**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 )

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

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New Service )

**initial Comments**

**of Industrial Energy Users-Ohio**

# Introduction

In the review by the Public Utilities Commission of Ohio (“Commission”) of the compensation of generation-related capacity service for AEP-Ohio,[[1]](#footnote-1) Duke Energy Commercial Asset Management and Duke Energy Retail Sales (collectively, “DECAM”) challenged AEP-Ohio’s attempt to increase its compensation and block shopping on the basis that it was unlawful and unreasonable and raised an important question about the consequences of AEP-Ohio’s position:

[I]f the Commission establishes a state mechanism that provides for utilities to charge for capacity on the basis of their embedded costs, what is to stop the remaining Ohio utilities from demanding equal treatment under the new state mechanism?[[2]](#footnote-2)

 Duke Energy Ohio, Inc. (“Duke”) soon answered the question: nothing has stopped Duke from seeking increased compensation for generation-related capacity service based on the illegal and unreasonable construct the Commission devised in the *AEP-Ohio Capacity Case* and *Electric Security Plan (“ESP”) II Case*.[[3]](#footnote-3) In fact, Duke and DECAM are now supporting AEP-Ohio at the Federal Energy Regulatory Commission (“FERC”).[[4]](#footnote-4) Additionally, The Dayton Power and Light Company has supplemented its pending ESP application to advance a proposal for a non-bypassable rider to assure its “financial integrity.”[[5]](#footnote-5) With its decisions in the AEP-Ohio cases, the Commission has opened Pandora’s Box.[[6]](#footnote-6)

In the *AEP-Ohio Capacity Case* and the *AEP-Ohio ESP II Case*, the Commission authorized AEP-Ohio to recover $188.88/MW-day as compensation for generation-related capacity service supplied to competitive retail electric service (“CRES”) providers. AEP-Ohio is authorized to bill and collect Reliability Pricing Model (“RPM”)-Based Prices[[7]](#footnote-7) from CRES providers with the balance of the total compensation deferred. The deferred balance is billed and collected through non-bypassable charges from retail customers.[[8]](#footnote-8)

In reliance on the Commission’s *AEP-Ohio Capacity Case* and *AEP-Ohio* *ESP II Case*, Duke filed on August 29, 2012 its Application seeking to increase its compensation for “wholesale” generation-related capacity services by deferring and collecting $257 million annually through non-bypassable retail charges.[[9]](#footnote-9) According to Duke, the Commission “has an obligation to ensure that an FRR entity[[10]](#footnote-10) 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.”[[11]](#footnote-11)

Duke’s Application seeks three categories of relief and asserts that the relief requested therein is permissible based on Sections 4905.04, 4905.05, 4905.06, 4905.13, 4905.22, and 4909.18, Revised Code.[[12]](#footnote-12) First, citing to Sections 4905.04, 4905.05, 4905.06, and 4909.18, Revised Code, Duke’s Application asserts that the Commission may authorize a cost-based “charge” for the provision of capacity services throughout its service territory.[[13]](#footnote-13) Second, citing Section 4905.13, Revised Code, Duke’s Application asserts that the Commission may authorize Duke to modify its accounting practices so as to defer, for future collection and financial reporting purposes, the difference between what Duke is already collecting for the provision of capacity services and its “cost of providing capacity services as such cost is established pursuant to Ohio’s newly adopted state compensation mechanism.”[[14]](#footnote-14) Third, citing Section 4909.18, Revised Code, Duke’s Application seeks an order approving a new non-bypassable tariff for the future recovery of the deferred amounts.[[15]](#footnote-15)

The hard truth which Duke’s Application offers customers is contained in the substantial electric bill increase Duke’s Application would, if approved, impose on shopping and non-shopping customers alike. Applying “the formulaic methodology recently approved by the Commission for establishing a cost-based compensation mechanism” for AEP-Ohio, Duke alleges that the total generation capacity service revenue requirement to achieve an 11.15% return on common equity is $364.9 million annually.[[16]](#footnote-16) Netting the revenue Duke is already collecting for generation capacity service ”via the [Fixed Zonal Capacity Price]”, Duke’s Application asserts that the Commission must authorize Duke to collect $257 million in additional annual compensation for such service.[[17]](#footnote-17) Duke seeks to defer the difference ($257 million annually) between the current capacity compensation and $364.9 million beginning on the date it filed its Application, August 29, 2012, through May 31, 2015. Duke also proposes to add a carrying charge to the deferred balance at a long term debt rate.[[18]](#footnote-18) Duke’s Application seeks authority to amortize the deferred portion of its capacity compensation (including the carrying charge) through a non-bypassable charge that will be imposed on shopping and non-shopping customers.[[19]](#footnote-19)

Duke’s Application does not identify the level of this proposed future non-bypassable charge. According to the Application, the level of the non-bypassable charge will be set in a separate future proceeding.[[20]](#footnote-20) 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 non-bypassable charge.[[21]](#footnote-21) 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 at the end of the deferral amortization period to “true up the total collected amount.”[[22]](#footnote-22) Finally, Duke also states that it expects that “the portion of the recovery attributable to an affiliate [after generation assets have been transferred as approved by the Commission] should then be passed through to such affiliate.”[[23]](#footnote-23)

The electric bill increase and anticompetitive implications of Duke’s Application were not lost on Duke’s retail customers or CRES providers. For example, AEP-Retail Energy Partners, LLC, an AEP-Ohio affiliate, sought to intervene in this case because “[t]he implementation, design, and structure of any cost-based capacity charge established by the Commission in these proceedings could adversely affect [AEP-Retail Energy Partners’] ability to provide competitive retail electric services to customers within Duke’s service territory.”[[24]](#footnote-24)

Many of Duke’s retail customers also immediately advised the Commission that the Duke Application violated the terms of Duke’s recent ESP settlement that resolved the issues now raised by Duke’s Application. In reliance on the settlement, IEU-Ohio and others filed a Joint Motion to Dismiss the Application on October 4, 2012. In the Joint Motion to Dismiss, the joint movants demonstrated that: (1) The Commission-approved ESP settlement obligated Duke to charge no more than the RPM-Based Price for generation-related capacity service supplied to CRES providers; (2) Duke’s Application is an untimely application for rehearing on the Commission’s approval of that settlement; and (3) Duke’s Application is barred by res judicata and collateral estoppel.[[25]](#footnote-25) The Joint Motion to Dismiss has been fully briefed by the parties and is awaiting a Commission decision.

IEU-Ohio urges the Commission to dismiss Duke’s Application for the reasons explained in the October 4, 2012 Joint Motion to Dismiss. But the fundamental problems with Duke’s Application go beyond those identified in the Joint Motion to Dismiss. Some of the additional fatal defects are described below.

* The Commission has no authority to approve an increase in Duke’s compensation for generation-related capacity services under the Commission’s general supervisory powers in Chapter 4905 or Section 4909.18, Revised Code. Generation capacity services have been declared competitive, and the relief Duke seeks is premised on statutory claims that are without merit. Duke’s Application seeks relief which the Commission may not entertain.
* Even if the Commission did have jurisdiction to invent and apply a cost-based ratemaking methodology to establish compensation for generation-related capacity service, Duke’s Application seeks an increase in compensation for capacity service it is currently providing. The Application fails to satisfy the statutory requirements applicable to a request to increase compensation for an existing service, and the process the Commission has proposed fails to satisfy the statutory requirements applicable to a request to increase rates. Duke’s Application invites the Commission to violate Ohio’s procedural and substantive requirements.
* Duke’s Application seeks an increase in its standard service offer (“SSO”) compensation without invoking or complying with the applicable statutory requirements. The relief requested is unreasonable and unlawful.
* Duke’s Application seeks an order setting a unique state compensation mechanism in reliance on the RAA that is inconsistent with the RAA’s terms and invites the Commission to make a determination of Duke’s rights under the RAA, a determination that is beyond the Commission’s authority.
* Duke’s Application seeks transition or equivalent revenue beyond the period during which the Commission could lawfully permit an electric distribution utility (“EDU”) to collect such revenue. In addition to violating the terms of Duke’s recent Commission-approved ESP settlement, approval of Duke’s Application also would violate Duke’s Commission-approved commitments in 2000 and 2004 to forego recovery of generation transition costs.
* The Application seeks authority to establish a deferred compensation collection mechanism that is unlawful under Section 4905.13 and 4928.144, Revised Code.
* Although Duke’s Application asserts that the relief it seeks is necessary for “financial integrity purposes,” it fails to assert a claim for emergency relief under Section 4909.16, Revised Code, and, in any event, the Commission’s precedent makes the financial consequences of market-based compensation for competitive services such as generation capacity service irrelevant for purposes of establishing the level of such compensation.[[26]](#footnote-26)
* Duke’s Application seeks an unlawful and anticompetitive subsidy of Duke’s competitive generation function that is, among other things, inconsistent with the state policy in Section 4928.02, Revised Code, violates Section 4928.17, Revised Code, and is based on a factually flawed assumption that Duke’s “legacy generation assets” provide capacity service to Duke’s retail distribution customers or CRES providers. Ohio law requires Duke’s competitive generation business to be fully on its own in the competitive marketplace.[[27]](#footnote-27)
* Duke seeks excessive carrying charges.
* Duke seeks an unlawful retroactive increase of its compensation for generation-related capacity service.

In summary, if Duke’s Application is seeking increased compensation for a competitive electric service, the Commission does not have authority to increase Duke’s total compensation or approve the accounting modifications under Chapter 4905 or Section 4909.18, Revised Code, and Duke’s Application fails to satisfy the statutory procedural and substantive requirements that must be satisfied before the Commission can authorize an EDU to collect compensation for competitive services. If, as Duke’s Application alleges, generation-related capacity service is a “wholesale” service, the Commission does not have any authority to permit Duke to collect compensation for that wholesale service. If, finally, the Commission assumes that generation capacity service is a non-competitive retail service, Duke’s Application fails to comply with the statutory requirements that must be satisfied before the Commission may authorize an EDU to increase its compensation for such service. Additionally, the Application violates a host of other statutory requirements and is premised on flawed factual assumptions.

To avoid wasting more time and money by further considering the merits of Duke’s Application, IEU-Ohio urges the Commission to vacate the current procedural schedule and grant the Joint Motion to Dismiss or otherwise summarily deny the relief requested by Duke.

# The Commission has no authority to increase Duke’s total compensation for GENERATION-RELATED CAPACITY SERVICE under SectionS 4905.04, 4905.05, 4905.06, or 4909.18, Revised Code

Duke seeks authorization to bill and collect an additional $257 million annually for the provision of “wholesale”[[28]](#footnote-28) generation-related capacity service because it is an FRR Entity.[[29]](#footnote-29) 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.[[30]](#footnote-30)

## The Commission lacks jurisdiction to increase compensation for “wholesale” generation-related capacity service under Chapter 4905 and Section 4909.18, Revised Code

 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.”[[31]](#footnote-31) Having described the underlying service as “wholesale” in reliance on the Commission’s decision in the *AEP-Ohio Capacity Case*,[[32]](#footnote-32) 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.[[33]](#footnote-33)

If the underlying service for which Duke is seeking increased compensation is a wholesale service as Duke alleges, the Commission does not have the power to authorize the proposed higher charge. Sections 4905.04, 4905.05, 4905.06, 4905.13, and 4905.22, Revised Code, all apply to a public utility as that term is defined in Sections 4905.02[[34]](#footnote-34) and 4905.03,[[35]](#footnote-35) Revised Code. Those Sections 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 regional transmission organizations (“RTOs”), such as PJM, the entity that actually bills CRES providers for wholesale capacity service.

Likewise, Section 4909.18, Revised Code, is the provision for establishing rates for retail service. 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. Section 4909.18, Revised Code, then provides that the public utility, the entity subject to the Commission’s jurisdiction, must file an application to establish or modify a rate. By the definitions contained in Chapter 4905 and Section 4909.01, Revised Code, the authority provided in Section 4909.18, Revised Code, extends to only retail electric utility services.[[36]](#footnote-36) There is nothing in Section 4909.18, Revised Code, that extends the Commission’s authority to authorize rates for a wholesale generation service.

Because the Application states that Duke is seeking authority to increase its compensation for a wholesale service, Duke has not stated a claim that the Commission is authorized to hear. This Commission does not have general or any other type of jurisdiction to supervise or regulate a wholesale electric service or the specific authority to authorize Duke to bill and collect a wholesale electric charge.

## The Commission lacks authority to authorize cost-based compensation for Duke’s provision of competitive generation-related capacity electric service

Duke does not allege that generation-related capacity service is a non-competitive service, nor could it. As discussed below, generation-related electric service has been declared competitive under Ohio law since January 1, 2001. And, in the *AEP-Ohio Capacity Case*, Duke’s affiliates agreed that generation-related capacity service is a competitive service that is not subject to cost-based ratemaking. As DECAM there stated, “capacity, as a part of generation service is a competitive service in Ohio.”[[37]](#footnote-37) DECAM continued, “Ohio policy clearly establishes the legislature’s intent that generation services be deregulated. … It is critically important to recognize that generation services is specifically categorized, by statute, as a competitive service.”[[38]](#footnote-38)

Because generation-related capacity service is competitive, it is not subject to the Commission’s traditional or cost-based price regulation. As DECAM argued in response to AEP-Ohio’s request to authorize a cost-based capacity charge, “It is critical in this proceeding 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 the electric distribution utility’s costs may be passed through to its consumers (such as fuel and purchased power costs), the overall rate plan must be based on market.”[[39]](#footnote-39) 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,[[40]](#footnote-40)or SB 3[[41]](#footnote-41) empowers the Commission to allow a utility to charge for capacity on the basis of its embedded costs.”[[42]](#footnote-42)

As confirmed by Duke’s affiliate DECAM, the General Assembly has declared that generation service is competitive, and the Commission cannot ignore that legislative declaration by relying on its general supervisory authority.[[43]](#footnote-43)

 The definitions in Section 4928.01, Revised Code,[[44]](#footnote-44) 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 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 certain statutorily defined circumstances.[[45]](#footnote-45) From these definitions, this conclusion holds regardless of whether the service is called wholesale or retail. The definition of “retail electric service” includes “*any service*” from the point of generation to the point of consumption.[[46]](#footnote-46)

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 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[[47]](#footnote-47) 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,[[48]](#footnote-48) 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 generation-related capacity service since those provisions cannot be applied to a 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 generation-related 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 the SSO. Except in very narrow areas in which cost-based recovery is specifically authorized, the SSO’s default competitive supply price is market based or tested, not cost-based.[[49]](#footnote-49) 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 circumstance.[[50]](#footnote-50)

Thus, the Commission is powerless to entertain Duke’s Application. DECAM was correct when it stated the Commission has no authority to increase the compensation of an EDU for generation-related capacity services based on a cost-based formula.[[51]](#footnote-51) 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 cost-based 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 generation-related capacity service.[[52]](#footnote-52) Citing several Supreme Court opinions,[[53]](#footnote-53) Duke’s Application alleges that it is seeking approval of a new charge for a “new service,”[[54]](#footnote-54) 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 non-competitive 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 service available from an EDU.

Duke’s Application further attempts to avoid the mandatory requirements of Section 4909.18 and 4909.19, Revised Code, applicable to an application seeking to increase rates or charges by asserting that the Commission may approve the increase in compensation without a hearing because it is seeking approval of a tariff applicable to a new service and not seeking an increase in compensation from its customers.[[55]](#footnote-55) 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 nonsense: it is clear that Duke is seeking an increase in compensation for the capacity service which it is already providing and for which it is already receiving compensation through its existing rates. Thus, if the Commission has authority to consider Duke’s Application under Section 4909.18, Revised Code, (and the Commission does not): (1) The compensation increase requested in the Application triggers the requirements of Sections 4909.18 and 4909.19, Revised Code, applicable to applications seeking an increase in rates; and (2) the Commission must hold Duke accountable for satisfying the procedural and substantive requirements in those Sections before it may authorize Duke to collect higher compensation.

### Duke is seeking to increase its compensation for generation-related capacity service

Although Duke alleges that it is seeking a new charge for a new service, Duke’s Application seeks an increase in the compensation it receives for generation-related capacity service Duke currently supplies to CRES providers at an RPM-Based Price and its SSO customers under its ESP generation tariffs.[[56]](#footnote-56) Duke’s Application confirms that Duke is currently collecting compensation for the capacity service it provides in accordance with RPM-Based Pricing and is requesting that the Commission increase that compensation by $776 million over the next three years.[[57]](#footnote-57) Further, the deferral proposed in Duke’s Application is the accounting host for the increased compensation and the deferral proposal is, among other things, an explicit admission by Duke that it is already receiving compensation for generation capacity service albeit at a level that is less than Duke now wants. Based on Duke’s own allegations, only one conclusion is possible: Duke is seeking an increase in compensation for the provision of generation-related capacity service.

To avoid the obvious conclusion that Duke is seeking an increase, Duke also alleges that it is seeking a new charge because the Commission has not set a state compensation mechanism for Duke and that Duke “has never before had a tariff for the collection of the costs incurred by it in fulfilling its obligations as an FRR entity.”[[58]](#footnote-58)

Duke’s allegation is factually wrong. In December 2010, the Commission determined that RPM-Based Prices are the state compensation mechanism.[[59]](#footnote-59) Further, Duke in its ESP settlement agreed to ESP rates based on RPM-Based Prices and agreed in that settlement and its Base Transmission Rider (“BTR”) stipulation to charge no more than RPM-Based Prices for generation-related capacity supplied to CRES providers.[[60]](#footnote-60) 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.[[61]](#footnote-61)

Duke also asserts three Ohio Supreme Court cases, *City of Cleveland v. Public Utilities Commission of Ohio* (“*City of Cleveland”*),[[62]](#footnote-62) *Cookson Pottery v. Public Utilities Commission of Ohio* (“*Cookson Pottery”*),[[63]](#footnote-63) and *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio* (“*Ohio Consumers’ Counsel”*)[[64]](#footnote-64) support its allegation that Duke is not seeking an increase in an existing charge. None of the cases, however, provides controlling authority in this proceeding. *City of Cleveland* and *Cookson Pottery* address the same question: should the replacement of a contract rate with a tariff rate that was higher than the contract rate be treated as an increase in rates? The Commission found there was no previous service under tariff and refused to treat the new tariff-based rate as an increase in rates. The Court in both cases affirmed. Neither case addressed the application of Section 4909.18, Revised Code, in an instance in which the electric utility is seeking to increase the amount of compensation it receives above the existing RPM-Based tariff rates.

The *Ohio Consumers’ Counsel* Case on which Duke relies addressed only the question of whether the Commission abused its discretion on an application to increase rates. The Commission provided notice and hearing, but did not treat an application that increased SSO rates as an application to increase rates. The Court only found that the Commission had not abused its discretion because it provided notice and an evidentiary hearing.[[65]](#footnote-65) The conclusion Duke seeks the Commission to draw, that no hearing is required for its Application, is unsupported. The Commission avoided a reversal only because it had afforded the parties notice and a hearing.

### The Application does not comply with the requirements applicable to an increase in rates for a non-competitive electric service

Even if, as Duke alleges, the Commission has jurisdiction to increase its compensation for the provision of generation-related capacity service under Section 4909.18, Revised Code, Duke has failed to satisfy the mandatory requirements applicable to an application to increase compensation.

Under Ohio’s cost-based ratemaking process, an application to increase compensation 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.”[[66]](#footnote-66)

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 is “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.[[67]](#footnote-67) The Commission has done so with the adoption of standard filing requirements.[[68]](#footnote-68)

Duke’s Application fails to provide any of the information that is required to perfect an application to increase compensation for an existing service when such compensation is tied to the Commission’s cost-based ratemaking authority. Instead, it points to total company (wholesale, retail, regulated and non-regulated) 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,[[69]](#footnote-69) 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.

Where 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. More specifically, the Commission must initiate an investigation, a report of the investigation must be prepared by the Commission’s Staff and issued, 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.[[70]](#footnote-70) 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.[[71]](#footnote-71)

## 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 first demonstrating that the resulting ESP is more favorable in the aggregate than a market rate offer (“MRO”) or satisfying other statutory requirements

 Because Duke, an EDU, is seeking to increase its compensation for the provision of generation-related capacity services through the Application, the Commission’s authority to authorize Duke to collect such compensation is confined to Chapter 4928, Revised Code. More specifically, Commission’s authority to authorize the collection of such compensation is confined to Sections 4928.141 to 4928.143, Revised Code.

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 those provisions which are set out in the list contained in Section 4928.143(B), Revised Code. Additionally, under Section 4928.143(C)(1), Revised Code, the EDU has the burden of demonstrating that its proposed ESP, in its pricing and all other terms and conditions, is more favorable in the aggregate than an MRO available under Section 4928.142, Revised Code. If the Commission does not find that the proposed ESP is more favorable than the MRO, it must disapprove the ESP application.[[72]](#footnote-72) And, 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.

The Application makes no attempt to demonstrate that the proposed charge, a charge designed to increase Duke’s (an EDU) compensation for generation-related capacity services, can be lawfully authorized by the Commission pursuant to Chapter 4928, Revised Code. That Chapter, and that Chapter alone, dictates how and when the Commission may authorize an EDU to obtain compensation for any competitive service.

The Application makes no attempt to demonstrate that the requested increase in compensation for competitive generation-related capacity service can be authorized by the Commission in accordance with the requirements of Section 4928.143(C)(1), Revised Code. Without such a showing and a subsequent lawful and favorable finding by the Commission, the Commission does not have authority to increase the compensation Duke is seeking through its generation-related tariffs as they would apply to SSO customers.

 The Application’s proposal to defer, for future collection, the increase in compensation for generation-related 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 which Duke, an EDU, provides 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 4928.141 through 4928.143, Revised Code. Section 4928.144, Revised Code, also requires that the Commission specify the costs against which the amount of the deferred collection must be matched in accordance with Generally Accepted Accounting Principles (“GAAP”).[[73]](#footnote-73) As discussed below, Duke’s Application seeks only to defer and recover deferred revenue. The higher and deferred compensation collection proposal contained in Duke’s Application is incompatible with the mandatory requirements in Sections 4928.141 through 4928.144, Revised Code, and may not be lawfully entertained by the Commission.

## The Commission may not lawfully or reasonably rely on the RAA to authorize Duke to collect higher compensation for generation-related capacity service through non-bypassable charges imposed on shopping and non-shopping customers

Duke’s Application asserts that the increase in compensation for generation-related capacity service (taking the total annual revenue to $364.9 million) can be authorized by the Commission pursuant to the terms of the RAA and the prevailing state compensation mechanism.[[74]](#footnote-74) This assertion is wrong. First, the RAA cannot extend the Commission’s statutory jurisdiction. Second, even if the Commission had authority to regulate generation-related capacity services based on the RAA (which it does not), 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 generation-related capacity service from retail customers through non-bypassable charges. The RAA is an agreement subject to the exclusive jurisdiction of FERC.

Although the Commission noted in the *AEP-Ohio Capacity Case* that its assertion of jurisdiction was “consistent with the governing section of the RAA”,[[75]](#footnote-75) 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.”[[76]](#footnote-76) Indeed, the Commission’s prior adoption of the RPM-Based Pricing method as the state compensation mechanism[[77]](#footnote-77) is also consistent with the RAA since the RAA specifically makes the RPM-Based Pricing method the default means of determining the compensation available for generation service capacity available to CRES providers.[[78]](#footnote-78)

Even if the RAA contained terms that suggested that the Commission should authorize a cost-based increase in Duke’s compensation for generation-related capacity service, the RAA could not expand the Commission’s jurisdiction to grant the relief sought by Duke. The RAA is a contract among PJM members and is approved as a tariff by FERC.[[79]](#footnote-79) The RAA cannot extend the jurisdiction of the Commission to permit it to authorize cost-based capacity compensation or the increase in compensation requested by Duke.[[80]](#footnote-80) The Commission’s subject matter jurisdiction is set by the General Assembly and is not affected by the RAA.[[81]](#footnote-81)

 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.

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. (Emphasis added.)

The state compensation mechanism, thus, is defined as the compensation from the CRES provider or the switching customer—and no one else.

 Duke already receives the RPM-Based compensation from CRES providers for capacity. In addition to the compensation it receives from CRES providers, Duke is seeking a non-bypassable 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. Therefore, the proposed charge in the Application cannot override the RAA requirement that RPM-Based Pricing controls as the default compensation method.

Additionally, the Commission is without authority to “adjudicate controversies between parties as to contract rights.”[[82]](#footnote-82) The RAA is a contract among its members and is to be interpreted, construed, and governed by the state law of Delaware.[[83]](#footnote-83) Additionally, it is a tariff approved by FERC.[[84]](#footnote-84) Duke’s Application, nonetheless, asserts a claim to increased compensation under the RAA.[[85]](#footnote-85) The Commission is without jurisdiction to determine what, if any, rights Duke may have under an agreement and this is particularly true in this case since the RAA is subject to the exclusive jurisdiction of FERC.

# THE COMMISSION HAS NO REMAINING AUTHORITY TO CONSIDER AN APPLICATION REQUESTING TRANSITION OR EQUIVALENT REVENUE[[86]](#footnote-86)

Ohio law precludes the Commission from authorizing an electric utility to bill and collect transition or equivalent revenue after the market development period (“MDP”). For Duke, the MDP ended on December 31, 2004 for non-residential customers and December 31, 2005 for residential customers. Once the MDP ended, Ohio law mandated that Duke’s functionally or structurally separated generation business had to be fully on its own in the competitive market.[[87]](#footnote-87) Moreover, Duke agreed to give up any claim it might have for a generation transition charge as a term of its Commission-approved Electric Transition Plan (“ETP”) settlement. Nonetheless, Duke’s Application requests that the Commission permit Duke to collect transition revenue or its equivalent through future non-bypassable charges. Because both statute and the Commission-approved provisions in Duke’s ETP settlement bar the Application’s claim for transition revenue, the Commission lacks authority to entertain Duke’s Application or grant the relief requested therein.

## Duke’s claim for increased generation-related compensation is a claim for transition or equivalent revenue

When the General Assembly authorized retail generation service competition, it also provided that the Commission could authorize electric utilities to recover generation transition revenue. Before an EDU could bill and collect transition charges to recover transition revenue, the EDU first had to submit a claim for transition revenue, and then the Commission had to make a finding on the total allowable transition revenue based on its determination of allowable transition costs. The transition costs eligible for recovery had to meet specified criteria. They had to be (a) prudently incurred, (b) legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in Ohio, (c) not otherwise recoverable in a competitive market, and (d) costs that the utility would have been otherwise entitled an opportunity to recover.[[88]](#footnote-88) Once the Commission determined the allowable transition costs, the Commission then was directed to establish a transition charge for each customer class “with all such transition charges being collected … during a market development period for the utility, ending on such date as the commission shall reasonably prescribe.”[[89]](#footnote-89) The Commission was also obligated to differentiate the transition charge so as to encourage at least 20% shopping prior to the mid-point of the MDP. While the MDP could not extend beyond December 31, 2005,[[90]](#footnote-90) it could and did end sooner than December 31, 2005 in Duke’s case at least with regard to commercial and industrial customers.

Duke’s Application requests Commission authority to collect transition revenue or its equivalent from retail consumers. Duke’s Application states that the proposed generation-related compensation increase is based on its “legacy” Ohio generation assets,[[91]](#footnote-91) the assets that Ohio law requires to be fully on their own in the competitive market. The Application further alleges that Duke “has committed legacy generation resources to fulfilling its obligation as an FRR entity.”[[92]](#footnote-92) 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.”[[93]](#footnote-93) The RPM-Based Price, Duke alleges, “is significantly less than [its] cost of providing capacity sufficient to meet its FRR obligations.”[[94]](#footnote-94) The difference between the proposed “cost-based” compensation and the “significantly less” RPM-based compensation is computed based on Duke’s “legacy” generating assets. Because of its current compensation structure, Duke claims that it “will be operating at a significant loss” if its current compensation is not modified through the Application.[[95]](#footnote-95) In summary, Duke is seeking additional compensation above what it would recover based on RPM Pricing that is determined based on a competitive bidding process to value and price capacity. The RPM Pricing method is a market-based pricing method. Duke’s Application, therefore, requests that the Commission authorize Duke to collect transition or equivalent revenue and does so well after the end of the time period within which the Commission was authorized to consider an EDU request for transition or equivalent revenue.

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

Ohio law precludes an EDU’s receipt of transition revenue at this time.[[96]](#footnote-96) It also 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.”[[97]](#footnote-97)

Further, SB 221 did not alter the Commission’s authority to authorize or the EDU’s right to receive transition revenue. In SB 221, the General Assembly adopted specific language terminating any further transition cost recovery: “[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.”[[98]](#footnote-98) Thus, the Commission is without statutory authority to consider or approve the request for transition revenue sought by Duke.

## Duke’s Application requests relief precluded by its Commission-approved stipulations

Additionally, the presentation of a transition or equivalent revenue claim in Duke’s Application and any action by the Commission that would consider or grant such claim would violate the terms of Duke’s Commission-approved ETP Stipulation. The ETP Stipulation resolved issues arising from the mandatory application Duke made following the passage of SB 3. In its ETP application, Cincinnati Gas and Electric Company (“CG&E”), Duke’s predecessor, sought transition cost recovery of $1.518 billion, including generation transition costs of $563 million.[[99]](#footnote-99) As part of the settlement, the ETP Stipulation placed the electricity price risk entirely on the electric utility.[[100]](#footnote-100) Specifically, CG&E agreed that it would not impose a generation transition charge.[[101]](#footnote-101) Although CG&E gave up its claim to collect generation asset transition revenue, CG&E was authorized to recover generation-related regulatory asset transition revenue of $884 million plus carrying costs and purchased power deferrals to maintain an adequate operating reserve margin.[[102]](#footnote-102) (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.[[103]](#footnote-103)) Over the objection of AK Steel and Shell that CG&E had stranded benefits (*i.e*. no generation transition costs), the Commission found that the stipulation provided an equitable resolution of the stranded generation cost matter.[[104]](#footnote-104) 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].”[[105]](#footnote-105)

In January 2004, CG&E filed its Rate Stability Plan (“RSP”) application that was resolved by a stipulation (“RSP Stipulation”).[[106]](#footnote-106) The RSP Stipulation provided that it did not amend or supersede any provision of the ETP Stipulation, except as expressly stated.[[107]](#footnote-107) There was no provision in the RSP Stipulation modifying CG&E’s commitment to forego the collection of generation transition revenue.

 In violation of its commitment in the ETP Stipulation and the RSP Stipulation, Duke, CG&E’s successor, seeks in this application to recover generation 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 AUTHORITY TO ADOPT ACCOUNTING PRACTICES THAT The Commission may not CONSIDER OR approve under Section 4905.13, Revised Code

Duke’s Application requests the Commission to permit Duke to adopt accounting practices that will permit it to defer, for future collection, the difference between what it currently collects as compensation for generation-related capacity service and the amount of compensation for such service that the Application asks the Commission to retroactively authorize. The accounting-related request in the Application sets up the related request for approval of a tariff that will permit Duke to amortize the accumulated deferred amount (including a carrying charge) through unspecified non-bypassable charges applied to shopping and non-shopping customers. Essentially, this is a request to defer revenue and as explained above, it is a request to defer the collection of transition or equivalent revenue in an amount equal to the difference between the market-based revenue stream and the so-called “cost-based” revenue stream plus interest which is characterized as a “cost” of the delayed recovery of the higher level of compensation. Duke’s Application asserts that the Commission may authorize the deferred accounting based on Section 4905.13, Revised Code, but this assertion is wrong. The accounting related relief requested in the Application is unlawful and conflicts with proper regulatory accounting.[[108]](#footnote-108)

Contrary to the assertion in Duke’s Application, Section 4905.13, Revised Code, does not authorize the Commission to make accounting modifications applicable to competitive generation electric service. Duke’s functionally or structurally separated generation business is, by operation of Ohio law, fully on its own in the competitive market and the deferral accounting peculiar to regulated businesses is not available to Duke for the generation business segment. Under Section 4928.05(A), Revised Code, the Commission is explicitly precluded from exercising regulatory or supervisory authority under the provisions of Chapter 4905, Revised Code, unless specifically provided otherwise. None of the exceptions noted in Section 4928.05, Revised Code, permits the Commission to exercise its authority under Section 4905.13, Revised Code, to authorize modifications in Duke’s accounting practices as such practices may be related to any competitive service including electric generation, aggregation, power marketing and power brokerage services supplied to consumers within Duke’s certified distribution service area.

Even if Duke could resort to regulatory accounting practices for its separated generation business, the deferral accounting sought by Duke’s Application violates applicable accounting standards. GAAP (that are also specifically referenced in Section 4928.144, Revised Code) require specific identification of the “allowable costs” that the accounting procedures will defer for future recovery so as to properly measure and record the expense levels that are deferred for future recovery. When such costs are deferred for future collection pursuant to a valid regulatory order, a regulatory asset is created to hold the accumulated deferred amount pending the amortization process. 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 as a result of regulatory action allowing future cost recovery.[[109]](#footnote-109) Duke, however, ended regulatory accounting for its generation function several years ago in response to the changes in Ohio law which ended the Commission’s authority to approve cost-based rates for generation related services.[[110]](#footnote-110) Thus, under GAAP, Duke cannot use regulatory accounting for any deferred cost associated with its competitive generation function.

Not only is the proposed deferral associated with Duke’s generation function improper under GAAP, the difference between the RPM-Based and so-called “cost-based” revenue, which Duke’s Application proposes to defer for future collection, is transition or equivalent revenue. Since the Commission lacks the authority to consider or approve requests for authority to collect transition or equivalent revenue, Duke cannot demonstrate that future collection of that revenue difference is probable. Thus, the deferral authority requested in Duke’s Application can have no impact on Duke’s accounting and reporting for financial purposes. More plainly stated, the deferral authority requested in Duke’s Application can have no impact on the return on common equity earned by Duke during the term of Duke’s current ESP and will only set up Duke (or more likely, an affiliate) to achieve, through non-bypassable charges, a windfall return on common equity once the term of the ESP ends.

Additionally, Duke is not seeking to defer allowable costs, as provided by GAAP. Allowable costs are defined as “[a]ll costs for which revenue is intended to provide recovery.  Those costs can be actual or estimated.”[[111]](#footnote-111) “An allowance for earnings on shareholders’ investment is not an incurred cost that would otherwise be charged to expense.”[[112]](#footnote-112) Duke is seeking authority to defer the generation capacity service compensation revenue difference between its current compensation and the proposed level of compensation that targets a specified level of earnings in shareholders’ investment plus a carrying cost. By definition, neither the deferred revenue or the carrying cost is an “allowable cost.” Thus, Duke would not be permitted under GAAP to use deferred accounting, even if Duke had not discontinued regulatory accounting for its functionally or structurally separated generation business.

Finally, the accounting-related relief requested in Duke’s Application is prohibited because it amounts to a retroactive increase in Duke’s compensation for generation-related capacity service. According to Duke’s Application, the deferral of the difference in the current and proposed level of compensation for generation-related capacity service that is presently being provided by Duke would commence on August 29, 2012. If the Commission granted this relief, the Commission would effectively and retroactively increase the compensation for generation-related capacity service to be paid by shopping and non-shopping customers. The Commission, however, is precluded from authorizing rates to retroactively increase the compensation of an EDU.[[113]](#footnote-113) The proposed deferral mechanism, therefore, is illegal and cannot be considered or approved in any event.

# The COMMISSION MAY NOT CONSIDER OR GRANT AN EDU’S CLAIM FOR INCREASED COMPENSATION ON “FINANCIAL INTEGRITY” GROUNDS UNLESS AND UNTIL THE EDU COMPLIES WITH THE PROCEDURAL AND SUBSTANTIVE REQUIREMENTS IN SECTION 4909.16, REVISED CODE, AND THE FINANCIAL CONSEQUENCES OF COMPENSATION FOR GENERATION RELATED SERVICES IS, IN ANY EVENT, IRRELEVANT

Duke’s Application asserts that Duke “will be operating at a significant loss” if the Commission fails to grant the relief requested therein.[[114]](#footnote-114) Apart from the fact that Duke does not have a legal basis to seek cost-based compensation from the Commission for generation-related capacity service, the Application’s assertion of an operating loss is not one which the Commission may consider or act upon unless and until the procedural and substantive requirements of Section 4909.16, Revised Code, (as applied by the Commission) are satisfied.

 The Commission has held that an application seeking an increase in compensation based on financial integrity grounds is subject to strict scrutiny and a clear and convincing evidentiary standard.[[115]](#footnote-115) In order to obtain such relief, the applicant must demonstrate: (1) “the existence of an emergency;” (2) that the emergency request is not filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code, and (3) that the temporary rate relief is only set to the minimum level necessary to avert or relieve the emergency.”[[116]](#footnote-116) “The ultimate question for the Commission is whether, absent emergency relief, the public utility will be financially imperiled or its ability to render service will be impaired.”[[117]](#footnote-117)

Although Duke’s Application asserts that Duke will suffer a financial loss if it is not allowed to collect higher compensation for generation-related capacity service, it has not satisfied any of the requirements that must be satisfied before the Commission may consider or address a request for higher compensation that is tied to a financial integrity claim.

Duke’s Application acknowledges that Duke is collecting the compensation which it agreed to collect as part of its Commission-approved ESP. Duke’s Application does not propose any change in current cash flow or accounting that would alter its current financial performance. Duke’s Application does not alleged that Duke, the EDU, will be financially imperiled or the manner in which its ability to render service will be impaired.

Moreover, Duke’s Application fails to demonstrate that the relief sought is the “minimum level necessary to avert or relieve an emergency.” Duke alleges that it is seeking relief “needed to ensure that the Company has the opportunity to earn 11.15 percent on its shareholders’ investment in capacity-related service.”[[118]](#footnote-118) It does not attempt to explain how an 11.15% return on investment is necessary to avoid an emergency.

Finally, the Commission has concluded “company earnings levels would not come into play for establishing generation rates.”[[119]](#footnote-119) “[W]ith the expiration of the MDP, generation rates are subject to the market (not the Commission’s traditional cost-of-service regulation).”[[120]](#footnote-120) Thus, there is no basis for Duke to assert a claim for additional compensation that will provide Duke’s shareholder with an 11.15% return on investment.

# Duke’s Application seeks an unlawful subsidy and violates corporate separation requirements and the procompetitive policy of the Valentine Act

As DECAM itself pointed out, it is the policy of the State to rely upon competition to discipline generation-related electricity prices in Ohio.[[121]](#footnote-121) To that end, the Commission “shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.”[[122]](#footnote-122) 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, the Commission previously rejected the authorization of non-bypassable charges to collect embedded generation-related costs. In AEP-Ohio’s *Sporn* proceeding, 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. OP 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.

Duke’s Application presents a similar violation of State policy because it seeks a determination that Duke is entitled to increase its compensation for generation-related capacity service above a market-based amount and to impose the burden of this higher amount on distribution service customers through non-bypassable charges. Because all retail customers will be required to pay the charge to fund the higher level of compensation for generation-related capacity service, Duke’s 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 works 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. As the General Assembly declared, “the utility shall be fully on its own in the competitive market.”[[123]](#footnote-123)

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.”[[124]](#footnote-124) By providing its generation function with a subsidy, Duke’s proposal violates these statutory requirements.

Duke compounds the violation of Section 4928.17, Revised Code, by proposing to “flow through” the revenue it recovers under the proposed tariff to its affiliate once Duke completes the transfer of its legacy generating assets.[[125]](#footnote-125) The flow through of above-market non-bypassable transition revenue from Duke to competitive affiliate would insulate the affiliate from competition and continue the violation of Section 4928.17, Revised Code.[[126]](#footnote-126) Furthermore, the flow through arrangement violates state law regarding agreements to create a monopoly. The Valentine Act[[127]](#footnote-127) declares that the agreements that work to create a monopoly and to fix prices in excess of the prices established by free commerce are void. The increased compensation flowed through to Duke’s affiliate crosses the line into anti-competitive behavior.

# Duke’s Application seeks excessive carrying charges

Duke’s Application seeks carrying charges on the unrecovered deferral balance calculated at the long-term debt rate of 4.11%.[[128]](#footnote-128) Short-term debt rates, however, are currently substantially below 4.11%.[[129]](#footnote-129) Duke should be required to ensure that any authorized carrying cost is as low as reasonably possible. This is especially true given that Duke is seeking to convert a generation-related charge for capacity into a non-bypassable charge. Generation charges would have been avoidable by customers, but Duke proposes to make those amounts unavoidable. If the Commission grants Duke’s Application to defer revenue in excess of the revenue Duke is presently receiving as compensation for generation-related capacity service (which it should not), the Commission should impose some market-based discipline on the carrying cost to minimize the cost to retail consumers caused by delaying the recovery of the revenue. As proposed, Duke’s carrying charge is excessive.

# Duke’s Application is UNREASONABLE AND UNLAWFUL because THE RELIEF REQUESTED THEREIN IS based on CLAIMS THAT ARE INCORRECT AND, EVEN IF CORRECT, WOULD NOT PERMIT THE COMMISSION TO GRANT SUCH RELIEF

Further, the foundation for the relief requested in Duke’s Application rests upon a claim that Duke is *entitled* to receive an increase in the current market-based compensation for generation-related capacity service in an amount that will produce total compensation equal to Duke’s computation of a so-called cost-based compensation. The threshold proposition presented by Duke’s Application is, however, wrong.

As a matter of law, RPM-Based compensation for generation-related capacity service is “just and reasonable,” and is dictated as the compensation that Duke agreed to collect as part of its Commission-approved ESP Settlement. If some other method of determining compensation exists and if, properly applied, it might provide a higher level of compensation to Duke for generation-related capacity service, this is not evidence that the current compensation method is unreasonable or unlawful. Duke may want to capture a greater amount of consumers’ wealth for generation-related capacity service and may be inspired by the Commission’s disposition of AEP-Ohio’s claims, but Duke is presently collecting exactly what it bargained for and received as part of its ESP package. It is important in the present context to note that the Ohio-related aspects of Duke’s operations recently elected and did move to the PJM organized market structure and, in doing so, Duke knew that it would have access to PJM’s organized capacity market. The explicit market-based compensation for capacity is not provided within the organized market structure of the Midwest Independent System Operator which Duke left. Indeed, much of Duke’s business motivation for moving to PJM was tied to the financial benefit available to Duke from PJM’s organized capacity market.[[130]](#footnote-130)

Duke’s Application further states that because Duke “self-supplies” capacity as an entity electing the FRR option within PJM’s capacity market, its “self-supplied” capacity is somehow dedicated to serve Duke’s Ohio load (both shopping and non-shopping).[[131]](#footnote-131) Duke’s Application then turns this “dedication” into a claim that Duke is entitled to increase its total compensation by imposing non-bypassable increases on all retail customers.[[132]](#footnote-132) But the “dedication” asserted in Duke’s Application is non-existent, and even if it did exist Duke’s current ESP ends the life of the “self-supply” fiction.

Duke is presently obligated to divest itself of its generation assets as a term of its Commission-approved ESP settlement. Pursuant to that Commission-approved settlement and the resulting ESP that went into effect on January 1, 2012, all of Duke’s generation assets shall be transferred to an affiliate at net book value.[[133]](#footnote-133) This transfer is to take place before December 31, 2014.[[134]](#footnote-134) Once the transfer takes place, the net book value of Duke’s “legacy” generating assets and related liabilities will not be part of Duke’s balance sheet. Yet the Application seeks authority to defer for future collection the higher compensation for generation-related capacity service as though Duke’s “entitlement” continues until May 31, 2015, at which time Duke’s FRR obligation ends.[[135]](#footnote-135) Thus, the Application’s use of the “legacy generation assets” to set Duke’s total compensation for satisfying its FRR obligation will bear no relationship with its actual assets long before Duke has ceased to collect the increased compensation.

In addition, the claim in Duke’s Application that its legacy generation assets are dedicated to serve Ohio retail load is wrong. An entity electing the FRR Alternative is not required to own the generation resources it submits to PJM to satisfy the capacity obligation that exists for any LSE within the organized PJM market structure.[[136]](#footnote-136) Under the FRR Alternative, generating units in an FRR plan can include capacity rights pursuant to a bilateral contract and are not limited to owned capacity.[[137]](#footnote-137) The FRR Capacity Resources can also include demand response and energy efficiency resources.[[138]](#footnote-138)

In fact, Duke’s Application does not include any demonstration that its legacy generating assets are satisfying its LSE capacity obligation. If Duke, an EDU, elected to rely on higher-than-market cost legacy generating assets to satisfy an FRR-related capacity obligation when it could have satisfied the capacity obligation at a lower cost, this was Duke’s choice, a choice subject to the control of Duke’s shareholder, not the Commission or retail customers. In this context, Duke’s request to pass this higher-than-market cost on to retail customers is also barred because this higher-than-market cost was not prudently incurred by Duke.

The RAA, furthermore, dispels the notion that it is possible for Duke’s legacy generating assets to be dedicated to meet any capacity obligation related to the load of Duke’s Ohio retail customers. The capacity obligation within the PJM organized market structure is defined and satisfied for the benefit of the entire PJM region, not particular LSE service areas. The RAA states that it is to be implemented in a manner consistent with the development of a robust competitive market.[[139]](#footnote-139) By its terms, the RAA is a PJM region-wide mutual assistance agreement through which signatory parties, including Duke, have agreed to share Capacity Resources throughout the region.[[140]](#footnote-140) The RAA exists, in part, because the sharing of Capacity Resources on a region-wide basis allows individual LSEs to carry a lower level of Capacity Resources and still achieve the desired level of reliability within the PJM Region.[[141]](#footnote-141)

Thus, the threshold claims made in Duke’s Application are wrong. Duke’s “legacy” generating assets, for as long as they remain with Duke, are no more dedicated to the provision of capacity service in Duke’s certified distribution service territory than AEP-Ohio’s are dedicated to the provision of capacity service in the AEP-Ohio service territory. Because the foundational premise of Duke’s Application is fundamentally flawed, Duke cannot demonstrate a reasonable basis for approving the cost-based capacity compensation it seeks in this proceeding.

# Conclusion

 The copycat Application that Duke has filed does not warrant any further consideration by this Commission. Duke has already resolved these issues through its existing settlements (reaching back to 2000) and should not be permitted to raise rates through non-bypassable charges. Further, Duke does not advance a lawful basis on which the Commission can authorize the relief Duke seeks. Additionally, the relief that Duke seeks would violate numerous statutory requirements and State policy. Therefore, the Commission should grant the Joint Motion to Dismiss or summarily deny the relief Duke seeks.

Respectfully submitted,

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**Certificate Of Service**

I hereby certify that a copy of the foregoing *Initial Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 2nd day of January 2013, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

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1. The Columbus Southern Power Company and the Ohio Power Company merged on December 31, 2011. The surviving entity was the Ohio Power Company. For purposes of this pleading, the Ohio Power Company is referred to as AEP-Ohio. [↑](#footnote-ref-1)
2. *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, Reply Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 6 (May 30, 2012) (“*AEP-Ohio Capacity Case*”). [↑](#footnote-ref-2)
3. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al*., Opinion and Order (Aug. 8, 2012) (“*AEP-Ohio ESP II Case*”). [↑](#footnote-ref-3)
4. *Ohio Power Company*, FERC Docket No. EC13-26-000, *et al*., Motion for Leave to Answer and Answer of Duke Energy Corporation at 2 & 4 (Dec. 17, 2012) (arguing that the protest of IEU-Ohio should be denied because “it seeks to upset a carefully and thoroughly deliberated state plan for the disposition of assets while retaining access to the capacity generated by those assets” and that FERC “should not engage in a shadow rate proceeding that second guesses the retail ratemaking and resource dispositions of the Ohio Commission.”). Duke Energy Corporation filed the Motion for Leave to Answer and Answer on behalf of both Duke and Duke Energy Commercial Asset Management, Inc. *Id*. at 1. As discussed below, Duke Energy Commercial Asset Management, Inc. argued to this Commission repeatedly that the relief sought by AEP-Ohio was unlawful and beyond the Commission’s authority. Clearly, the Commission’s unlawful decisions in the *AEP-Ohio Capacity Case* and *AEP-Ohio ESP II Case* have inspired members of the Duke corporate family to ignore the legal principles that they previously urged the Commission to respect. While Duke is now subject to criticism for its flip-flopping, the Commission’s unlawful and unreasonable efforts to accommodate AEP-Ohio’s efforts to increase its prices further above market and erect economic barriers to consumers’ efforts to enjoy the bill reduction benefits readily available from CRES providers is the root cause of the problem. Once the Commission authorized AEP-Ohio to implement its excessive prices and erect its economic blockade against free trade, Duke was sure to get in line for a portion of what the Commission served up for AEP-Ohio. Duke did just that on August 29, 2012. [↑](#footnote-ref-4)
5. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Second Revised Application of The Dayton Power and Light Company for Approval of an Electric Security Plan (Dec. 12, 2012). [↑](#footnote-ref-5)
6. In the Greek myth of Pandora, Pandora is given a box, but told not to open it. She does not obey and releases evil into the world. [↑](#footnote-ref-6)
7. RPM-Based Price refers to the price of capacity resulting from the auction processes established by PJM Interconnection LLC (“PJM”) pursuant to the Reliability Assurance Agreement (“RAA”). [↑](#footnote-ref-7)
8. *AEP-Ohio Capacity Case,* Opinion and Order (July 2, 2012), *AEP-Ohio ESP II Case*, Opinion and Order (Aug. 8, 2012). [↑](#footnote-ref-8)
9. Application of Duke Energy Ohio, Inc. (Aug. 29, 2012) (“Application”). [↑](#footnote-ref-9)
10. Under the RAA, the Fixed Resource Requirement (“FRR”) Alternative permits a load serving entity (“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 or auctions. [↑](#footnote-ref-10)
11. Application at 3. [↑](#footnote-ref-11)
12. *Id*. at 1. Duke relies primarily on Sections 4105.04, 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. Application at 6 n.18. [↑](#footnote-ref-12)
13. *Id*. at 2. [↑](#footnote-ref-13)
14. *Id*. [↑](#footnote-ref-14)
15. *Id*. at 4 [↑](#footnote-ref-15)
16. *Id*. at 7, 8. [↑](#footnote-ref-16)
17. *Id*. at 8. [↑](#footnote-ref-17)
18. *Id*. at 10. [↑](#footnote-ref-18)
19. *Id*. at 9 and Attachment D. [↑](#footnote-ref-19)
20. *Id*. at 9. [↑](#footnote-ref-20)
21. *Id*. [↑](#footnote-ref-21)
22. *Id*. [↑](#footnote-ref-22)
23. *Id*. at 10. Duke does not explain what the “attributable” amount might be. [↑](#footnote-ref-23)
24. Motion to Intervene of AEP Retail Energy Partners LLC, Memorandum in Support of the Motion to Intervene of AEP Retail Energy Partners LLC at unnumbered pages 4-5 (Oct. 3, 2012). [↑](#footnote-ref-24)
25. Joint Motion to Dismiss by Signatory Parties, Memorandum in Support of Joint Motion to Dismiss, *passim* (Oct. 4, 2012). [↑](#footnote-ref-25)
26. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 18 (Jan. 26, 2005) (“*AEP-Ohio RSP Case*”). [↑](#footnote-ref-26)
27. Section 4928.38, Revised Code. [↑](#footnote-ref-27)
28. Application at 3. [↑](#footnote-ref-28)
29. *Id*., *passim*. [↑](#footnote-ref-29)
30. *Id.* at 3 & 6. [↑](#footnote-ref-30)
31. Application at 3. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *See, e.g.,* *id.* at 1, 2, 4, 5, 6 & n.18. [↑](#footnote-ref-33)
34. “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-34)
35. Section 4905.03, Revised Code (Public utility company definitions) 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-35)
36. As discussed in further detail below, the scope of Section 4909.18, Revised Code, is further narrowed to non-competitive retail electric services by Section 4928.05(A), Revised Code. [↑](#footnote-ref-36)
37. *AEP-Ohio Capacity Case*, Initial Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 7 (May 23, 2012). [↑](#footnote-ref-37)
38. *Id*. [↑](#footnote-ref-38)
39. *AEP-Ohio Capacity Case*, Reply Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 8 (May 30, 2012). [↑](#footnote-ref-39)
40. Amended Substitute Senate Bill 221 (2008) (“SB 221”). [↑](#footnote-ref-40)
41. Amended Substitute Senate Bill 3 (1999) (“SB 3”). [↑](#footnote-ref-41)
42. *AEP-Ohio Capacity Case,* Reply Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 9 (May 30, 2012) (emphasis added). [↑](#footnote-ref-42)
43. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835, 840 (1993). [↑](#footnote-ref-43)
44. “‘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-44)
45. 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-45)
46. Section 4928.01(A)(27), Revised Code (emphasis added). [↑](#footnote-ref-46)
47. 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 non-competitive. Because non-competitive service components are defined to be everything except competitive service components or functions, a service component must either be competitive or non-competitive. [↑](#footnote-ref-47)
48. 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 generation-related capacity service. [↑](#footnote-ref-48)
49. Section 4928.142, Revised Code, provides for the introduction of market-based prices through the use of a competitive bidding process 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 MRO. Thus in each case the SSO is market based or tested. [↑](#footnote-ref-49)
50. *Columbus S. Power Co. v. Pub. Util. Comm.,* 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.2d 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”).

*Id.* at 840. [↑](#footnote-ref-50)
51. *AEP-Ohio Capacity Case*, Reply Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 8 (May 30, 2012). [↑](#footnote-ref-51)
52. Application at 4, 5. [↑](#footnote-ref-52)
53. *Id*. at 5 n.13 and 6 n.14. [↑](#footnote-ref-53)
54. *Id*. at 5. [↑](#footnote-ref-54)
55. *Id*. 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, if the Commission refuses to summarily dismiss Duke’s Application. [↑](#footnote-ref-55)
56. 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-56)
57. Application at 4, 8. [↑](#footnote-ref-57)
58. *Id*. at 5. [↑](#footnote-ref-58)
59. *AEP-Ohio Capacity Case*, Entry at 2 (Dec. 8, 2010). [↑](#footnote-ref-59)
60. For a discussion of Duke’s agreements, see Joint Motion to Dismiss, Memorandum in Support of Joint Motion to Dismiss at 1-8 (Oct. 4, 2012). [↑](#footnote-ref-60)
61. 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 Federal Power Act. RAA, Schedule 8.1, Section 8.D. [↑](#footnote-ref-61)
62. 67 Ohio St.2d 446 (1981). [↑](#footnote-ref-62)
63. 161 Ohio St. 498 (1954). [↑](#footnote-ref-63)
64. 111 Ohio St.3d 300 (2006). [↑](#footnote-ref-64)
65. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, ¶ 19 (2006). [↑](#footnote-ref-65)
66. Section 4909.18, Revised Code. [↑](#footnote-ref-66)
67. Section 4909.18(E), Revised Code. [↑](#footnote-ref-67)
68. Rule 4901-1-01, 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-68)
69. Application, Attachment B. [↑](#footnote-ref-69)
70. Section 4909.19(C), Revised Code. [↑](#footnote-ref-70)
71. *Id*. [↑](#footnote-ref-71)
72. Section 4928.143(C)(1), Revised Code. [↑](#footnote-ref-72)
73. Section 4928.144, Revised Code, requires compliance with GAAP for, among other things, the creation of a regulatory asset (the accumulated deferred amount subject to future collection). As discussed below regarding Duke’s improper reliance on the Commission’s accounting-related authority in Section 4905.13, Revised Code, Duke previously suspended regulatory accounting for its generation assets. Since Duke suspended regulatory accounting for the generation function, GAAP preclude the creation of a regulatory asset for the generation function. Section 4928.144, Revised Code, also requires the applicant to identify the costs that are being deferred to be matched against the deferred compensation and amortized through a future charge. Duke’s Application, however, does not seek to defer the recognition of any cost based on a mechanism that provides for future recovery. Instead, it seeks authority to collect, in the future, a higher level of revenue for service that it is currently providing. Duke’s Application sets that higher level of revenue at the difference between $364.9 million (including a return on equity of 11.15%) and what it is currently collecting “via the FZCP.” [↑](#footnote-ref-73)
74. Application at 10. [↑](#footnote-ref-74)
75. *AEP Capacity Case,* Opinion and Order at 13 (July 2, 2012). [↑](#footnote-ref-75)
76. RAA, Schedule 8.1, § D.8. [↑](#footnote-ref-76)
77. *AEP-Ohio Capacity Case*, Entry (Dec. 8, 2010). [↑](#footnote-ref-77)
78. DECAM similarly and correctly stated, “There is nothing inherent about being an FRR entity that makes it impossible or inappropriate for a utility to charge for capacity on the basis of RPM FZCP rates.” *AEP-Ohio Capacity Case*, Reply Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 6 (May 30, 2012). [↑](#footnote-ref-78)
79. *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-79)
80. *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-80)
81. *City of Washington v. Pub. Util. Comm.*, 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-81)
82. *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31 (1921). [↑](#footnote-ref-82)
83. RAA, § 16.2. [↑](#footnote-ref-83)
84. *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331 (2006). [↑](#footnote-ref-84)
85. Application at 2. [↑](#footnote-ref-85)
86. As discussed below, Ohio’s electric restructuring legislation enacted in 1999 provided each EDU with a limited opportunity to recover transition revenue to offset revenue lost or “stranded” because the EDU’s unbundled generation revenue was subject to potential erosion from the market forces enabled by a different regulatory regime. On April 24, 1996 (prior to Ohio’s restructuring legislation), FERC issued a final rule as part of FERC’s effort to remedy the anticompetitive structure of the electric industry. That final rule, issued through FERC Order 888, required all public utilities owning or operating facilities used to transmit electricity in interstate commerce to file open access non-discriminatory transmission tariffs containing specified terms and conditions. FERC’s final rule also permitted public and transmitting utilities to seek recovery of legitimate, prudent, and verifiable stranded revenue associated with pre-existing service obligations, whether the result of wholesale or retrial open access, computed based on a “lost revenue” approach. The responsibility for the stranded revenue was directly assigned to the customer exiting the pre-existing relationship as a result of “open access” and was to be collected through either an “exit fee” or transmission surcharge. In Order 888, FERC held that it would be the primary forum for resolving stranded revenue issues associated with retail-turned-wholesale customers. At pages 553-554 of Order 888, FERC determined that it would play a backup role with regard to stranded revenue claims related to retail customer choice:

This Commission’s authority to address retail stranded costs is based on our jurisdiction over the rates, terms and conditions of unbundled retail transmission in interstate commerce. The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users. However, because it is a state decision to permit or require retail wheeling that causes retail stranded costs to occur, we will leave it to state regulatory authorities to deal with any stranded costs occasioned by retail wheeling. The only circumstance in which we will entertain requests to recover stranded costs caused by retail wheeling is when the state regulatory authority does not have authority under state law to address stranded costs when retail wheeling is required. [↑](#footnote-ref-86)
87. Section 4928.38, Revised Code. [↑](#footnote-ref-87)
88. Section 4928.39(A)-(D), Revised Code. [↑](#footnote-ref-88)
89. Section 4928.40(A), Revised Code. [↑](#footnote-ref-89)
90. Section 4928.40(A) & (B), Revised Code. [↑](#footnote-ref-90)
91. Application at 7-8 and Attachment A & B. [↑](#footnote-ref-91)
92. *Id.* at 3. [↑](#footnote-ref-92)
93. *Id.* at 4 (emphasis added). [↑](#footnote-ref-93)
94. *Id.* [↑](#footnote-ref-94)
95. *Id.* at 8-9. [↑](#footnote-ref-95)
96. Section 4928.38, Revised Code. The period for transition revenue recovery consisted of two overlapping periods. The MDP lasted until December 31, 2005. The regulatory asset portion of recoverable transition costs were required to be separately identified. Section 4928.39(D), Revised Code. Recovery of the regulatory asset portion continue until December 31, 2010. Section 4928.40(A), Revised Code. [↑](#footnote-ref-96)
97. Section 4928.38, Revised Code. [↑](#footnote-ref-97)
98. Section 4928.141(A), Revised Code. [↑](#footnote-ref-98)
99. *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case Nos. 99-1658-EL-ETP, *et al*., Opinion and Order at 23 (Aug. 31, 2000) (hereinafter “*Duke ETP Case*”). [↑](#footnote-ref-99)
100. *Id.* [↑](#footnote-ref-100)
101. *Duke ETP Case*, Stipulation at 6.(May 4, 2000) [↑](#footnote-ref-101)
102. *Duke ETP Case*, Opinion and Order at 23. [↑](#footnote-ref-102)
103. *Id.* [↑](#footnote-ref-103)
104. *Id.* at 28. [↑](#footnote-ref-104)
105. *Id.* [↑](#footnote-ref-105)
106. *In the Matter of the Application of The Cincinnati Gas and 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-106)
107. *RSP Case*, Stipulation and Recommendation at 20 (May 19, 2004), *approved*, Opinion and Order (Sept. 29, 2004). [↑](#footnote-ref-107)
108. In the context of the approval of lawful transition charges, the Commission was directed to “not permit the creation or amortization of additional regulatory assets without notice or hearing.” Section 4928.40(A), Revised Code. [↑](#footnote-ref-108)
109. Financial Accounting Standards Board Codification 980. [↑](#footnote-ref-109)
110. 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-110)
111. Financial Accounting Standards Board, Codification Reference 980-340-20. [↑](#footnote-ref-111)
112. Financial Accounting Standards Board, Codification Reference 980-340-25-5. [↑](#footnote-ref-112)
113. *In re Columbus Southern Power Company*, 128 Ohio St. 512 (2011). [↑](#footnote-ref-113)
114. Application at 9. [↑](#footnote-ref-114)
115. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case Nos. 09-453-HT-AEM, *et al*., Opinion and Order at 6 (Sept. 2, 2009). [↑](#footnote-ref-115)
116. *Id.* [↑](#footnote-ref-116)
117. *Id*. [↑](#footnote-ref-117)
118. Application at 8. [↑](#footnote-ref-118)
119. *AEP-Ohio RSP Case*, Opinion and Order at 18 (Jan. 26, 2005). [↑](#footnote-ref-119)
120. *Id*. [↑](#footnote-ref-120)
121. *AEP-Ohio Capacity Case*, Reply Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 8 (May 30, 2012). [↑](#footnote-ref-121)
122. Section 4928.06(A), Revised Code. [↑](#footnote-ref-122)
123. Section 4928.38, Revised Code. [↑](#footnote-ref-123)
124. Section 4928.17(A)(2) & (3), Revised Code. [↑](#footnote-ref-124)
125. Application at 10. [↑](#footnote-ref-125)
126. *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 (Nov. 16, 2012). [↑](#footnote-ref-126)
127. Chapter 1331, Revised Code. Courts have determined that antitrust principles should be considered to evaluate the public interest. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968); *Northern Natural Gas Company v. Federal Power Commission*, 399 F.2d 953, 960-61 (Ct. App., D.C. Cir. 1968). Section 4928.17(A)(2), Revised Code, requires the corporate separation plan to satisfy the “public interest in preventing unfair competitive advantage and preventing the abuse of market power.” Thus, the Valentine Act is relevant to the Commission’s analysis of the pass through of transition revenue to Genco authorized in the Order. [↑](#footnote-ref-127)
128. Application at 5 and Attachment B at 17. [↑](#footnote-ref-128)
129. Wall St. J., Market Data Center, http://online.wsj.com/mdc/public/page/mdc\_bonds.html?mod=mdc \_topnav\_2\_3000 (viewed Dec. 31, 2012). [↑](#footnote-ref-129)
130. Press Release, Duke Energy Ohio and Duke Energy Kentucky Propose Switch to PJM Regional Transmission Organization (May 20, 2010) (available at <http://www.duke-energy.com/news/releases/2010052001.asp>). [↑](#footnote-ref-130)
131. Application at 2, 3. [↑](#footnote-ref-131)
132. *Id*. at 8-10. [↑](#footnote-ref-132)
133. *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 at 31 (Nov. 22, 2011). [↑](#footnote-ref-133)
134. *Id*. at 29. [↑](#footnote-ref-134)
135. Application at 10. Under the RAA, Duke could terminate its FRR election due to state regulatory action. RAA, Schedule 8.1, § C.3. [↑](#footnote-ref-135)
136. *AEP-Ohio Capacity Case*, Tr. Vol. V at 975; *see also id,* Tr. Vol. I at 90. [↑](#footnote-ref-136)
137. *Id*., Tr. Vol. V at 979. [↑](#footnote-ref-137)
138. *Id*., Tr. Vol. V at 976. [↑](#footnote-ref-138)
139. *Id*., Tr. Vol. II at 468. More specifically Article 2 of the RAA provides as follows:

This Agreement is intended to ensure that adequate Capacity Resources, including planned and Existing Generation Capacity Resources, planned and existing Demand Resources, Energy Efficiency Resources, and ILR will be planned and made available to provide reliable service to loads within the PJM Region, to assist other Parties during Emergencies and to coordinate planning of such resources consistent with the Reliability Principles and Standards. Further, it is the intention and objective of the Parties to implement this Agreement in a manner consistent with the development of a robust competitive marketplace. To accomplish these objectives, this Agreement is among all of the Load Serving Entities within the PJM Region. Unless this Agreement is terminated as provided in Section 3.3, every entity which is or will become a Load Serving Entity within the PJM Region is to become and remain a Party to this Agreement or to an agreement (such as a requirements supply agreement) with a Party pursuant to which that Party has agreed to act as the agent for the Load Serving Entity for purposes of satisfying the obligations under this Agreement related to the load within the PJM Region of that Load Serving Entity. Nothing herein is intended to abridge, alter or otherwise affect the emergency powers the Office of the Interconnection may exercise under the Operating Agreement and PJM Tariff. [↑](#footnote-ref-139)
140. *Id*., Tr. Vol. VI at 1346-48. [↑](#footnote-ref-140)
141. RAA at 4 (“each party is committing to coordinate its planning of Capacity Resources to satisfy the Reliability Principles and Standards”). [↑](#footnote-ref-141)