. [↑](#footnote-ref-237)
238. Section 4928.141(A), Revised Code. [↑](#footnote-ref-238)
239. *RSP Case*, Opinion and Order at 22-23. [↑](#footnote-ref-239)
240. Section 4928.06(A), Revised Code. [↑](#footnote-ref-240)
241. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) ("*Sporn Case*"). [↑](#footnote-ref-241)
242. Section 4928.17(A)(2) & (3), Revised Code. [↑](#footnote-ref-242)
243. Duke Ex. 1 at 10; Tr. Vol. I at 213. [↑](#footnote-ref-243)
244. *See In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 23-26 (Nov. 16, 2012). [↑](#footnote-ref-244)
245. Duke Ex. 3 at 20-21. [↑](#footnote-ref-245)
246. Tr. Vol. III at 620-21. [↑](#footnote-ref-246)
247. FES Ex. 3 at 10-11. For example, Duke or its affiliate may be able to upset the bidding process outside Duke’s service territory. Duke’s unregulated generation-owning affiliate currently is active in the SSO auctions of other Ohio EDUs and has been a successful bidder. Tr. Vol. I at 214-18; IEU-Ohio Exs. 1, 2, & 3. [↑](#footnote-ref-247)
248. Duke Ex. 1 at 4-5 & 8. [↑](#footnote-ref-248)
249. *In re Columbus S. Power Co.*, 128 Ohio St.3d at 514-15. Although the Court and General Assembly have authorized the use of reconcilable riders, the reconciliation aspect of the rate must be set on a prospective basis and must be incorporated into the original rate order. *See, e.g*., Section 4928.143(B)(2)(a), Revised Code; *Lucas Cty. Comm’rs. v. Pub. Util. Comm’n of Ohio*, 80 Ohio St.3d 344, 348 (1997); *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St. 2d 509 (1982). [↑](#footnote-ref-249)
250. *In re Columbus S. Power Co.*,128 Ohio St.3d at 514. [↑](#footnote-ref-250)
251. Duke Ex. 1 at 4-5 & 8. [↑](#footnote-ref-251)
252. *Id*. at 2. [↑](#footnote-ref-252)
253. Section 4928.38, Revised Code. [↑](#footnote-ref-253)
254. Section 4928.05(A), Revised Code. [↑](#footnote-ref-254)
255. Section 4928.05(A), Revised Code. The Commission’s authority to order a phase-in under Section 4928.144, Revised Code, does direct that the Commission shall provide for regulatory assets pursuant to generally accepted accounting principles. That Section, however, is not applicable to this proceeding, and Duke admits as much. Tr. Vol. V at 1201; Duke Ex. 29 at 28-30. [↑](#footnote-ref-255)
256. Financial Accounting Standards Board Codification 980. [↑](#footnote-ref-256)
257. IEU-Ohio Ex. 11 at 16. Duke initially ended regulatory accounting for its generation function in response to the changes in Ohio law that ended the Commission’s supervisory and regulatory authority over competitive services. FERC Form 1, Annual Report for Cincinnati Gas & Electric Company at 123.1 (Dec. 31, 2001) (available at: http://www.puco.ohio.gov/emplibrary/files/docketing/AnnualReports/2001/Electric%20 and%20Gas/Cincinnati%20Gas%20and%20Electric%20Company%2C%20The%202001%20FERC%201.pdf). [↑](#footnote-ref-257)
258. Tr. Vol. V at 1201. [↑](#footnote-ref-258)
259. Tr. Vol. V at 1203. [↑](#footnote-ref-259)