**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Duke Energy )

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

Pursuant to Section 4909.18, Revised Code. )

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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**INDUSTRIAL ENERGY USERS-OHIO’S MEMORANDUM CONTRA Motion of Duke Energy Ohio, Inc., to Vacate the October 3, 2012, Entry and for the Issuance of a Procedural Schedule Consistent with R.C. 4909.18 and Application for Review and Interlocutory Appeal Filed by Duke Energy Ohio, Inc.**

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**INDUSTRIAL ENERGY USERS-OHIO’S MEMORANDUM CONTRA Motion of Duke Energy Ohio, Inc., to Vacate the October 3, 2012, Entry and for the Issuance of a Procedural Schedule Consistent with R.C. 4909.18 and Application for Review and Interlocutory Appeal Filed by Duke Energy Ohio, Inc.**

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 Pursuant to Rules 4901-1-12(C), and 4901-1-15(D), Ohio Administrative Code (“O.A.C.”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby files its memorandum contra to Duke Energy Ohio, Inc.’s (“Duke”) Motion to Vacate[[1]](#footnote-1) and Interlocutory Appeal[[2]](#footnote-2) filed on October 9, 2012 in the above-captioned matters. Although the Public Utilities Commission of Ohio (“Commission”) should vacate the procedural schedule, it should deny Duke’s request for approval of its application without hearing or for a compressed procedural schedule. Instead, the Commission should suspend the procedural schedule contained in the October 3, 2012 Entry until the Commission issues a decision on the motion to dismiss filed in these proceedings on October 4, 2012.

# Background

On August 29, 2012, Duke filed an Application that seeks to increase the compensation it receives for generation-related capacity service by $776 million.[[3]](#footnote-3) The Application essentially asks the Commission to give Duke guaranteed above-market compensation for generation-related capacity service along the lines the Commission regrettably awarded to the Ohio Power Company.[[4]](#footnote-4) Despite the fact that the Application provides that Duke is seeking to defer and then bill and collect through a non-bypassable charge $776 million in addition to the compensation it currently is approved to receive for generation-related capacity service, Duke’s Application requests that the Commission grant this increase without a hearing on the theory that it is not seeking an increase in rates for an existing service and that the Commission may act on the Application under Section 4909.18, Revised Code, which is not applicable to applications to establish compensation for competitive retail electric services.[[5]](#footnote-5) Regardless of Duke’s baseless theory, Duke’s Application is prohibited by the terms of two Commission-approved stipulations, and it is prohibited by Ohio law.[[6]](#footnote-6) For these reasons, the Motion to Dismiss was jointly filed by several parties on October 4, 2012.[[7]](#footnote-7)

 Without rehashing all of the Motion to Dismiss, IEU-Ohio notes that in Duke’s recent electric security plan (“ESP”) proceeding[[8]](#footnote-8) Duke agreed to charge competitive retail electric service (“CRES”) providers serving retail customers in its territory prices established by PJM Interconnection, L.L.C.’s (“PJM”) Reliability Pricing Model (“RPM”) for capacity service.[[9]](#footnote-9) In Duke’s proceeding regarding the transfer of control of its transmission assets from the Midwest Independent Transmission System Operator (“MISO”) to PJM,[[10]](#footnote-10) Duke also agreed that it would forgo seeking an increase in the compensation it receives from CRES providers from the Federal Energy Regulatory Commission (“FERC”). The Motion to Dismiss also identifies that the Signatory Parties contest the legal basis asserted by Duke for authority to increase the compensation it receives for capacity service from CRES providers.[[11]](#footnote-11) Duke has not yet responded to the Motion to Dismiss.

 On October 3, 2012, the Commission issued a procedural schedule in these proceedings. Comments are due January 2, 2013; reply comments are due February 1, 2013; Duke’s testimony is due by March 1, 2013; Staff and intervenor testimony are due March 9, 2013; and an evidentiary hearing is scheduled to commence April 2, 2013.

On October 9, 2012, Duke filed the Motion to Vacate and Interlocutory Appeal challenging the procedural schedule. Though filed separately, the Motion to Vacate and the Interlocutory Appeal are based on the same faulty legal claims. First, Duke claims that the Commission must attempt to issue a decision within six (6) months of the date its Application was filed, and argues that the current procedural schedule will not allow for that to happen.[[12]](#footnote-12) Second, Duke claims that the Commission erred by scheduling a hearing because the Application is not for an increase in rates and that a hearing should be scheduled only if it appears to the Commission that Duke’s application may be unjust or unreasonable.[[13]](#footnote-13)

# Argument

The Commission should reject Duke’s legal assertions in its Motion to Vacate and Interlocutory Appeal. Rather, the Commission should vacate the procedural schedule and rule on the dispositive Motion to Dismiss before any procedural schedule is established. If the Commission does not rule on the Motion to Dismiss before setting a procedural schedule, the intervening parties will have to expend considerable resources preparing for what will likely be a lengthy hearing involving issues that are presently before the Commission in other contested proceedings as well as unique issues raised by Duke’s copycat Application.

First, Duke’s Application, Motion to Vacate, and Interlocutory Appeal are meritless.[[14]](#footnote-14) These three pleadings all make the nonsensical claim that Duke is not seeking an increase in rates.[[15]](#footnote-15) Duke’s Application directly contradicts this, stating that it is currently collecting compensation for the capacity service it provides CRES providers in accordance with RPM-based pricing and has requested that the Commission increase that compensation by $776 million over the next three (3) years.[[16]](#footnote-16) Duke’s Application seeks more compensation than it is presently authorized to collect. Thus, Duke’s Application seeks an increase in rates.

Yet, Duke’s Interlocutory Appeal asserts that the Application is not seeking an increase in rates to claim that the Commission has deviated from past precedent by setting its Application for a hearing without first finding that the Application appears to be unjust and unreasonable.[[17]](#footnote-17) If Chapter 4909, Revised Code, is applicable at all (and Section 4928.05(A)(1), Revised Code, specifically holds that it is not applicable) then the Commission would be required to fulfill extensive statutory requirements, including holding a hearing, before it could authorize an increase in rates. Thus, Duke’s request for certification of its Interlocutory Appeal is meritless.

Additionally, Duke’s Application, Motion to Vacate, and Interlocutory Appeal ignore the commitments it recently made in resolving its *ESP Proceeding* and *RTO Migration Proceeding*. The Commission may promptly dispose of this Application by granting the Motion to Dismiss. If the Commission withholds a decision on the Motion to Dismiss, the parties and Commission Staff (“Staff”) will be required to invest considerable time and resources to contest the unlawful and unreasonable claims contained in the Application. Based on the recent experience in AEP-Ohio’s *Capacity Case*,[[18]](#footnote-18) the resource commitment will be substantial.

As the Commission is aware, the *Capacity Case* that Duke relies upon for its Application in these proceedings was and is a strongly contested proceeding. AEP‑Ohio’s *Capacity Case* has lasted almost two years and with layers of complexity associated with jurisdictional conflicts, discovery disputes, and two evidentiary hearings[[19]](#footnote-19) over a month in length that addressed AEP-Ohio’s request to significantly increase its compensation for generation-related capacity service. In fact, almost all of AEP-Ohio’s efforts to secure above-market compensation for generation-related service were challenged in one way or another: from the legal basis that could support the requested above-market compensation to procedural and substantive issues that must be addressed when the Commission invents and applies a cost-based method of ratemaking to authorize prices providing above-market compensation for such service. And the contested proceedings involving AEP-Ohio’s compensation for generation-related capacity service are still before the Commission as a result of multiple applications for rehearing that have been granted. Additionally, IEU-Ohio has filed a complaint seeking writs of prohibition and mandamus from the Ohio Supreme Court based on its view that the Commission’s decisions regarding AEP-Ohio’s compensation for generation capacity service exceed the Commission’s authority. Since Duke’s Application seeks to harvest increased compensation based on the Commission’s AEP‑Ohio related decisions, Duke’s Application will, if addressed on the merits, raise the issues that have been hotly contested in the AEP-Ohio proceedings. All of the unnecessary cost and time associated with the litigation invited by Duke’s Application can be avoided if the Commission promptly (and properly) grants the Motion to Dismiss.

In any case, no party or the Staff should be required to invest resources to address Duke’s unlawful and unreasonable Application until the Commission decides the Motion to Dismiss.

In sum, IEU-Ohio agrees that the procedural schedule announced on October 3, 2012 should be vacated as Duke has requested but for different reasons than Duke has advanced. The current procedural schedule is unreasonable because it requires parties like IEU-Ohio to spend considerable time and resources on a process associated with Duke’s copycat Application in circumstances where Duke’s Application should be rejected on its face for the reasons contained in the Motion to Dismiss. Any procedural schedule regarding Duke’s Application should be adopted only after the Commission rules on the dispositive Motion to Dismiss. To do otherwise would be fundamentally unfair.

# Conclusion

For the foregoing reasons, the Commission should deny Duke’s Interlocutory Appeal and should vacate the current procedural schedule. A procedural schedule should be adopted (if one is necessary at all) only after the Commission rules on the Motion to Dismiss.

 Respectfully submitted,

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**Certificate Of Service**

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio’s Memorandum Contra Duke Energy Ohio, Inc.’s Motion to Vacate and Interlocutory Appeal*, was served upon the following parties of record this 15th day of October 2012, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

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1. Motion of Duke Energy Ohio, Inc., to Vacate the October 3, 2012, Entry and for the Issuance of a Procedural Schedule Consistent with R.C. 4909.18 (Oct. 9, 2012). [↑](#footnote-ref-1)
2. Application for Review and Interlocutory Appeal Filed by Duke Energy Ohio, Inc. (Oct. 9, 2012). [↑](#footnote-ref-2)
3. Application of Duke Energy Ohio, Inc. at 9 (Aug. 29, 2012) (“Application”). [↑](#footnote-ref-3)
4. The Ohio Power Company and Columbus Southern Power Company merged in 2011. Collectively they are referred to as AEP-Ohio. AEP-Ohio is a wholly-owned operating utility of American Electric Power Company, Inc. (“AEP”). [↑](#footnote-ref-4)
5. Applicationat 6. [↑](#footnote-ref-5)
6. Joint Motion to Dismiss by Signatory Parties (Oct. 4, 2012) (“Motion to Dismiss”). [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al*., (hereinafter “*ESP Proceeding*”) [↑](#footnote-ref-8)
9. *Id.* at 2-8, 13-16. [↑](#footnote-ref-9)
10. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariff Approvals,* Case Nos. 11-2641‑EL‑RDR, *et al*. (hereinafter “*RTO Migration Proceeding*”). [↑](#footnote-ref-10)
11. Motion to Dismiss at 2 n.5. [↑](#footnote-ref-11)
12. Motion to Vacate at 4-5; Interlocutory Appeal at 7. [↑](#footnote-ref-12)
13. Motion to Vacate at 4; Interlocutory Appeal at 6-7. [↑](#footnote-ref-13)
14. IEU-Ohio joins the arguments of the Signatory Parties that have filed a Joint Memorandum Contra Duke Energy Ohio, Inc. Application for Review and Interlocutory Appeal on October 15, 2012. [↑](#footnote-ref-14)
15. Application at 4; Motion to Vacate at 4; Interlocutory Appeal at 5. [↑](#footnote-ref-15)
16. Application at 4, 8. As identified in the Motion to Dismiss, parties contest Duke’s claim that Chapter 4909, Revised Code, applies. Motion to Dismiss at 2, n.5. [↑](#footnote-ref-16)
17. Interlocutory Appeal at 5-8; *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Entry at 3 (June 21, 2012) (a party may seek an interlocutory appeal “if an attorney in the Commission’s Legal Department” certifies the interlocutory appeal because it “presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the Commission is needed to prevent undue prejudice or expense to one or more of the parties ... .”); Rule 4901-1-15, O.A.C. [↑](#footnote-ref-17)
18. *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-18)
19. The first hearing, in the fall of 2011, lasted almost a month and addressed AEP-Ohio’s request to significantly increase its compensation for capacity service as well as the other proceedings that AEP‑Ohio’s *Capacity Case* was consolidated with, namely AEP-Ohio’s ESP. The second hearing in AEP‑Ohio’s *Capacity Case* only addressed AEP-Ohio’s request to significantly increase its compensation for capacity service and lasted approximately a month. [↑](#footnote-ref-19)