**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 No. 11-346-EL-SSO  Case No. 11-348-EL-SSO |
| In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority. | )  )  )  ) | Case No. 11-349-EL-AAM  Case No. 11-350-EL-AAM |

**MOTION TO STRIKE PORTIONS OF OHIO POWER’S APPLICATION FOR REHEARING AND MEMORANDUM CONTRA**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

**AND**

**THE APPALACHIAN PEACE AND JUSTICE NETWORK**

# 

The Office of the Ohio Consumers’ Counsel (“OCC”)[[1]](#footnote-1) and the Appalachian Peace and Justice Network (“APJN”)[[2]](#footnote-2) (together, “Movants”) jointly submit this Motion to Strike portions of Ohio Power’s (“AEP Ohio” or “Company”) Application for Rehearing (filed on September 7, 2012) and portions of its Memorandum Contra (filed on September 17, 2012). This Motion is filed to protect customers from AEP Ohio’s inappropriate use of prior settlements and rulings on settlements, as precedent to support higher rates for customers. The Stipulations that AEP Ohio relies on bar it from using them in this fashion.

The specific portions subject to this motion to strike include references to isolated provisions found in three Stipulations approved by the PUCO. The provisions referenced include the ROE approved as part of the Company’s stipulated distribution case,[[3]](#footnote-3) the SEET threshold in two Duke SSO Stipulations,[[4]](#footnote-4) the corporate separation conditions agreed to in the recent Duke SSO Stipulation, and Duke’s electric service stability charge. The grounds for this Motion to Strike are further explained in the following memorandum in support.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

On September 7, 2012 interested parties, including Ohio Power, filed applications for rehearing of the Commission’s August 8, 2012 Opinion and Order. On September 17, 2012, Ohio Power and others filed Memoranda Contra Applications for Rehearing. In its Application for Rehearing and Memorandum Contra, the Company relies upon three different Stipulations and PUCO Orders adopting the Stipulations to bolster its claims on three of its assignments of error on rehearing.[[5]](#footnote-5)

These three assignments of error on rehearing should be rejected for the reasons set forth in OCC/APJN’s Memorandum Contra, filed on September 17, 2012. But the Commission should also strike portions of the arguments because AEP Ohio inappropriately relied upon past Stipulations as precedent, as explained in detail below.

# II. ARGUMENT

## A. The Company Inappropriately Relies Upon The Provisions In Stipulations As Precedent, Which Violates The Express Terms Of The Stipulations.

### 1. The AEP Ohio Distribution Case Stipulation Prohibits Parties from Using Information or Data Stipulated to as Precedent in any Future Proceedings.[[6]](#footnote-6)

The Distribution Case Stipulation resolved all the issues raised by parties in respect to AEP Ohio’s application to increase its distribution rates. The Signatory Parties to the Stipulation clearly viewed the Stipulation as a package deal. Provisions of the stipulation declare that the Stipulation represents “a package that, taken as a whole, is acceptable for the purposes of resolving all contested issues without resorting to litigation.”[[7]](#footnote-7) Additionally, the Signatory Parties agreed that “no specific element or item contained in or supporting this Stipulation shall be construed or applied to attribute the results set forth in this Stipulation as the results that any Signatory Party might support or seek, but for this Stipulation\*\*\*.”[[8]](#footnote-8) The Stipulation “contains a combination of outcomes that reflects an overall compromise involving a balance of competing positions, and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken on an individual issue.”[[9]](#footnote-9)

In that same provision in the Stipulation there is language that limits the use of the Stipulation in subsequent proceedings and prohibits the Stipulation from serving as precedent before the PUCO. The Stipulation establishes that “except for enforcement purposes or to establish that the terms of the Stipulation are lawful, neither this Stipulation nor the information or data contained herein or attached hereto shall be cited as precedent in any future proceeding for or against any Signatory Party, or the Commission itself if the Commission approves the Stipulation. Nor shall the acceptance of any provision within this settlement agreement be cited by any party or the Commission in any forum so as to imply or state that any signatory party agrees with any specific provision of the settlement.”[[10]](#footnote-10)

The Stipulation was approved by the PUCO December 14, 2011.[[11]](#footnote-11) The Stipulation approved, inter alia, a return on equity of 10.0 percent for CSP and 10.3 percent for OP. But, in its Application for Rehearing, AEP Ohio refers to the Distribution Case Stipulation and PUCO Order approving it to bolster its claim for using a higher return on equity in calculating the Retail Stability Rider.[[12]](#footnote-12) Although the Commission used a 9% ROE in this proceeding, the Company argues that 9%, as a target ROE in establishing the RSR revenue target, is unreasonable. Specifically, its Application for Rehearing at Page 21 reads as follows:

First, the understatement of the ROE value is demonstrated by the fact that just 8 months ago, in AEP Ohio’s distribution rate case, *the parties stipulated, and the Commission approved,* ROEs for the distribution service business of OPCo and Columbus Southern Power Company (CSP) of 10.0 and 10.3 percent. *Case Nos. 11-351 and 11-352. Opinion and Order at 5 (December 14. 2011).* Those very recently approved ROEs for the two companies (which subsequently merged) demonstrate that a 9 percent ROE for the combined companies is too low. In addition, because the distribution operations of AEP Ohio face risks that are lower than those faced by the generation service business, it is beyond contradiction that the appropriate ROE for the combined operations of AEP Ohio, including generation, transmission, and distribution, is higher than the 10.0/10/3 percent values approved for the pre-merger companies in the distribution rate cases.” (Emphasis added).

These words should be struck.

AEP Ohio is unabashedly defying the expressed intentions of parties (including OCC and APJN) to not have their settlements used against them as precedent. AEP’s use of the Distribution Case Stipulation provisions on ROE is inappropriate and contrary to the very terms of the stipulation. This portion of the Application for Rehearing should be struck.

### 2. The Duke ESP Stipulations,[[13]](#footnote-13) Prohibit Parties from Using Information or Data Stipulated to as Precedent in any Future Proceedings.

The two Duke Stipulations relied upon by AEP in its pleadings resolved all the issues raised by the parties in respect to Duke Ohio’s applications for approval of its electric security plan. The Duke ESP 2 Stipulation also resolved Duke’s application to amend its corporate separation plan, which was consolidated with Case No. 11-3549-EL-SSO.[[14]](#footnote-14)

The Stipulations were clearly agreement to a package of provisions, rather than agreement to each of the individual provisions included in the Stipulation.[[15]](#footnote-15) Additionally, the Stipulations contained language declaring that “the Signatory Parties’ agreement to the Stipulation, should not be interpreted as agreement to only isolated provisions.”[[16]](#footnote-16) The Signatory Parties agreed to limit the use of the Stipulations in subsequent proceedings and expressly prohibited the Stipulations from serving as precedent before the PUCO.[[17]](#footnote-17) The Stipulations were approved by the PUCO on December 17, 2008 and November 22, 2011.[[18]](#footnote-18)

#### Using the 15% SEET threshold as precedent is prohibited by the terms of the Stipulations.

In the Duke ESP 1 case, the PUCO approved, inter alia, a SEET threshold ROE of 15 percent,[[19]](#footnote-19) as recommended in the Stipulation.[[20]](#footnote-20) In the Duke ESP 2 case, the PUCO again approved a SEET threshold ROE of 15 percent, as recommended in the Stipulation.[[21]](#footnote-21)

But AEP Ohio relies upon the Duke ESP 1 Stipulation and the subsequent Duke ESP 2 Stipulation to make its claim that the Commission’s SEET threshold of 12% is unreasonable.[[22]](#footnote-22) Specifically, it asserts in its Application for Rehearing at page 33:

*Duke and other parties agreed, as part of the settlement agreement* that resolved its first ESP proceeding, which covered the 2009, 2010, and 2011 annual periods *and the Commission approved* for Duke, a SEET threshold ROE of 15 percent. *Case No. 08-920-EL-SSO, Opinion and Order at 21 (Dec. 17, 2008).* In its subsequent proceeding, which governs the January 2012 through May 2015 period, *Duke agreed again, as part of another settlement agreement approved by the Commission,* to a SEET threshold ROE of 15 percent, applicable to each annual period with ESP. *Case No. 11-3549-EL-SS), Opinion and Order, at 35 (November 22, 2011).* There is simply no credible basis for imposing upon AEP Ohio a SEET threshold of 12 percent covering a period during which the Commission has simultaneously approved a 15 percent ROE threshold for another Ohio electric utility. (Emphasis added).

These offending words should be struck.

AEP Ohio’s use of the Duke settlement agreements is very inappropriate. The Commission should strike the passage because it directly violates not just one, but two stipulations.

#### Using the corporate separation terms as precedent is prohibited under the terms of the Duke ESP II Stipulation.

Under the Duke SSO Stipulation, full corporate separation was approved, along with the transfer of generating assets at net book value. [[23]](#footnote-23) The Commission found the corporate separation plan complied with R.C. 4928.17 and the applicable provisions of the Ohio Administrative Code.[[24]](#footnote-24) According to the PUCO, the provisions of the stipulation provided “the necessary safeguards to ensure that the statutory mandates pertaining to Duke’s sale of generation assets and corporate separation are adhered to and the policy of the state carried out.”[[25]](#footnote-25)

The Company on rehearing uses the Duke ESP 2 Stipulation to strengthen its application for rehearing on corporate separation issues. The Company petitioned the PUCO to modify its Opinion and Order in one of two ways. It requested that the Commission direct AEP Ohio to retain the pollution control revenue bonds (“PCRBs”) and not transfer the bonds. Alternatively, it requested that AEP Ohio be authorized to transfer the bonds to AEP Genco. Under that scenario AEP would retain the PCRBs until their respective tender dates. AEP would then “synthetically”[[26]](#footnote-26) transfer liabilities to AEP Genco with inter-company notes during the period after corporate separation and before the bonds’ respective tender dates.

The Company alleges that these modifications it seeks are “essentially identical” to the conditions accepted by the PUCO in the Duke ESP II Stipulation. The passages from the Application for rehearing are:

* + Application for Rehearing, Page 44: “These provisions are essentially identical to the *condition accepted by the Commission in Section VIII.B of the Duke Stipulation,* which states ‘that contractual obligations arising before the signing of the Stipulation shall be permitted to remain with Duke Energy Ohio without Commission approval; for the remaining period of the contract but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for Duke Energy Ohio if Duke Energy Ohio were to transfer such obligations to its subsidiary or affiliate.’” (Emphasis added).
* Application for Rehearing, Page 44: the clause contained in the last portion of the final sentence of the first paragraph “*including as reflected in Section VII.B of the Duke Stipulation.”* (Emphasis added).
* Application for Rehearing, Page 44: the clause *“(b) adopt the same approach taken in the Duke order \*\*\*”* (Emphasis added).

These offending words should be struck.

In its Memorandum Contra, the Company tries to refute IEU Ohio’s proposal that the asset transfer should reflect a market book value by relying on the Duke Stipulation as well. It emphasizes that in the Duke stipulation parties agreed, and the Commission approved, transfer of assets at net book value. Specifically, in its Memorandum Contra at pages 77-79, the Company argues:

Furthermore, IEU’s opposition to a net book value transfer should be rejected \*\*\*and it should be equitably estopped because *IEU lobbied (successfully) for Duke Ohio to be permitted to transfer its assets at net book value. (Stipulation and Recommendation in Case Nos. 11-3549-EL-SSO, et al., at page 3 and 25-26).* The Commission determined based on similar information that it was in the public interest to waive Rule 4901:1-37-09(C)(4) and allow Duke Ohio to transfer its generation assets at net book value. If that treatment was in the public interest for Duke Ohio, it is also in the public interest to grant AEP Ohio’s similar waiver request.\*\*\*Granting Duke Ohio’s affiliate full and final approval for generation divestiture up front and waiving the filing and process rules\*\*\*serves to provide Duke Ohio with an undue preference and advantage in violation of this statute. The better approach is to grant AEP Ohio the same relief afforded to Duke Ohio. \*\*\*If Duke Ohio is able to transfer its generation assets at net book value and AEP Ohio is subject to greater scrutiny and a different valuation methodology, then Duke Ohio would be receiving an unfair benefit from the truncated process\*\*\*. If Duke Ohio were able to transfer those assets at net book value to its competitive generation affiliate, but AEP Ohio was required to transfer its assets to AEP Genco at a potentially greater cost, over a greater period of time, and in some cases to even transfer the same assets under a different methodology, the Duke’s competitive generation company would be receiving a competitive advantage over AEP Genco.” (Emphasis added).

These offending words should be struck.

This reliance on the Duke stipulations is contrary to the terms of the Stipulation and inappropriate. The Commission should not allow the Company to violate the Stipulation.

#### Using Duke’s ESSC charge as precedent is prohibited under the terms of the Duke ESP 2 stipulation.

In its Memorandum Contra the Company utilizes the Stipulations and PUCO Orders adopting the Stipulations to respond to various parties’ applications for rehearing. For instance, in response to “a few”[[27]](#footnote-27) intervenors objections, the Company attempts to rebut the unlawfulness of the RSR by citing to the Duke Electric Service Stability Charge (ESSC). The ESSC charge was part of the Duke ESP 2 Stipulation in Case No. 11-3549-EL-SSO, and the terms of the Stipulation preclude it from being used as precedent. But despite this, the following passages from the Company’s pleading show that the Company has inappropriately relied upon the Stipulation to refute arguments against the RSR :

* Memorandum Contra Application for Rehearing, Page 7: “Indeed, the *Commission has already adopted a similar charge* for Duke Energy Ohio; though Duke’s financial stability *charge was part of a Stipulation*, the Commission would not have been able to adopt it if it were unlawful.” (Emphasis added).
* Memorandum Contra Application for Rehearing, Page 19: “Notwithstanding rehearing objections by a few of the intervenors concerning the RSR*, the Commission has already adopted a similar charge* for Duke Energy Ohio in its recent SSO case. See *Case Nos. 11-3549-EL-SSO et al., November 22, 2011 Opinion and Order (adopting a non-bypassable Electric Service Stability Charge (ESSC) that conveys $330 million to Duke Energy Ohio).*  \*\*\*Although Duke’s financial stability charge was part of a Stipulation, the Commission may only approve lawful mechanisms even when part of a stipulation.” (Emphasis added).

These offending words should be struck.

When the Company makes these arguments it is explicitly presenting specific terms of past stipulations as precedent. This violates the terms of the stipulations and is contrary to the inherent nature of the stipulation as a package of compromises, as explained below. The Commission should not permit the Company to blatantly and repeatedly violate the terms of the Stipulations. The Motion to Strike should be granted.

## B. Using Isolated Provisions In A Stipulation As Precedent Is Contrary To The Inherent Nature Of A Stipulation.

A Stipulation represents a resolution of a number of issues in a proceeding or multiple proceedings. A Stipulation is a package composed of many different provisions—provisions which may not be acceptable on a stand-alone basis, but when put together with other terms constitute an acceptable compromise. Indeed, as the Duke Ohio ESP 2 Stipulation stated, “[t]his stipulation 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.” [[28]](#footnote-28) It simply does not represent the positions that parties would have taken outside the context of a package agreement. To extricate distinct provisions of a Stipulation and attempt to apply those to a different company, under a different set of facts,[[29]](#footnote-29) perverts the entire stipulation process.

## C. Stipulations Are Not Precedent.

Moreover, approval of one stipulation does not compel the Commission to rule a particular way in any other case. The Commission itself recognizes this concept and in fact specifically ordered in the Duke ESP 2 case that “nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation.”[[30]](#footnote-30) And while the Commission has noted that it *may* find the provisions of one stipulation applicable, reasonable and just, and may impose similar provisions in another matter,[[31]](#footnote-31) it need not. Here, the Commission acted within its discretion and determined that the provisions of the stipulations are not applicable, nor are they reasonable and just to impose in this proceeding, for this utility. There is no error or unreasonableness in the Commission’s decision.

## D. For Public Policy Reasons, The Commission Should Enforce The Stipulations, And Not Permit The Company To Violate These.

As explained, the Company has pervasively misused the Stipulations and the Commission Orders approving the Stipulations in its pleadings. Allowing a PUCO-adopted Stipulation and a PUCO Order adopting the Stipulation to be used in violation of the terms expressly agreed upon by all of the signatory parties will have a chilling effect on the willingness of parties to enter into future negotiations. If the Commission wishes to encourage future settlements and encourage respect for terms of past settlements, it must treat a breach of the settlement as a serious matter. It should strike those portions of the Application for Rehearing and Memo Contra from the record and not rely upon them to determine whether rehearing is appropriate.

Sound regulation should not discourage dispute-resolution through settlements. Settlement agreements provide the potential for cost savings and regulatory certainty. If, however, parties to a settlement are not assured that the terms of the settlement agreement, agreed to and eventually approved by the PUCO, will be held inviolate, parties will be disinclined to sign onto settlements.

# III. CONCLUSION

Accepting and relying upon the stipulated material to determine whether rehearing should be granted would be unjust and unreasonable. Doing so violates the very specific terms of the stipulation. Focusing in on one term of the Stipulation, and using it in isolation of the other terms of the Stipulation, ignores the reality that the Stipulation represents a package deal and not necessarily agreement by every signatory party on every single provision. Moreover, stipulations are not precedent.

Allowing parties like the Company to violate the terms of the stipulation is bad policy that will have a chilling effect on parties’ willingness to enter into a settlement agreement. For all these reasons, the Commission should strike those portions of the Company’s Application for Rehearing and Memo Contra Applications identified in this Motion to Strike.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Strike has been served electronically upon those persons listed below this 28th day of September, 2012.

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1. OCC represents Ohio Power Company’s (“Ohio Power” or “Company”) residential utility customers. [↑](#footnote-ref-1)
2. APJN is a not for profit organization whose members include low-income customers in southeast Ohio. [↑](#footnote-ref-2)
3. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates,* Case No. 11-351-EL-AIR et al., Opinion and Order (Dec. 14, 2011)(“Distribution Case”). [↑](#footnote-ref-3)
4. *In the Matter of the Application of Duke Energy Ohio, Inc. of Authority to Establish a Standard Service offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Stipulation (Oct. 24, 2011) (“Duke ESP 2 case”)*; In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-El-SSO et al., Stipulation (Oct. 27, 2008) (“Duke ESP 1 case”). [↑](#footnote-ref-4)
5. AEP Ohio Assignment of Error II.A : It was unreasonable for the Commission to use 9% as a target ROE in establishing the RSR revenue target ; AEP Ohio Assignment of Error VI: The Commission’s imposition of a SEET threshold was unreasonable and unlawful; and AEP Ohio Assignment of Error VIII: The Commission should have approved the corporate separation application at the same time that it issued the Order or made the ESP Plan contingent based on approval of the pending corporate separation case, since many of the obligations and commitments under the ESP are dependent upon completion of corporate separation. The corporate separation issue that was addressed concerning the Pollution Control Bonds should be clarified and/or reconsidered and modified. [↑](#footnote-ref-5)
6. Attachment 1. [↑](#footnote-ref-6)
7. Distribution Case Stipulation at 15. [↑](#footnote-ref-7)
8. Id. at 14. [↑](#footnote-ref-8)
9. Id. at 15. [↑](#footnote-ref-9)
10. Id. at 14. [↑](#footnote-ref-10)
11. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates,* Case No. 11-351-EL-AIR et al., Opinion and Order (Dec. 14, 2011). [↑](#footnote-ref-11)
12. See AEP Ohio Assignment of Error II.A : It was unreasonable for the Commission to use 9% as a target ROE in establishing the RSR revenue target. [↑](#footnote-ref-12)
13. Duke ESP 1 (Attachment 2); Duke ESP 2 (Attachment 3). [↑](#footnote-ref-13)
14. See Duke ESP 2 Stipulation and Recommendation at 1 (Oct. 25, 2011), Case No. 11-3549-EL-SSO et al. [↑](#footnote-ref-14)
15. See Duke ESP 1, Attachment 2 at 4 (Stipulation “resolves all issues” (p.1)), Stipulation reflects “an overall reasonable resolution of all such issues (p. 4). See Duke ESP 2, Attachment 3 at 2. [↑](#footnote-ref-15)
16. Duke ESP 1, Attachment 2 at 4 (Stipulation is not intended to reflect the views or proposals which any individual party may have advanced acting unilaterally.); Duke ESP 2, Attachment 3 at 2. [↑](#footnote-ref-16)
17. Duke ESP 1, Attachment 2 at 2 (“Except for dispute resolution purposes, neither this Stipulation, nor the information or data contained therein or attached, shall be cited as precedent in any future proceeding for or against any Party, or the Commission itself.”); Duke ESP 2, Attachment 3 at 41-42 (Stipulation was “submitted for purposes of these proceedings only and neither this Stipulation nor any Commission order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon by any Party in any proceedings except as necessary to enforce the terms of this Stipulation.”). [↑](#footnote-ref-17)
18. *In the Matter of the Application of Duke Energy Ohio, Inc. of 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); *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-El-SSO et al., Opinion and Order (Dec. 17, 2008). [↑](#footnote-ref-18)
19. Duke ESP 1, Attachment 2 at 35, ¶28. [↑](#footnote-ref-19)
20. Id. The Parties expressly agreed that “[t]his paragraph does not create a precedent for the computation of DE-Ohio’s return on common equity or the applicability of the significantly excessive earnings test set forth in R.C. 4928.143 regarding any SSO that DE-Ohio may implement subsequent to December 21, 2011.” [↑](#footnote-ref-20)
21. *In the Matter of the Application of Duke Energy Ohio, Inc. of 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); Duke ESP 2, Attachment 3 at 35. [↑](#footnote-ref-21)
22. AEP Ohio Assignment of Error VI, AEP Ohio Application for Rehearing at 31-34: The Commission’s imposition of a SEET threshold was unreasonable and unlawful. [↑](#footnote-ref-22)
23. Duke ESP 2, Attachment 3 at 26. [↑](#footnote-ref-23)
24. Duke ESP 2 Case, Opinion and Order at 46. [↑](#footnote-ref-24)
25. Id. [↑](#footnote-ref-25)
26. It is unclear what a “synthetic” transfer entails. [↑](#footnote-ref-26)
27. All of the intervenors who filed applications for rehearing objected to the RSR—Ormet, OMA, OHA, FES, Schools, OEG, IEU, Kroger, APJN and OCC. [↑](#footnote-ref-27)
28. Duke ESP 2 Stipulation at 2. Such language is standard in stipulations for the very purpose of trying to prevent the very conduct and problem presented in this Motion to Strike. [↑](#footnote-ref-28)
29. The Company in responding to OCC arguments that the Commission wrongly construed the more favorable in the aggregate test, , claims that the AEP ESP is “sui generis” –no prior price test is controlling for this proceeding. See Memorandum Contra at 88. Yet, with respect to the ROE and SEET threshold it abandons the claim that an individual, case-by-case analysis is necessary. Instead it seeks the very same treatment as was afforded a different company, at a different time, under different circumstances. Additionally, it seeks to apply the PUCO’s holding on ROE, reached in its distribution case, governed by a different chapter of the Revised Code altogether. The Company cannot have it both ways. [↑](#footnote-ref-29)
30. *In the Matter of the Application of Duke Energy Ohio, Inc. of 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 at 51 (Nov. 22, 2011). [↑](#footnote-ref-30)
31. See e.g. *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, Finding and Order at ¶32 (Jan. 23, 2012). [↑](#footnote-ref-31)