**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Revised Code Section 4909.18.In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.In the Matter of the Application of Duke Energy Ohio, Inc., for the Approval of a Tariff for a New Service. | )))))))))) | Case No. 12-2400-EL-UNCCase No. 12-2401-EL-AAMCase No. 12-2402-EL-ATA |

**REPLY BRIEF**

**BY**

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#

# INTRODUCTION

Duke Energy Ohio (“Duke” or “Utility”) proposes to collect $729 million (plus carrying charges) from retail customers over a thirty-four-month period that relates backto August 1, 2012.[[1]](#footnote-2) As explained in the Joint Motion to Dismiss and OCC’s Initial Post Hearing Brief, this proposal is unjust, unreasonable, and unlawful on many fronts.

* It violates the Electric Security Plan (“ESP”) Stipulation signed less than a year and a half ago.**[[2]](#footnote-3)**
* It is contrary to the General Assembly’s directive that Duke be “fully on its own in the competitive market”**[[3]](#footnote-4)** after its market development period ended in 2005.**[[4]](#footnote-5)**
* Duke has failed to prove that $729 million (plus carrying costs) is a just and reasonable revenue requirement that should be collected from its retail customers.
* Duke seeks rate increases for services rendered in the past. Doing so is retroactive ratemaking and is prohibited in Ohio under *Keco* and its progeny.[[5]](#footnote-6)

 Under Ohio law, customers are supposed to be the beneficiaries of Duke’s entry into a competitive generation market. But Duke wants customers to protect it from the market. It requests protection in the form of receiving from retail customers embedded cost rates for wholesale capacity that Duke sells to marketers at the PJM Reliability Pricing Model (“RPM”) price. The PUCO should reject this request. In doing so the PUCO will be upholding the quintessential policy of the state—ensuring reasonably priced retail electric service is available to consumers in the state of Ohio.

# LAW AND ARGUMENT

## A. The Joint Motion To Dismiss Should Be Granted For Reasons That Include Justice For Customers That Already Are Paying Several Hundred Million Dollars To Duke For Agreed-To Stability Charges.

Various intervening parties to this proceeding (“Signatory Parties”), including OCC, filed a Joint Motion to Dismiss on October 4, 2012.[[6]](#footnote-7)The Signatory Parties moved the PUCO to dismiss Duke’s Application to collect $729 million from customers—about $150-$200 per year for three years for a typical residential customer. These are the same customers that already are paying $330 million to Duke in so-called “stability” charges that, unlike the capacity charges, were agreed to in the Stipulation in the electric security plan case. In the Joint Motion to Dismiss, the Signatory Parties urged the PUCO to enforce the entire Duke ESP Stipulation which priced capacity at Final Zonal Capacity Price (“FZCP”), not embedded costs. The Signatory Parties also argued that Duke is precluded under the doctrines of res judicata and collateral estoppel from re-litigating its Electric Security Plan.

Duke attempted to refute these arguments, in part, by alleging that res judicata and collateral estoppel do not apply in this case.[[7]](#footnote-8) Duke also alleges that it did not waive its rights to reasonable compensation when it agreed to the ESP Stipulation. Additionally, Duke alleges that the PUCO could not have ruled on the issue at hand because it has no authority to include capacity costs as part of an ESP. These arguments fail for the reasons discussed in detail below.

### 1. Duke’s application violates the doctrines of res judicata and collateral estoppel that protect customers from Duke’s second bite at a golden apple.

Duke argues that the doctrines of res judicata and collateral estoppel do not apply to bar its request in this case.[[8]](#footnote-9) Duke also contends that neither the ESP Stipulation nor the PUCO’s order approving the ESP Stipulation constitute a final judicial determination on the merits.[[9]](#footnote-10) In addition, Duke states that the claims at issue in the prior and pending proceedings are separate and distinct: one addressing competitive retail pricing and one addressing noncompetitive wholesale pricing.[[10]](#footnote-11) Duke is wrong. The capacity supply service at issue in this proceeding is the same capacity supply service that was at issue in the Duke ESP. And the assets being used by Duke to supply capacity in the ESP are the same assets at issue in this proceeding.

Duke cites to *State ex rel.* *Davis et al. v. Public Employees Retirement Board,* 120 Ohio St.3d 386 (“Davis”)and *Consolo v. City of Cleveland,* 103 Ohio St.3d 362 (2004) (“Consolo”) as precedent for its argument that a “stipulated settlement does not constitute a ‘valid, final judgment upon the merits’ sufficient to support a claim of res judicata.”[[11]](#footnote-12) But neither *Davis* nor *Consolo* support Duke’s argument.

First, these collateral estoppel cases do not address res judicata or any of its elements. The Ohio Supreme Court has held, “res judicata promotes the principle of finality of judgments by requiring plaintiffs to present every possible ground for relief in the first action.”[[12]](#footnote-13) But neither of the cases cited by Duke addresses what actually constitutes a valid, final judgment on the merits.

*Davis* does not support Duke’s assertion that a stipulated settlement cannot constitute a valid, final judgment on the merits for res judicata purposes. *Davis* addresses collateral estoppel elements that are not common to res judicata. In *Davis*, the collateral estoppel claim failed because the issue was not actually litigated in the previous proceedings.[[13]](#footnote-14) As proof that the issue was not actually litigated, the Court cited to a party’s request during the administrative proceeding that the authority not rule on the issue, and the authority’s subsequent determination “that it was not considering these issues in its ruling.”[[14]](#footnote-15) Ultimately, the Court held: “[w]hen an issue is not actually litigated and decided in the previous proceeding, collateral estoppel does not preclude the issue from being litigated in the subsequent proceeding.”[[15]](#footnote-16) *Davis* also analogized a party’s failure to raise or contest issues with a stipulation.[[16]](#footnote-17) The Court cited to the Restatement for the proposition that “[a]n issue is not actually litigated if \*\*\* it is the subject of a stipulation between the parties.”[[17]](#footnote-18) But at no point does *Davis* challenge the finality or the validity of the judgment in the previous case.

The law is clear. While collateral estoppel requires that the identical issue “be actually litigated, directly determined, and essential to the judgment in the prior action,’”[[18]](#footnote-19) res judicata simply does not. Res judicata precludes both claims that were actually litigated and claims that were not actually litigated, but which could have been raised.[[19]](#footnote-20) The *Davis* case, which addressed a collateral estoppel claim, does not support Duke’s res judicata argument.

*Consolo*, which addressed a collateral estoppel claim, also does not support Duke’s res judicata argument. In *Consolo*, the Ohio Supreme Court found the elements of collateral estoppel missing, but the Court did not address res judicata elements (i.e., was there a final judgment on the merits). Collateral estoppel also requires an issue to be actually litigated and essential to the final judgment upon the merits.[[20]](#footnote-21) Yet, in *Consolo*, the Court found that one issue “was neither actually litigated nor essential to [the Court’s] judgment.”[[21]](#footnote-22) Thus, the facts in both *Davis* and *Consolo* are distinguishable from the present case.

The issue of how Duke was to be compensated for providing capacity as an FRR entity was an integral part of the prior proceeding. The ESP Stipulation, Duke’s testimony, the PUCO Order, and Duke’s tariffs all attest to that fact. The issues raised in this case were already litigated, and Duke had the opportunity to present evidence of its embedded costs of being an FRR entity. In fact it did present such evidence in its original application,[[22]](#footnote-23) but as part of the ESP settlement Duke agreed to forego cost-based capacity prices in lieu of market- based capacity prices and compensation through Riders RC and ESSC. Duke agreed to be compensated for its FRR obligation under the terms of the Stipulation. Duke’s agreement under the Stipulation cannot be squared with its allegations in this proceeding that it is receiving inadequate capacity compensation, which will cause it to operate at a significant loss.[[23]](#footnote-24) Thus, when collateral estoppel and res judicata are applied, it is clear that Duke is precluded from seeking the additional relief requested in its Application.

Moreover, Duke’s arguments in favor of narrowing the scope of the res judicata and collateral estoppel doctrines are contrary to legal precedent regarding these doctrines.

Res judicata precludes not only re-litigation of issues raised and decided in a prior action, but the doctrine also “applies even to instances in which a party is prepared to present new evidence or new causes of action not presented in the first action, or to seek remedies or forms of relief not sought in the first action.”[[24]](#footnote-25)

The Supreme Court of Ohio has held that:

A party cannot re-litigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies, in reference to the same subject matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so.[[25]](#footnote-26)

Hence, the scope of these doctrines is broad and encompasses Duke’s claims in the present case. Duke was afforded a fair opportunity to litigate how its capacity should be priced when it filed its ESP application. In fact, the very same legal authority that it relies on here—Section 8.1 of the PJM RAA which authorizes the PUCO to establish a state compensation mechanism—was part of the legal authority Duke relied on to initially seek a cost-based rate for capacity in its filed ESP. The facts are the same, the law is the same, and the parties are the same. Despite this, Duke continues to argue that the ESP proceeding and the current proceeding are separate and distinct.[[26]](#footnote-27) Again, Duke is wrong.

The issues pertaining to the capacity rate were well known because AEP Ohio was litigating the same issues at both the federal and state levels since, at a minimum, December, 2010. Duke’s argument that a generic state mechanism (or methodology for establishing the state mechanism) was a new creation by the PUCO in 2012, after Duke’s ESP had been approved, is just inaccurate. As previously explained by multiple parties, the PUCO explicitly limited its review in the AEP Ohio Capacity Case to AEP Ohio.[[27]](#footnote-28) The issue of an appropriate capacity charge for AEP Ohio was fully raised and litigated, and was known to the industry in 2010. The only thing that is new or different is Duke’s attempt to get a second bite at the regulatory process by seeking the “higher of” the result reached in its two Stipulations or the litigated result in AEP Ohio’s Capacity Case.

According to the Court, “where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.”[[28]](#footnote-29) The Court has held that PUCO proceedings “characterized by notice, hearing, and the making of an evidentiary record” are quasi-judicial proceedings.[[29]](#footnote-30) Moreover, the doctrine can also be applied in cases concluded by settlement.[[30]](#footnote-31) Therefore, res judicata and collateral estoppel bar Duke’s requests in this case.

### 2. Duke waived its rights to reasonable compensation from customers.

Duke argues that it has not waived its right to just and reasonable compensation for its capacity service.[[31]](#footnote-32) Duke states that “waiver is a matter of intention –it is the voluntary relinquishment of a known right, claim or privilege with the intent to do so with full knowledge of the facts.”[[32]](#footnote-33) Then, Duke reasons that “[n]owhere does the ESP Order specify how much Duke Energy Ohio would be paid for providing wholesale capacity service or that Duke Energy Ohio voluntarily relinquished its right to recover its costs….”[[33]](#footnote-34) But in making this argument, Duke is asking the PUCO to ignore the facts and circumstances that surround this proceeding.

The timeline of events leading up to this proceeding show that Duke voluntarily chose to pursue the approaches it took for capacity pricing—knowing the cost recovery implications. For example, Duke chose to initiate the move from the Midwest Independent Transmission System Operation (“MISO”) to PJM Interconnection in June of 2010.[[34]](#footnote-35) In August of 2010, Duke submitted a Fixed Resource Requirement Integration Plan, which detailed how it would meet its PJM resource adequacy requirements as an FRR entity.[[35]](#footnote-36) Duke should have been aware at that time that under the RAA the default price for capacity was RPM. It should have also known that the only way to request a cost-based price under the RAA is to file at FERC. But Duke filed a Stipulation in its Application for Approval of the Establishment of Rider BTR (base transmission rider) and a Regional Transmission Rider in April of 2011. There, Duke agreed that it would not request FERC approval of a wholesale capacity charge based upon Duke’s costs as an FRR entity in PJM between January 1, 2012 and May 31, 2016.[[36]](#footnote-37)

In June of 2011, Duke filed an application for a Standard Service Offer in the form of an ESP. Duke proposed to collect the costs of its capacity based on embedded costs, plus a reasonable rate of return.[[37]](#footnote-38) However, Duke filed a Stipulation to resolve its ESP case on October 24, 2011 that provided for capacity to be at the market-based price, rather than a cost-based price.[[38]](#footnote-39) Duke was not forced to make any of these decisions.

While it is true that the Duke ESP Stipulation does not explicitly say “Duke waives its right to reasonable compensation for capacity,” Duke cannot separate itself from the decisions it has made. Duke decided to become an FRR entity. Duke decided to forego its opportunity to seek cost-based compensation at FERC. Duke should have known that RPM prices are the default under the RAA. Duke settled its ESP. Duke did not include a provision for cost-based capacity in the ESP settlement. Duke did not file a request for rate relief on the grounds it was not recovering its capacity costs under the ESP from November 22, 2011 through August 28 2012. All of these decisions were voluntary. All of these decisions should have been made by Duke with full knowledge of the facts surrounding FRR entities and the PJM capacity market. Duke should be held accountable for its decisions.

### 3. The PUCO has held that capacity costs can be included in an electric security plan.

Duke argues that its ESP did not establish a state compensation mechanism for Duke.[[39]](#footnote-40) Specifically, Duke asserts that an ESP can only include components found under a subdivision of R.C. 4928.143. [[40]](#footnote-41) In this regard, Duke states:

R.C. 4928.143 does not authorize, for inclusion in an ESP, the approval of a state mechanism for capacity service provided by an FRR entity. The Commission confirmed this fact when it found that ‘Chapter 4928, Revised Code, has no application in terms of the Commission’s authority to establish the [state compensation mechanism].[[41]](#footnote-42)

Duke further concludes that “the ESP Order did not establish - nor could it have established - a state compensation mechanism for Duke Energy Ohio.”[[42]](#footnote-43) But Duke’s argument must be rejected. Duke ignores the fact that the PUCO has already determined that it has the authority to include capacity costs through an ESP proceeding.

The AEP Ohio Capacity Case Order did not address the deferral recovery mechanism for AEP Ohio. Rather, the PUCO merely noted that an appropriate mechanism would be established in the AEP Ohio Electric Security Plan Case and that any other financial considerations would also be addressed by the PUCO in that case.[[43]](#footnote-44) But ultimately, in the AEP Ohio ESP Case, the PUCO stated:

Certain parties that oppose the Commission’s incorporation of the Capacity Case deferrals in the modified ESP overlook the fact that the Capacity Case was opened prior to each of the ESP 2 applications filed by AEP-Ohio and that each of the applications proposed a state compensation capacity charge and plan for resolution of the issue.[[44]](#footnote-45)

The PUCO concluded that “in accordance with Section 4928.144, Revised Code, the Commission may order any just and reasonable phase-in of any rate of price established under Sections 4928.141, 4928.142, or 4928.143, Revised Code, including carrying charges.”[[45]](#footnote-46) The PUCO held that “AEP Ohio proposed certain capacity charges and a plan as a part of its modified ESP,” and it is within the PUCO’s authority to approve or modify and approve an ESP.[[46]](#footnote-47) The PUCO found that nothing in R.C. 4928.144 limits its authority to modify the ESP to include deferrals on its own motion.[[47]](#footnote-48)

Similarly, in the AEP Ohio Capacity Case, AEP Ohio argued on rehearing that the PUCO’s Capacity Order was unlawful and unreasonable in finding that the Provider of Last Resort (“POLR”) charge approved in the ESP 1 Order reflected AEP Ohio’s cost of supplying capacity for retail loads served by marketers.[[48]](#footnote-49) AEP Ohio contended that the POLR charge was based upon the continued use of RPM pricing to set the capacity charge for marketers.[[49]](#footnote-50) The PUCO disagreed with AEP Ohio and found that it had approved retail rates for AEP Ohio, including recovery of capacity costs through a POLR charge.[[50]](#footnote-51) The PUCO ultimately permitted AEP Ohio to recover capacity costs associated with customer shopping through its POLR charge.[[51]](#footnote-52) The PUCO acknowledged that the purpose of the POLR charge was to compensate AEP Ohio for the risk associated with its POLR obligation.[[52]](#footnote-53) However, the PUCO also found that the POLR charge was approved, in part, to recover capacity costs associated with customer shopping.[[53]](#footnote-54) Accordingly, the PUCO concluded that there are capacity costs associated with the POLR obligation, and that such costs may be properly recoverable through an ESP upon a proper record.

Finally, in the PUCO’s December 8, 2010 Entry in the AEP Ohio Capacity Case, the PUCO found that it approved retail rates, “including recovery of capacity costs through provider of last resort charges to certain retail shopping customers, based upon the continuation of the current capacity charges established by the three-year capacity auction conducted by PJM, under the current FRR mechanism.”[[54]](#footnote-55)

These rulings by the PUCO directly contradict Duke’s assertion that, as a matter of law, the services at issue in the Duke ESP cannot be the same services as those that are being sought in this case. The PUCO’s decisions in the AEP Ohio Capacity and ESP Cases show that the PUCO has ruled that capacity charges can be included within its approval of an ESP plan. Thus, the PUCO had the authority to approve a state compensation mechanism for Duke through its approval of the Duke ESP Stipulation. Duke’s argument should be denied.

## B. Contrary To Duke’s Assertions, There Is No State Law That Requires The PUCO To Apply Traditional Regulatory Principles To The Wholesale FRR Capacity Service That Duke Provides To Marketers And The Winners Of Its Competitive Bid Auctions.

Duke argues that the PUCO has authority to supervise and regulate under various sections of the Revised Code including R.C. 4905.04, 4905.05, 4905.06, and 4905.26.[[55]](#footnote-56) Duke alleges that under these state laws, the PUCO has an obligation to ensure that jurisdictional utilities receive just and reasonable compensation for the services they render. Duke considers the wholesale FRR capacity service that it provides to marketers to be “services” subject to regulation under Chapter 4905, Revised Code, consistent with the PUCO’s findings in the AEP Capacity Case.[[56]](#footnote-57) Duke also argues that providing wholesale “non-competitive”[[57]](#footnote-58) FRR capacity service to marketers is very similar to providing traditional public utility service prior to restructuring.[[58]](#footnote-59)

According to Duke, the PUCO can (and must), under traditional regulation, ensure that jurisdictional utilities receive reasonable compensation for the services they render.[[59]](#footnote-60) Duke defines reasonable compensation as a cost based state mechanism for the wholesale FRR capacity service that Duke must provide to marketers. Duke argues that applying a cost based mechanism for wholesale FRR capacity is appropriate because the wholesale service is subject to traditional ratemaking under Chapter 4909, Revised Code. Duke relies upon the PUCO’s decision in the AEP Ohio Capacity case for support for this proposition. Duke argues that, like AEP Ohio, it needs to augment the PJM auction rates for FRR capacity because it is not being compensated for its embedded costs, and thus, not receiving a reasonable return on its investment.[[60]](#footnote-61) But Duke’s arguments are based on faulty legal assumptions which are addressed below.

### 1. R.C. 4905.04, 4905.05, and 4905.06 do not permit the PUCO to establish rates.

R.C. 4905.04, 4905.05, and 4905.06 do not establish any PUCO obligation to ensure that jurisdictional utilities receive just and reasonable compensation for services provided to marketers. A close look at these statutes confirms this.

R.C. 4905.04 gives the PUCO the power to supervise and regulate public utilities, and to require that all public utilities furnish their products and render all services exacted by the PUCO or law. R.C. 4905.05 defines the PUCO’s scope of jurisdiction as extending to public utilities with plant or property within the state. R.C. 4905.06 establishes that the PUCO has general supervision over public utilities. It allows the PUCO to take actions to keep them advised of utilities’ general condition, capitalization, and franchises and the manner in which utilities manage their property with respect to the adequacy, safety, and security of the public and their employees. The broadsupervisory powers identified in these statutes have generally been used in the context of affecting public safety and service reliability.[[61]](#footnote-62) Yet issues of public safety and service reliability are not present in Duke’s Application.

The Ohio Supreme Court has determined that a statute broadly granting the PUCO all powers necessary to carry out Chapter 4901 could not be used to disregard other specific ratemaking statutes.[[62]](#footnote-63) That reasoning applies here. The broad general supervisory statutes cited by Duke cannot be substituted for the specific ratemaking statutes found under R.C. Chapter 4909.

None of these broad, general supervisory statutes allow the PUCO to set rates. As explained in detail in OCC’s Initial Brief,[[63]](#footnote-64) rates outside an ESP can only be set through a rate case filed under R.C. 4909.18 or through a complaint case, filed under R.C. 4905.26. Duke has not presented either for the PUCO to review.

Moreover, while the PUCO did cite to these general supervisory sections of the Code in the AEP Capacity Charge Case, the context was different. Going back to the very first Entry in the AEP Capacity Case, the PUCO initially cited to these laws to enable it to expressly adopt the then existing capacity rates as the state compensation mechanism. [[64]](#footnote-65) But those existing capacity rates were already part of PUCO-approved AEP ESP retail rates.[[65]](#footnote-66) So while the PUCO can find that a state compensation mechanism already exists, that is much different than “establishing” outside of an ESP, a state compensation mechanism that requires the setting of new rates.

Even the PUCO seemed to acknowledge this in subsequent Entries on Rehearing. In its October 17, 2012 Entry on Rehearing it granted rehearing[[66]](#footnote-67) to clarify that its investigation initiated in the AEP Capacity Case was conducted under specific authority found in R.C. 4905.26.[[67]](#footnote-68) Its clarification was noted not just once but at numerous points within the Application for Rehearing. Further in a later Entry on Rehearing (Dec. 12, 2012), the PUCO emphasized that it initiated the capacity case hearing to review AEP’s existing capacity charge to determine that it was consistent with R.C. 4905.26.[[68]](#footnote-69)

### 2. R.C. 4905.04, 4905.05, and 4905.06 do not establish any obligation to ensure that jurisdictional utilities receive just and reasonable compensation for services.

Nor do these statutes pertain to any PUCO obligation to ensure that jurisdictional utilities receive just and reasonable compensation for the services they render. There are no words that convey any such authority in R.C. 4905.04, 4905.05, or 4905.06. Neither the PUCO nor Duke can change that fact. Authority to change Ohio law lies solely with the General Assembly.

While other statutes within Chapter 4905 may require that jurisdictional utilities receive just and reasonable compensation for services (i.e. R.C. 4905.26 and 4905.22), those statutes are directed to retail, jurisdictional services provided to consumers in the state. They have no applicability to wholesale rates that a utility charges unregulated marketers and winners of the competitive bid auctions.

The PUCO is a creature of statute with no statutory authority beyond that conferred by the General Assembly.[[69]](#footnote-70) Ohio law does not confer upon the PUCO the authority to regulate wholesale transactions. While the PUCO has general jurisdiction over public utilities as a whole, it does not necessarily have jurisdiction over all the services provided by a public utility.[[70]](#footnote-71)

Here the PUCO has no jurisdiction over the generation operations of Duke. It is well settled that the generation component of electric service is not subject to PUCO regulation.[[71]](#footnote-72) R.C. 4928.03 specifies that retail electric generation service is competitive and therefore not subject to commission regulation. R.C. 4928.05 expressly removes competitive retail electric services from PUCO regulation. Instead under R.C. 4928.141(A) an EDU must provide a market-based standard service offer of all competitive retail electric services, including electric generation service.

But Duke (and the PUCO, through the AEP Capacity Case Order) believes that labeling FRR capacity service that a utility provides to unregulated marketers as either “non-competitive” or “wholesale” permits the PUCO to regulate this portion of generation. But both are wrong.

The Ohio Supreme Court’s ruling in *IEU v. Pub. Util. Comm.*[[72]](#footnote-73) underscores the importance of looking beyond the label given to a service, to consider instead the substance of the service. In *IEU v. Pub. Util. Comm.*, the Court determined that characterizing ancillary service as a distribution service and not generation service is unlawful and “blurs the legislativedistinctions between electric transmission, generation,and distribution.”[[73]](#footnote-74) The Court concluded that, if the PUCO approach were upheld, the three functions of electricity service would be subject to commission regulation, negating the General Assembly’s deregulation of the electric-utility industry. The Court judiciously noted that while it appreciated the PUCO’s concern with respect to the future reliability of the electric generation market, “a concern for the future of the competitive market does not empower the commission to create remedies beyond the parameters of the law.”[[74]](#footnote-75)

But here Duke is seeking remedies beyond the parameters of the law. Duke wants to characterize a component of generation as “wholesale” and “non-competitive” in order receive regulatory protection for what has been deregulated. The labels Duke (and the PUCO) seeks to apply to an inherent part of generation service (whether “retail” or “wholesale”) should be set aside. Instead the question should be what is the true nature of the electric service being provided?

“Retail electric service” is defined very broadly under R.C. 4928.01(A)(27). It is “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.” Under this definition even though capacity is sold on a wholesale basis to marketers and auction winners, that capacity service is then sold to shopping and non-shopping customers in this state. Although customers may be one step removed from the transaction, nonetheless the capacity service is a service “involved in” supplying or arranging for the supply of electricity. As such, the PUCO’s authority with respect to generation service is limited to authorizing retail SSO rates that are established in conformity with R.C. 4928.141 to 4928.144.

 Even if Duke (and the PUCO) is correct in arguing that Chapter 4928 does not apply to “wholesale” electric service, there is no simple default to Title 49 regulation. Why? Because there is no provision of Title 49 that authorizes the PUCO to establish wholesale prices for a utility’s provision of capacity that marketers require to serve their retail electric generation service customers. As discussed supra, a general concern for retail competition (as expressed in the AEP Capacity Case Order) does not empower the PUCO to create remedies beyond the parameters of the law. *IEU v. Pub., Util. Comm.,* 117 Ohio St.3d 486, 491. Even if the FERC delegated authority to the PUCO to establish wholesale capacity charges, it nonetheless must have the independent statutory authority to do so. But it does not. The PUCO is without subject matter jurisdiction under Ohio law to establish wholesale capacity charges levied by a public utility on unregulated marketers and the winners of the competitive bid auctions.

### 3. R.C. 4905.22 does not require fair and reasonable rates for wholesale generation rates.

Duke argues that the PUCO has the authority and responsibility to ensure that approved rates are reasonable.[[75]](#footnote-76) Duke cites to the provisions of Chapter 4905 and Chapter 4909.[[76]](#footnote-77) Specifically, Duke points to R.C. 4905.22 and 4909.15. Duke argues that without the full rate relief requested, Duke’s return on equity will be unreasonable. These arguments lack both legal and factual support.

As explained supra, R.C. 4905.22 and 4909.19 are statutes directed to retail, jurisdictional services provided to consumers in the state. They have no applicability to wholesale rates that a utility charges unregulated marketers and winners of the competitive bid auctions.

Additionally, what Duke fails to recognize is the PUCO has no jurisdiction over its generation operations. R.C. 4928.03 specifies that retail electric generation service is competitive and therefore not subject to PUCO regulation. R.C. 4928.05 expressly removes competitive retail electric services from PUCO regulation. Instead under R.C. 4928.141(A) an EDU must provide a market-based standard service offer of all competitive retail electric services, including electric generation service.

### 4. While R.C. 4905.26 may be construed as a rate setting statute that establishes a utility’s right to just and reasonable rates, it only applies in limited circumstances, which are not present in this case.

Duke attempts to bolster its legal claim for $729 million (plus carrying costs) by foisting R.C. 4905.26 as an additional statute for the PUCO to use to grant its request. However, Duke’s attempts should be rebuffed for a multitude of reasons.

 Although the statute does allow a utility to file a complaint as to matters affecting its service, and permits the PUCO to change rates, it is not the panacea that Duke believes it to be. First, Duke did not file its application as a self-complaint under R.C. 4905.26. There is no mention at all of that statute in its application. Nor is its application filed in the form of a complaint**. And there is no Commission-initiated complaint or investigation in this case, unlike the PUCO’s AEP Ohio Capacity proceeding**. In that proceeding, the Commission determined that its authority to set a capacity rate was derived in large part from its investigation of AEP Ohio’s capacity rate. [[77]](#footnote-78)

And even assuming arguendo that Duke can somehow transfigure its application into a self-complaint under R.C. 4905.26, it still is doomed to failure. The PUCO has ruled on numerous times that complaint cases under R.C. 4905.26 are not the primary method for the PUCO to modify or approve rates.[[78]](#footnote-79) In fact, where the complaint cases are initiated by the utility (“self-complaint” cases) the PUCO has only authorized rates changes under limited circumstances and those limited circumstances are not present in this case.

Recently, the PUCO had occasion to review the self-complaint of Suburban Natural Gas Company.[[79]](#footnote-80) In its Order, the Commission defined the “limited circumstances” under which it would change rates when faced with a utility self-complaint case filed under R.C. 4905.26. The PUCO ruled that rate changes through a utility self -complaint case could be made if any of the following conditions are met:

* when the impact of the rate change has been directed to particular customer classes;
* when the rate change has occurred during a rate proceeding;
* when the rate change has been temporary in duration, or occurred in the context of an emergency rate proceeding, pursuant to Section 4909.16, Revised Code.[[80]](#footnote-81)

The Commission noted, with multiple citations to prior cases, that it had circumscribed the conditions for a self- complaint case.[[81]](#footnote-82) The Commission determined it would only examine the reasonableness of charges proposed by a utility in a self-complaint

proceeding if the charges were not a general, across the board rate increase and the self-complaint mechanism would protect the customers' interests.[[82]](#footnote-83)

These PUCO-imposed restrictions are consistent with the statutory requirements of R.C. 4905.26. In other words a change in rates limited to a subclass of customers may be necessary to prevent or remedy what the statute refers to as an unjust, unreasonable, preferential, or discriminatory situation. Such a situation may exist where customers in general are being charged for a service they are not receiving, and thus, are subsidizing.[[83]](#footnote-84) Additionally, the PUCO has ruled that under normal circumstances it would not permit noncompetitive offerings to be considered pursuant to a self-complaint proceeding.[[84]](#footnote-85)

In this proceeding Duke seeks a rate change directed across the board to all of its customers. The rate increase is not directed to a particular customer class. Duke requests its rate increase on a stand-alone basis—it is not sought during the course of another rate proceeding. And Duke’s request is not temporary in duration as it will extend for three long years. Duke has also failed to prove that its request is an emergency request filed under R.C. 4909.16. Finally, if the PUCO accepts Duke’s claim that capacity service is truly a “non-competitive” service, then this is another reason why there is no authority to approve the rate increase under R.C. 4905.26.

### 5. Providing wholesale “non-competitive”[[85]](#footnote-86) FRR capacity service to marketers is not similar to providing traditional public utility service prior to restructuring.

According to Duke, the wholesale capacity FRR service that it provides to marketers is similar to traditional public utility service that was provided to customers prior to restructuring. But Duke’s claims of similarity are misguided.

Under traditional regulation in Ohio, the services that are provided by utilities are those provided to the public and citizens of the state—not to third party merchants. One need only look at how the General Assembly defined a public utility to confirm this. R.C. 4905.03 defines a public utility as an entity “engaged in the business of supplying electricity for light, heart, or power purposes *to consumers within this state.”*[[86]](#footnote-87)

“Consumers in this state” were not and have never been marketers. Moreover, the obligations of utility are to the public at large—not to marketers.[[87]](#footnote-88)

## C.Even If The Commission Can Regulate The Provision Of Wholesale Generation Capacity Under Ohio Law, It Is Not Bound To Use Fully Embedded Costs To Compensate Duke For Its Capacity.

If the PUCO determines that the FRR capacity service provided by Duke to marketers and auction winners can be regulated under the PUCO’s traditional regulatory authority (per R.C. Chapters 4905, 4909), the PUCO need not compensate Duke for its fully embedded cost. There are numerous reasons why as explained in detail below. First, the Reliability Assurance Agreement (“RAA”) does not require the PUCO to affirmatively develop a state compensation mechanism. Second, as the PUCO itself has recognized, it is under no obligation to adopt a specific mechanism to address capacity costs.[[88]](#footnote-89)

### Under the reliability assurance agreement, a state commission *may* adopt a state compensation mechanism, but it is not required to do so.

Duke argues that “[t]he Commission also has found that Section D.8 of Schedule 8.1 of the RAA acknowledges the authority of the Commission to establish [a state compensation mechanism] that, once established, prevails over the other compensation methods addressed in that section.”[[89]](#footnote-90) Duke’s statement assumes that a state Commission *must* develop a state compensation mechanism for FRR entities. Duke is wrong. Duke fails to acknowledge that it is within the discretion of a state Commission to adopt a state compensation mechanism for FRR entities. In this regard, Schedule 8.1, Section D.8 of the RAA’s language is precise, and states:

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 Section 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, an a retail LSE may at any time exercise its rights under Section 206 of the FPA.[[90]](#footnote-91)

The RAA specifies the mechanisms through which an entity such as Duke can recover the costs associated with its FRR obligation from its wholesale customers, which PJM refers to as Load Serving Entities (“LSEs”). The RAA states that where there is a state compensation mechanism in place, then that method prevails.[[91]](#footnote-92) When there is no state compensation mechanism in place, the RAA states that an FRR entity shall be compensated in accordance with Attachment DD to the PJM Tariff, which specifies market-based capacity prices set in the PJM-administered forward auction process. Under the RAA, an FRR entity has the option to make a filing at FERC under Section 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR entity’s embedded costs.[[92]](#footnote-93) Thus, a state commission is not obligated under the RAA to intervene on an FRR entity’s behalf and implement a state compensation mechanism.

Duke states that “although PJM’s RAA makes the RPM auction price the default rate for compensation for FRR capacity service, the RAA does not limit recovery to auction-based pricing. Rather, the RAA provides for two other forms of compensation — a state compensation mechanism and a rate established through a Section 205 filing.”[[93]](#footnote-94) But this statement is also misleading on two grounds. First, a state Commission is not required to act under the RAA. Second, Duke incorrectly assumes that a state compensation mechanism must be different than the default pricing mechanism (the PJM market-based price). The RAA does not mandate that a state compensation mechanism be based on costs.

OCC and other parties have consistently argued throughout this proceeding that the PUCO adopted a compensation mechanism for Duke as a result of approving the Stipulation and Recommendation in the Duke Electric Security Plan proceeding (i.e., market-based prices).[[94]](#footnote-95) The RAA does not limit the number of state compensation mechanisms that a state commission can implement. Thus, it is inconsequential that the PUCO adopted a different state compensation mechanism for AEP Ohio. The RAA does not state that there may only be one state compensation mechanism for all FRR entities within the state. Accordingly, it is both plausible and appropriate under the RAA for the PUCO to have separate state compensation mechanisms for separate FRR entities. It is also just and reasonable that the state compensation mechanism for Duke is market-based pricing, as that is what Duke agreed to in the ESP Stipulation that was approved by the PUCO.

The PUCO Staff explained in its post-hearing brief, stating: “[i]nstead of the cost-based capacity charge that had been proposed in Duke’s ESP Application, the Stipulation expressly adopted capacity priced at RPM prices…The Stipulation language coupled with Duke and Staff testimony from the ESP proceeding confirm that Duke agreed to provide capacity and agreed to be compensated for its FRR obligation based on the PJM reliability pricing model.”[[95]](#footnote-96) But Duke disputes that the Commission approved a state compensation mechanism as a result of its ESP.[[96]](#footnote-97) Specifically, Duke argues that “[t]he Intervenors fail to identify any language in the controlling ESP Order that expressly identifies a state compensation mechanism for Duke Energy Ohio.”[[97]](#footnote-98) Even if the PUCO agrees with Duke and it determines that it did not establish a state compensation mechanism for Duke as a result of approving the Duke ESP Stipulation, the PUCO 1) is not required to develop a state compensation mechanism for Duke under the RAA, and 2) should not develop a cost-based state compensation mechanism for Duke.

### The PUCO is not obligated to establish a cost based rate for capacity services. In this case, it should not develop cost based compensation for Duke as it would violate the Duke ESP Stipulation.

According to the PUCO, capacity costs may be addressed through a state compensation that is specifically crafted to meet the stated needs of a particular utility or through a rider or other mechanism.[[98]](#footnote-99) The PUCO can also determine that it need not establish a separate and distinct state compensation mechanism for Duke, as one has already been set in Duke’s ESP proceeding, as discussed in detail in OCC’s Initial Brief.**[[99]](#footnote-100)** Moreover, a cost-based state compensation mechanism for Duke would violate the terms of the Duke ESP Stipulation.

As explained *supra*, the PUCO is not obligated to establish a cost-based state compensation mechanism for Duke. The RAA clearly provides a default capacity price (the PJM market-based price) for FRR entities. In the alternative, Duke could have sought a cost-based price at FERC by making a filing under Section 205 of the Federal Power Act. But Duke agreed not to do so. Now, Duke is claiming that the default price for capacity under the RAA (the PJM market-based price) is confiscatory and that the PUCO must act. But these arguments by Duke do not require the PUCO to act, nor does the plain language of the RAA. And Duke has failed to cite any precedent to the contrary.

There are several reasons why it would be improper for the PUCO to establish a cost-based state compensation mechanism as a result of this proceeding. First, Duke agreed to a capacity price as a result of the Stipulation entered into by Duke resolving its ESP. This capacity price is the Final Zonal Capacity price for the unconstrained region of the Regional Transmission Organization (“RTO”) for its FRR obligations.[[100]](#footnote-101) Approving a cost-based compensation mechanism for Duke as a result of this proceeding violates the terms of the ESP Stipulation. As the PUCO Staff explained:

The Company’s request for additional compensation for capacity services in this case violates the terms of the stipulation approved by the Commission that resolved Duke’s ESP case. The issue of compensation for capacity services was addressed and fully resolved in the ESP proceeding. Duke agreed to provide capacity and agreed to be compensated for its FRR obligation based on the PJM RPM.[[101]](#footnote-102)

If the PUCO approves Duke’s request it will fail to preserve the integrity of the ESP Stipulation. And, as the Ohio Energy Group (“OEG”) pointed out “[granting] Duke’s request would require the Commission to take a substantial step backwards. As a result of its Commission-approved ESP Stipulation, Duke is where the Commission wants it to be.”[[102]](#footnote-103) OCC agrees.

Duke also agreed to a $330 million Electric Service Stability Charge to resolve its ESP proceeding. If the PUCO establishes a cost-based state compensation mechanism for Duke at this point in time, it will not only directly violate the terms of the Duke ESP Stipulation, it will also undermine the agreement bargained for by the Signatory Parties. The Signatory Parties to the Duke ESP Stipulation undoubtedly would not have agreed to give Duke $330 million dollars of customers’ money for a stability charge if they thought Duke would seek a $729 million cost-based state compensation mechanism less than a year later.

As OCC explained in its Initial Brief, Duke has asked the PUCO to set aside the capacity pricing portion of the Stipulation in favor of a cost-based capacity charge. This will directly undermine the agreement bargained for. Preserving the integrity of stipulations means that parties should be able to rely upon the terms of an agreement, such as the Duke ESP Stipulation, and should be able to enforce its terms. The PUCO should respect the precedential value of all its decisions, including its decision to adopt the Stipulation in the Duke ESP case. Doing so provides regulatory certainty which benefits not only customers, but investors and shareholders as well.

It is essential that the PUCO respect its previous decisions and not depart from them, especially without a clear need. As the PUCO has acknowledged on numerous occasions, parties must keep their commitments made in stipulations.[[103]](#footnote-104) To do otherwise is to invite every settled case to be reopened at the first sign of discontent by any party, in turn, creating an environment that discourages negotiation and settlement. Implementing a cost-based state compensation mechanism for Duke as a result of this case would be in direct conflict with the terms of the Stipulation the PUCO approved to resolve the Duke ESP case. This is a slippery slope that could have devastating consequences for customers.

Duke states in its post-hearing brief that “although a stipulation may be accorded substantial weight, the Commission must independently interpret any stipulation and determine whether it is reasonable and in the public interest.”[[104]](#footnote-105) The PUCO has already independently found that the Duke ESP Stipulation it is reasonable and in the public interest. It would be unreasonable and contrary to customers’ interests for the PUCO to implement a cost-based state compensation mechanism that is contrary to the terms of the Duke ESP Stipulation it approved—especially given the fact that the PUCO is not required to implement a state compensation mechanism under the RAA.

## D. The PUCO Should Reject Duke’s Allegations That If It Does Not Receive Its Fully Embedded Cost Of Capacity, There Will Be An Unconstitutional Taking.

Duke argues that it is “constitutionally entitled to a rate that permits it to earn a fair return on the value of assets it employs for public convenience.”[[105]](#footnote-106) Duke asserts that under this principle it is “entitled to recover the cost of providing ‘regulated service’—in this situation, its wholesale FRR capacity service—including a fair return on its investment.”[[106]](#footnote-107) Duke claims its current receipt of only the FZCP is confiscatory under the Ohio and federal constitutions.[[107]](#footnote-108) Duke points to its current returns on equity that are below zero as evidence of the unconstitutional taking.[[108]](#footnote-109) But as explained below, Duke’s arguments are not well made, especially in light to the fact that the PUCO does not have authority to decide constitutional issues.

### 1. The PUCO has no authority to decide constitutional issues.

Title 49 of the Ohio Revised Code defines the entire scope of the PUCO’s jurisdiction. Under Title 49, the PUCO has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying jurisdiction to all courts, except the Supreme Court.[[109]](#footnote-110) The rationale behind these grants of authority is that the determination of issues related to applicable laws and regulations, industry practices, and standards is best accomplished by the PUCO with its expert staff.[[110]](#footnote-111) But because the PUCO is ultimately a creature of statute,[[111]](#footnote-112) it has only those powers conferred to it by statute.

The Ohio Supreme Court has also confined the scope of the PUCO’s jurisdiction to utility-related matters.[[112]](#footnote-113) The Ohio Supreme Court has explicitly provided that decisions regarding the constitutionality of statutes are decisions for the courts, and not for the PUCO or for an advisory board. To this end, the Supreme Court has emphasized: “[the fact that the] PUCO has exclusive jurisdiction over service-related matters does not diminish ‘the basic jurisdiction of the court of common pleas \*\*\* in other areas of possible claims against utilities, including pure tort and contract claims \*\*\* moreover, PUCO ***is not a court*** and has no power to judicially ascertain and determine legal rights and liabilities.’”[[113]](#footnote-114) Constitutional rights fall within the “legal rights and liabilities” that courts have the power to determine,[[114]](#footnote-115) and therefore, the PUCO has no jurisdiction to determine constitutional claims. Similarly, in *Consumers’ Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, 247, the Ohio Supreme Court determined that “an administrative agency such as the commission may not pass upon the constitutionality of a statute.”

 The PUCO itself has long recognized that it lacks jurisdiction to decide constitutional questions.[[115]](#footnote-116) It has ruled that it lacks jurisdiction to address “as applied” constitutional challenges to the way it interprets and applies statutes.[[116]](#footnote-117) Similarly, the PUCO has recognized that it cannot determine the constitutionality of a provision in a utility’s tariff.[[117]](#footnote-118) The PUCO also ruled it could not pass on the constitutionality of the SEET provisions of S.B. 221.[[118]](#footnote-119) And the PUCO has specifically acknowledged its lack of jurisdiction to consider the question of constitutional taking.[[119]](#footnote-120)

For example, in *Cincinnati Gas & Electric Co,[[120]](#footnote-121)* the Commission denied an application for rehearing by the utility which, in part, claimed that the rate of return allowed in the proceeding was confiscatory.[[121]](#footnote-122) The PUCO had authorized a rate of return of 7.21 percent which resulted in an approved rate increase that was less than what the utility has requested.[[122]](#footnote-123) The utility asserted that the rate of return was unjust and unreasonable and constituted an unconstitutional taking of the utility’s property.[[123]](#footnote-124) The PUCO rejected this argument and stated that while the argument was “totally without merit, the Commission lacks the jurisdiction to consider constitutional questions.”[[124]](#footnote-125)

Thus, as a threshold matter, the PUCO cannot consider Duke’s constitutional claims that a taking is occurring if it does not receive more than the FZCP. And, any court of competent jurisdiction will find that Duke’s constitutional arguments are misplaced, and not supported by fact or reason, as explained below.

### 2. Unconstitutional taking is not present when the losses are associated with deregulated services.

Duke calls upon the landmark cases of *Smyth*, *Bluefield*, and *Duquesne* to support its claim that if it does not receive its fully embedded cost of capacity its return on its investment will be below that which is legally acceptable.[[125]](#footnote-126) But Duke fails to recognize a critical distinction between it and the entities involved in *Smyth*, *Bluefield, and Duquesne Light*. The entities in the landmark cases all involved companies whose services were fully regulated.

 In contrast, Duke is not similarly situated because its electric generation services in Ohio are not regulated, but subject to competition. As discussed in OCC’s Brief, the wholesale capacity services provided to marketers and auction winners are a part of Duke’s competitive generation services.[[126]](#footnote-127) And under a competitive marketplace, Duke is to be fully on its own.[[127]](#footnote-128) Neither the PUCO nor customers have an obligation to restore revenues lost by operation of the competitive market.

The United States Supreme Court itself has acknowledged the traditional taking standards announced in *Bluefield* do not apply when utilities are facing financial pressure from competitive forces. Specifically, in *Market Street Railway Co. v. Railway Comm. of California*, the Court rejected the argument that a commission-mandated rate reduction for a utility in a competitive market resulted in confiscatory rates and therefore a taking under the Constitution.[[128]](#footnote-129) The Court explicitly noted the different set of circumstances the case presented from previous utility cases it had decided:[[129]](#footnote-130)

[I]t should be noted at the outset that most of our cases deal with utilities which had earning opportunities, and public regulation curtailed earnings otherwise possible. But if there were no public regulation at all, this appellant would be a particularly ailing unit of a generally sick industry. The problem of reconciling the patrons' needs and the investors' rights in an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces, and whose earning possibilities are already invaded by competition from other forms of transportation, is quite a different problem.

The utility in *Market Street Railway* had relied upon *Hope* as authority for it to earn a rate which would be enough to protect its financial integrity and maintain its credit.[[130]](#footnote-131) But the Court rejected this argument. Instead it found that there was a marked difference between the utility in *Hope* and the utility.. The Court described the utility in *Hope* as one which was in an advantageous economic position and poised to make significant earnings. On the other hand, it characterized the utility as one operating in a competitive market whose financial problems could not be rectified with a rate increase.[[131]](#footnote-132) The Court rejected the utility’s takings claim, holding that the due process clause has never been used or intended for public utility commissions to fix rates that ensure the continuation of a service no one currently wants or to protect the credit of a business whose securities are already impaired.[[132]](#footnote-133) The Court held that the due process clause “has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.”[[133]](#footnote-134)

The current case presents strikingly similar issues to *Market Street Railway*. Duke claims market based compensation (FZCP) is insufficient for it. But the PUCO does not regulate the competitive market and Duke was by statute required to be fully on its own after its market development period ended in 2005.

Duke cannot successfully argue a taking because the admitted factors behind its problems are from market forces. As the United States Supreme Court stated in *Market Street Railway,* the due process clause does not ensure protection of financial integrity against the operation of economic forces. Customer switching and declining wholesale prices are both products of economic forces and Duke cannot seek respite from these forces in the form of a $729 million (plus carrying charge) charge to its customers.

Just like the utility in *Market Street Railway,* Duke is attempting to protect its bottom line from market forces—here the “culprit” is low market based prices for capacity. “Low” is measured by Duke to be anything below its fully embedded cost of capacity. But the U.S. Supreme Court rejected similar claims in *Market Street Railway*. The PUCO should also reject such claims.

## E. Despite Duke’s Claims That AEP Ohio And Duke Are “Similarly Situated” There Are Significant Differences The PUCO Must Consider. These Differences Allow The PUCO To Treat Duke Differently Than AEP Ohio Without Running Afoul Of Discrimination Laws Or Equal Protection Policies Under Federal And State Constitutions.

 Duke continues to argue that Duke and AEP Ohio should be treated similarly because they are similarly situated utilities.[[134]](#footnote-135) In reality, the only similarity Duke has been able to establish is that both Duke and AEP Ohio are FRR entities.[[135]](#footnote-136) But this fact has never been in dispute. It is the various differences between Duke and AEP Ohio that Duke continuously (and conveniently) leaves out of its arguments that are central to deciding this case. These distinctions show that outside of being FRR entities, these utilities, and the circumstances surrounding their respective capacity charges, are not similar.

 OCC and several other parties pointed out in their post-hearing briefs the various differences between the two utilities.[[136]](#footnote-137) First, the AEP Ohio Capacity Case decisions are only applicable to AEP Ohio.[[137]](#footnote-138) Second, AEP Ohio’s capacity charge was approved within the context of its electric security plan, while Duke settled its electric security plan through a Stipulation.[[138]](#footnote-139) Third, Duke is not establishing a new capacity service; but rather, it is seeking to increase rates for the capacity service it currently provides under its ESP.[[139]](#footnote-140)

 Moreover, unlike AEP Ohio, Duke is not providing capacity service directly to retail customers. AEP Ohio actually provides capacity service to Standard Service Offer (“SSO”) (non-shopping) customers. Duke does not. Duke Witness, Keith Trent explained that Duke does not directly provide capacity to any of its retail customers.[[140]](#footnote-141) In contrast, as of March 1, 2012, 26% of AEO Ohio’s load switched to an alternative supplier.[[141]](#footnote-142) Thus, AEP Ohio is directly providing service to approximately 74 percent of its non-shopping standard service customers.

 In contrast, Duke provides capacity service directly to marketers and standard service auction winners.[[142]](#footnote-143) Duke already charges marketers and standard service auction winners the FZCP for capacity pursuant to the terms of the Duke ESP Stipulation. Thus, it is disconcerting that Duke is seeking to charge customers $729 million for capacity deferrals when Duke is not providing this service directly to customers. This is especially true given the fact that Duke is charging customers $330 million for a stability charge.

 Fourth, Duke is seeking an unlawful retroactive capacity charge, whereas AEP Ohio’s capacity charge was applied on a prospective basis.[[143]](#footnote-144) Fifth, AEP Ohio and Duke differ significantly in the approach they took to seek cost-based capacity pricing.[[144]](#footnote-145) These arguments all show that the similarities between Duke and AEP Ohio stop after acknowledging that they are both FRR entities.[[145]](#footnote-146)

 Duke argues that its situation is identical to AEP Ohio, and thus it would be unconstitutional to treat it differently than AEP Ohio.[[146]](#footnote-147) But Duke is incorrect. The facts and circumstances show a litany of distinctions between the two utilities:

* The AEP Ohio Capacity decision does not apply to Duke. The AEP Ohio Capacity Decision applies only to AEP Ohio. The PUCO was clear in stating that no other FRR entity was considered for purposes of its decision in the AEP Ohio Capacity Case.[[147]](#footnote-148)
* Duke settled its ESP proceeding with a Stipulation that provides for a market-based capacity price (FCZP), plus a $330 million dollar ESSC charge.[[148]](#footnote-149) AEP Ohio litigated its ESP which ultimately included a capacity mechanism.[[149]](#footnote-150)
* Duke stipulated away its right to seek cost based compensation from FERC through a FPA Section 205 filing in Case No. 11-2641-EL-RDR, et.al. AEP Ohio made a FPA 205 filing with FERC, which triggered the PUCO’s review in Case No. 10-2929-EL-ESC.

* AEP Ohio’s state compensation mechanism deferral applies prospectively after the date of the Commission’s order. [[150]](#footnote-151) Duke’s proposed mechanism would apply retroactively.
* AEP Ohio’s capacity charge was implemented through its ESP proceeding.[[151]](#footnote-152) Duke has asserted that a state compensation mechanism cannot be established through an ESP.[[152]](#footnote-153) And Duke asked the PUCO to establish a new rate for its capacity services under traditional rate-making statutes (Ohio Revised Code Chapters 4905 and 4909) – well after it settled its ESP.[[153]](#footnote-154)
* Duke requested a cost-based capacity charge under chapters 4909 and 4905 of the Revised Code —and has not met its burden of proof under these chapters to receive the relief requested. A rate increase (per R.C. 4909.18) can only be granted if the applicable provisions of the Revised Code are complied with. Under R.C. 4905.26, the existing rate complained of must be shown by the complainant to be unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.
* Duke is not establishing a new capacity service; it is seeking to increase rates for the capacity service it currently provides under its ESP.
* AEP Ohio provides service directly to non-shopping SSO customers. Duke does not.

 These significant differences between AEP Ohio and Duke must be considered and acknowledged by the PUCO. It is not an apples to apples comparison between AEP Ohio and Duke, as Duke contends. Instead of addressing these differences in its post-hearing brief, Duke provided a list of “remarkable”[[154]](#footnote-155) similarities. But none of the points made by Duke are the subject of contention in this case. For example, Duke states “[b]oth AEP Ohio and Duke Energy Ohio, as FRR entities, have binding self-supply obligations.” And, “AEP Ohio’s FRR obligations will terminate on May 31, 2015, as will Duke Energy Ohio’s FRR obligations.” These similarities are not “remarkable” and Duke’s argument is not persuasive. No party has disputed Duke’s status as an FRR entity (a status Duke voluntarily chose). Duke is being compensated at the FZCP price for its FRR obligations because that is what it agreed to.

### The PUCO is not required to approve Duke’s capacity deferrals because Duke is not similarly situated to AEP Ohio, and thus is not entitled to “equal protection.”

Duke believes its proposed deferral mechanism is reasonable and urges the Commission to approve it.[[155]](#footnote-156) Duke argues that the PUCO should approve its deferral request because the PUCO in the AEP Ohio Capacity case approved a similar deferral approach with two sources of compensation-suppliers and retail customers.[[156]](#footnote-157) And Duke notes that in that case the PUCO rejected the intervenors’ arguments against the deferrals. Duke argues that a state compensation mechanism is similarly appropriate for it. In fact Duke argues that the PUCO should apply the same structure to it to ensure consistent treatment of FRR entities, as contemplated under the federal and state equal protection clauses.[[157]](#footnote-158)

As explained supra, the PUCO has no jurisdiction to entertain constitutional claims. Even though the Commission cannot rule on the constitutionality of this claim, any court of competent jurisdiction will find that Duke’s constitutional arguments should be rejected. This is because Duke and AEP are not similarly situated and the equal protection clause does not require similar treatment in such an instance.

The federal and state equal protection c[lauses](https://advance.lexis.com/GoToContentView?requestid=e5a58b46-7feb-2db3-7805-c1f1dbfe5ed,710a93bf-ba5a-d50c-f1db-8e58d475e14,670cd741-694f-c280-d4f-5460223affec&crid=2496e66-582b-e432-4a27-e59575b2997)[[158]](#footnote-159) require that all *similarly situated individuals* be treated in a similar manner. The equal protection clause prohibits laws (or government regulations) that treat differently those persons who are in all relevant respects alike.[[159]](#footnote-160)

Duke focuses on one similarity between it and AEP Ohio—both are FRR entities.[[160]](#footnote-161) Duke seems to believe that that because both Ohio utilities are FRR entities they both should receive exactly the same regulatory treatment. This simplistic notion is not sufficient to support a claim for similar treatment under the equal protection clauses.

While it is true that Duke and AEP Ohio are both FRR entities, there are many dissimilarities, as discussed supra that can form a reasonable basis for different treatment. The Equal Protection Clause "\* \* \* imposes no iron rule of equality\*\*\*.” *Allied Stores of Ohio, Inc. v. Bowers* (1959), [358 U.S. 522, 526](https://advance.lexis.com/GoToContentView?requestid=1db4424-74a4-5c92-e0f8-53568c15aea2,df0cb32f-94f2-1d33-c7b7-e8756fa248c,b587e68a-7a05-7eef-46ac-c584526d5569&crid=404d173d-c056-e017-e355-a169793ff743). Under the law where there is no “suspect classification” the dissimilar treatment need only have a reasonable basis to withstand constitutional challenge.[[161]](#footnote-162)  The constitution is violated “only if the classification [treatment] rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it \* \* \*." *McGowan v. Maryland*, [366 U.S. 420, 424-25 (1961)](https://advance.lexis.com/GoToContentView?requestid=1db4424-74a4-5c92-e0f8-53568c15aea2,df0cb32f-94f2-1d33-c7b7-e8756fa248c,3645c45-3582-8587-df1b-58f6f35dc648&crid=8e2993-38a2-d2c6-3966-3a9f1a4a1fe). See, also, *People v. Valdez*, [402 N.E.2d 187 (Ill. 1980)](https://advance.lexis.com/GoToContentView?requestid=1db4424-74a4-5c92-e0f8-53568c15aea2,df0cb32f-94f2-1d33-c7b7-e8756fa248c,3645c45-3582-8587-df1b-58f6f35dc648&crid=8e2993-38a2-d2c6-3966-3a9f1a4a1fe).

Here, as discussed in detail in OCC’s initial brief,[[162]](#footnote-163) and in the Join Motion to Dismiss[[163]](#footnote-164) AEP Ohio is distinguishable from Duke in many respects. These distinguishing factors form a reasonable basis for the PUCO to treat Duke differently than AEP Ohio. See discussion supra.

The most formidable distinction relates to Duke’s pursuit (or non-pursuit) of cost based capacity for its FRR obligation over the past several years. For example, instead of continuing to pursue its claim for cost-based pricing for capacity in its ESP case, Duke voluntarily agreed to accept compensation based on RPM prices, plus $330 million for the ESSC rider.[[164]](#footnote-165) AEP Ohio, on the other hand, pursued cost-based pricing at the state level. Instead of litigating state issues related to the MISO/PJM transfer case,[[165]](#footnote-166) Duke settled and agreed not to seek FERC approval of cost-based pricing for its FRR

obligations under the PJM RAA.[[166]](#footnote-167) AEP Ohio did not, choosing instead to litigate the issue before FERC.

Duke chose its own path on this issue. Unlike AEP Ohio that consistently continued to take the risk of litigation, Duke opted for regulatory certainty. That regulatory certainty came in the form of stipulations in separate PUCO proceedings. Those stipulations were reached in April 2011 and October 2011, well after AEP Ohio filed numerous proceedings at the state and federal levels contesting the application of market-based RPM pricing to wholesale capacity. In those stipulations, Duke chose to resolve the wholesale pricing issue by accepting RPM priced capacity plus the $330 million ESSC, foregoing any challenges to the wholesale capacity pricing at the state and federal level.

Given Duke’s acceptance of RPM priced capacity, and its voluntary choice to forego litigation, Duke is in a far different legal position than AEP Ohio. Its legal position –accepting RPM priced capacity, instead of aggressively pursuing cost-based capacity, is reason enough for the PUCO to treat Duke differently without running afoul of the equal protection clause.

### 2. Duke failed to prove that it would be discriminatory if the PUCO does not implement a cost-based state compensation mechanism.

Duke repeatedly argues that the PUCO must treat it the same as AEP Ohio.[[167]](#footnote-168) Duke contends that the PUCO should ignore the fact that it stipulated to a capacity price to resolve its ESP proceeding, and instead the PUCO must give Duke the same treatment as it gave AEP Ohio (i.e., a cost-based capacity price). To this end, Duke states: “failure to follow the AEP Ohio precedent in these circumstances would result in unduly discriminatory treatment of similarly situated utilities….” [[168]](#footnote-169) Duke is wrong.

Under R.C. 4905.35(A) a public utility is not permitted to make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage. Thus, the standard for discrimination under R.C. 4905.35 is an “*unreasonable* preference” or “*unreasonable* disadvantage.” Although R.C. 4905.35 describes discriminatory behavior by a public utility (rather than discrimination against a public utility) the standard for proving discrimination is undoubtedly a significant burden. In this case, Duke has failed to meet its burden of proof because it has not shown that it would be unreasonable for the PUCO to dismiss this case.

 Specifically, Duke has not shown that the PUCO has unreasonably preferred AEP Ohio to Duke. And Duke has not established that it has been, or would be, unreasonably disadvantaged if it were to continue charging marketers and winners of the standard service auctions the FZCP for capacity. Duke is being compensated at the FZCP market-based price because that is what it agreed to. Duke is also receiving $330 million dollars from customers for a stability charge because that is what it negotiated to resolve its ESP case. Thus, any “disadvantages” that Duke claims to be experiencing are a direct result of the agreements Duke made.

Duke has failed to meet its burden to prove that it would be discriminatory for the PUCO to have a cost-based state compensation mechanism for AEP Ohio, but a market-based capacity price for Duke. Duke has not shown that it would be unreasonable to have separate state compensation mechanisms for AEP Ohio and Duke. And Duke has not established that it will be unreasonably disadvantaged by being compensated at the FZCP. The PUCO should not allow Duke to deliberately violate the terms of the ESP settlement.

## F. Duke’s Request To Collect Increased Costs For Capacity Services Rendered, Starting August 1, 2012, Is Retroactive Ratemaking.

Duke argues as well that the proposed deferral period (August 1, 2012 through May 15, 2015) is appropriate.[[169]](#footnote-170) Duke picks August 1, 2012 because this is the first month after the PUCO determined that AEP had a right to embedded cost recovery for fulfilling a wholesale capacity service obligation.[[170]](#footnote-171) According to Duke there is no retroactive ratemaking because there is no ratemaking.[[171]](#footnote-172) In this regard Duke unequivocally claims that “The Company’s Application in these proceedings does not include a request to set rates.”[[172]](#footnote-173) Duke is merely seeking authority to defer costs, it proclaims.[[173]](#footnote-174) Therefore, there is no impermissible retroactive ratemaking.[[174]](#footnote-175) But Duke’s sophistry should be recognized for what it is—a feeble attempt at trying to make its unlawful request seem lawful.

There is undoubtedly ratemaking at issue. First, Duke seeks authority to defer costs, claiming that the PUCO has authority over its books of accounts and that the deferral does not affect rates. Then after the deferral is authorized, Duke will argue that, having authorized the deferrals, it would be arbitrary and capricious to deny recovery of those deferrals in its rates. However, if the costs for which deferral is being sought are not eligible for ultimate recovery through rates, then the PUCO should not authorize deferral of those costs because such a deferral would result in misstatement of Duke’s books of account. That is, there can be no regulatory asset if it is not reasonable to assume that rates will be set to recover the costs for which deferral is being sought.[[175]](#footnote-176)

Hence, the deferral request goes hand in hand with ratemaking. The Ohio Supreme Court has itself recognized the express linkage between accounting and ratemaking and has permitted appeals of accounting orders, finding that harm can result even without the direct setting of rates.[[176]](#footnote-177)

And while the Commission may not be asked to set “rates,” it has been asked to set a charge to be collected in future rates. For example, Duke requests in its application an order “establishing the amount of the cost-based charge, pursuant to Ohio’s newly adopted state compensation mechanism, for the provision by Duke Energy Ohio of capacity services throughout its service territory.”[[177]](#footnote-178) Indeed Duke calculated a net annual revenue requirement that would enable it to achieve an 11.15 % ROE on its investment used to provide the FRR services from August 1, 2012 through May 31, 2015.[[178]](#footnote-179) That annual revenue requirement is $258.7 million per year for three years.[[179]](#footnote-180) Setting charges for services based on established revenue requirements is ratemaking. And it is retroactive because Duke seeks compensation for wholesale capacity services it has provided during the period its application in this case has been under review. Present rates may not make up for dollars lost while a PUCO proceeding is pending.[[180]](#footnote-181)

 Moreover, as noted in OCC’s Initial Brief, Duke’s claim that it is only equitable for it to receive the same compensation as AEP Ohio should be disregarded. The timing of Duke’s application was completely within its own control. Duke insists that this case is completely independent of Case No. 11-3549-EL-SSO, et al. and the settlement of that case. Accepting this premise (as one must if the Commission does not grant the motion to dismiss), then Duke could have filed the present case simultaneously with its filing of Case No. 11-3549-EL-SSO, et al. or any time before or after. Given the discretion that Duke had over the timing of the filing of this case, it has no equitable claim to the recovery of any costs incurred before the Commission issues an order in this case.

The PUCO should recognize Duke’s request for what it is—ratemaking that is retroactive—and not be fooled by surface arguments aimed at disguising the true nature of Duke’s request. As noted by the Ohio Supreme Court, “[t]oo much legal ingenuity is today employed in advising clients how to do a perfectly unlawful thing in a prima facie lawful way, and in advising courts to do a perfectly unconstitutional thing in a prima facie constitutional way. Whether or not such sophistry shall succeed depends upon whether the courts shall regard the substance of things, or merely the surface of things.”[[181]](#footnote-182)

## G. Permitting Duke To Transfer Capacity Revenues To An Affiliate Post Corporate Separation Is Unreasonable And Unlawful.

Duke argues that end of the deferral period should be May 31, 2015, instead of December 31, 2014, the deadline for corporate separation.[[182]](#footnote-183) Duke claims that its corporate separation does not diminish its obligation to provide capacity services.[[183]](#footnote-184) Duke relies upon the PUCO’s findings in the AEP ESP proceeding where the PUCO rejected intervenors’ claims that transfer of cost-based capacity revenues to an affiliate was anti-competitive. Duke claims that without the certainty of such revenue there is “no assurance that the transferee will have the financial support necessary to enable it to provide capacity service to satisfy Duke’s obligations.”

 However, as argued in OCC’s Initial Brief, Duke should not be permitted to collect embedded capacity costs incurred after December 31, 2014, when it will be structurally separated. Doing so violates not only the provisions of R.C. 4928.02(H) but also violates R.C. 4928.17(A)(3). That provision prohibits Duke, after its corporate separation, from extending “any undue preference or advantage to any affiliate . . . engaged in the business of supplying the competitive retail electric service.” It also prohibits an affiliate from receiving “undue preference or advantage from any affiliate, division or part of the business engaged in business of supplying the noncompetitive retail electric service.”

 The PUCO, however, in the AEP ESP case, failed to address claims that transferring the capacity and RSR revenues from an EDU to an affiliate violates the corporate separation provisions of the Code. Rather the PUCO focused on the intervenors’ claim of subsidies under R.C. 4928.02(H), finding that there could be no subsidy because the generating affiliate is receiving the actual cost of service.[[184]](#footnote-185)

 Under the corporate separation law, the affiliate can receive no “undue preference” or “advantage.” But here the affiliate would be receiving a “regulated” revenue stream that other marketers do not receive. And the revenue stream paid for by Duke’s customers will afford the Duke affiliate something other marketers cannot receive in the market—compensation for capacity at fully embedded cost.

Moreover, as argued in OCC’s Initial Brief,[[185]](#footnote-186) Duke is not rendering a public utility service to retail customers for the charge it seeks in this case. The service in question is provided by Duke to marketers and winners of the auctions, not to jurisdictional customers. The PUCO is without any statutory authority to regulate the rates charged to marketers and the winners of auctions.[[186]](#footnote-187) Thus the cost of these marketers’ services cannot by definition be costs attributable to service that the Commission regulates under Chapter 4909. They are not costs that the PUCO may consider when fixing just, reasonable, and compensatory rates under R.C. 4909.151.

## H. Duke Has Not Used The Most Current Projections In Its Applications In Either Its Pro Forma Financials Or Its Revenue Requirement.

Duke argues that its use of *the most current projections* *as of the date of its August 2012 filing* is appropriate.[[187]](#footnote-188) By this, Duke is referring to use of projections in its pro forma statements, as presented by Mr. Savoy. Part of Mr. Savoy’s pro forma projections--operating expenses (lines 12-18) are based on 2 & 10 data—two months actual, 10 months estimated for 2012.[[188]](#footnote-189) The other part of Mr. Savoy’s pro forma projections—operating revenues (lines 1-11) were derived from a June 28, 2012 commercial business model run that related to a 2012 budget containing 6 months actual and 6 months projected data.[[189]](#footnote-190) Mr. Savoy’s pro form projections were then relied upon by all of the other Duke Witnesses[[190]](#footnote-191) to prove that Duke’s financial integrity “is in a dire and precarious position.”[[191]](#footnote-192)

For purposes of computing its revenue requirement in this case Duke used the same data reported in its FERC Form 1, as of December 31, 2011.[[192]](#footnote-193) That is for the revenue requirement that establishes the alleged need for $729 million (plus carrying charges) Duke uses a “test year” of 12 months actual data for the year of 2011. Duke believes the 2011 data is appropriate because it provides a reliable and verifiable source of data that will avoid protracted reviews and litigation before the PUCO.[[193]](#footnote-194) It also notes that the approach tracks the methodology approved by the PUCO for AEP Ohio, where data from AEP’s 2010 FERC Form 1 was used.[[194]](#footnote-195) Duke used forecasted data in its revenue requirement calculation only to compute the margins from sale of energy.[[195]](#footnote-196)

Duke criticizes the intervenors for suggesting that the forecasted data used in the Application is too old and must be replaced, in part, by newer information.[[196]](#footnote-197) Duke claims that “to the extent that Intervenors are suggesting that one particular forecast be used, as opposed to the most recent forecast available, such an outcome is biased because it allows intervenors to choose that single forecast that is the least favorable to the Company.” Duke goes on to claim that if the PUCO determines that the fresher available data should be used, the “freshest available data is the only supportable option. And the freshest forecasted data in the record is that presented by the Staff’s expert witness, Ralph Luciani.”[[197]](#footnote-198)

 But Duke is wrong on a number of fronts. First, it mixes apples with oranges when it suggests that Intervenors are choosing one particular forecast that is not the freshest available data. Revised OCC Exhibits 7A and 8A—the pro forma projections, are the freshest available pro forma projections that are in the record. Mr. Luciani does not present any pro forma projections. Thus if one were to use the freshest available pro forma data, it would be OCC Exhibits 7A and 8A. Once the freshest available pro forma projections are used, it becomes clear that Duke’s claim of being in a dire and precarious position is highly exaggerated. At most, given the projections of Duke’s income for 2013 and 2014, there is a relatively small negative adjusted income for one segment of its business-its legacy generating assets.

And on the revenue requirement front, while Intervenors have proposed adjustments to the revenue requirements calculated by Mr. Wathen, most of the adjustments were made to correct blatant errors made by Mr. Wathen,[[198]](#footnote-199) OCC and others have proposed additional adjustments, for instance, to O&M, on grounds that the 2011 actual expenses are not reasonable.

 The basic premise of OCC’s adjustments to O&M is that the actual 2011 expenses, even though verifiable, are not reflective of the experience Duke is anticipated to have during the rate effective period (2013 and beyond). OCC’s adjustment is based on the freshest available O&M expense projections—projections that Duke itself provided! OCC did not pick and choose but merely put into record Duke’s own latest approved budget data, based on Duke’s actual 12 month experience in 2012. OCC’s adjustment to one portion of the 2011 data was an adjustment not much different than the adjustments Duke itself made to its actual 2011 data.[[199]](#footnote-200)

“Test year” data can and should be adjusted if it is not representative of the experience expected when rates go into effect.[[200]](#footnote-201) In the case of the O&M expenses, Mr. Savoy testified that O&M reductions shown in the latest pro forma data (OCC Ex.7 A and 8A) reflected the significant cost reduction efforts undertaken at all of Duke’s plants as it continues to deal with the economics in Ohio.[[201]](#footnote-202) Yet, under Duke’s approach the PUCO should ignore the actual experience of Duke in 2012 and allow Duke to collect O&M expenses incurred in 2011. But these O&M expenses are clearly overstated, in light of the most recent experience of Duke. They are thus, not reasonable expenses of the utility that customers should be expected to reimburse Duke for.

## I. Duke’s Energy Margin Calculation Produced By Dr. Zhang’s Commercial Business Model Should Be Used In Lieu Of Mr. Luciani’s Calculations.

With respect to the energy margin calculation, which is the only projected part of Mr. Wathen’s revenue requirement, Duke prefers to abandon the margins produced by its own commercial business model, run by Dr. Zhang. Instead it wants to adopt the reduced margins projected by PUCO Staff witness Luciani through his generic PROMOD model, despite the fact that the PUCO Staff is not recommending a revenue requirement for Duke.[[202]](#footnote-203) While Duke justifies its jumping ship from the “S.S. Zhang” to the “S.S. Luciani” on the basis of “freshness”--this too is a transparent attempt to grasp whatever will result in more money flowing into Duke’s pockets.

As adeptly demonstrated by Dr. Zhang, the architect of Duke’s commercial business model, Duke’s model is much more suitable as a tool in this proceeding because it is specific to Duke, and is used for a number of *actual business* purposes- budgeting, planning, and transacting business of Duke on a daily basis.[[203]](#footnote-204) Duke uses the CBM for both DECAM and DEO. [[204]](#footnote-205) Dr. Zhang indicated the daily runs of the CBM are necessary[[205]](#footnote-206) because the information produced is actually transacted on and “we are very careful about that.”[[206]](#footnote-207)

Dr. Zhang further testified that the model was developed over a number of years, starting in 1999. The model went through internal evaluation and validation in 2001 and 2002.[[207]](#footnote-208) Further validation and testing of the model by external parties were undertaken at numerous times after the model began to be used by the utility in 2002.[[208]](#footnote-209) Dr. Zhang further testified “There is a continuation of improvement every day along the lines as things move, as we see new technology, as we see different types of regulations, so there’s further improvement along the way.”[[209]](#footnote-210)

In comparison, Mr. Luciani’s revenue calculation (which is not a recommendation) comes from a generic cost production model,[[210]](#footnote-211) which is not necessarily used to transact business but is used to simulate a plant operator’s profit maximizing strategy.[[211]](#footnote-212) Under Mr. Luciani’s model the net energy margins are

significantly lower (by $35 million) than that produced by Duke’s specific commercial business model (based on the June 27, 2012 run).[[212]](#footnote-213)

And while Mr. Luciani’s analysis was the latest and freshest of all energy margin analysis, Mr. Luciani himself expressed reservations over the end product he produced given the fact that he was unable to conduct discovery.[[213]](#footnote-214) Mr. Luciani also expressed his concern that the utility knows more about the plants than he does for purposes of producing energy margins, and that Duke is privy to more data than he is able to access publicly.[[214]](#footnote-215) Additionally, Mr. Luciani noted that if he would have had more time, he would have tried to explore the differences between his assumptions and Duke’s.[[215]](#footnote-216)

Notably, if the PUCO were to adopt Mr. Luciani’s revenue calculation, and set the rate of return at 9.5% or higher, the result is that the adjusted capacity rate for Duke would be higher than the rate Duke has requested in its application.[[216]](#footnote-217) In other words if the PUCO were to adopt the revenue requirement calculation of Mr. Luciani, which includes the $35 million lower net energy margins, and order a rate of return at 9.5% or higher, it would be giving Duke more money than it requested.

But the PUCO has repeatedly held that the rate relief to which a utility is entitled is capped by the amount requested through its application.[[217]](#footnote-218) It has applied this policy even though a greater revenue deficiency has been demonstrated.[[218]](#footnote-219) Indeed, in following this precedent, the PUCO has, on occasion, adopted negative returns on equity.[[219]](#footnote-220) In one case, after discussing the precedent that the rate relief can be no greater than that requested, the Commission adopted a negative 48.57% rate of return, finding it to be “fair and reasonable for purposes of this case.”[[220]](#footnote-221)

The rationale supporting these PUCO decisions is that potential intervenors are entitled to know the stakes in deciding whether to oppose a rate request.[[221]](#footnote-222) The stakes cannot be known where the amount requested is a moving target. And here the notice issue is all the more egregious because Duke failed to give any notice at all.[[222]](#footnote-223)

Limiting the rate increase to the level a utility requested in its application is a longstanding policy of the PUCO. As the PUCO has noted it raises issues about the sufficiency of notice that the Ohio Supreme Court has passed on. For instance in a 1982 Columbia Gas Case,[[223]](#footnote-224) the PUCO discussed a proposal to give the utility an amount higher than was requested. Intervenors there argued that the rate relief was limited by the level which the utility requested in its application. [[224]](#footnote-225) Noting that the arguments of intervenors were based on sufficiency of notice, the PUCO ruled that under Ohio Supreme Court precedent, a notice problem was raised that precluded it from granting relief greater than what the utility requested:

[Office of Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153 (1981),](https://advance.lexis.com/GoToContentView?requestid=b38022d4-f4b4-d171-3f0b-d629783867e&crid=6c528b50-9fd3-ae55-e1c6-cda35a90e176) which Columbia cites in support of its position, contains language which seems to indicate that this case does raise a notice problem. The Court found that a notice provision was not inadequate simply because it did not mention the cancellation of four nuclear units which occurred after the notice was published and, in so finding, stated that the decision to terminate the plants did not alter the substance and prayer of the application because the company ‘did not request additional rate relief when it revised its original application to reflect the terminated plant expenditures.’ at 160.

Columbia argues that a Commission decision accepting the intervenors' position would encourage companies to file for increases which are substantially more than what is required to provide a fair and reasonable return. This, the company argues, would defeat the purpose of providing ‘the sort of notice upon which parties can rely in the course of making decisions about a case’ (COH Reply Brief, at 12). But how much more defeating of that purpose would [52]  it be to permit a company to continually amend upward its request. As the Commission stated in [Toledo Edison Co](https://advance.lexis.com/GoToContentView?requestid=b38022d4-f4b4-d171-3f0b-d629783867e&crid=6c528b50-9fd3-ae55-e1c6-cda35a90e176)., Case No. 82-372-EL-AIR (Opinion and Order, April 9, 1981):

. . . to hold that a company is entitled to an increase greater than that requested through the noticed rates would create the possibility that a company could reduce interventions in its rate case by the simple expedient of understating its published request, then spring a greatly increased rate request on the Commission at hearing.

Although, as the Commission implied in the Toledo case, there may be circumstances presented in which an increase may be authorized which is greater than that which had been requested, the Commission has no responsibility to do so for a company with the sophistication and regulatory experience of [Columbia Gas of Ohio](https://advance.lexis.com/GoToContentView?requestid=b38022d4-f4b4-d171-3f0b-d629783867e&crid=6c528b50-9fd3-ae55-e1c6-cda35a90e176), Inc., where there was no clear error in the original filing. We believe that the rate relief authorized in this case should be no greater than that which the company requested in its application.

Here, similar to Columbia Gas, Duke is a sophisticated utility with considerable regulatory experience. Nor were there clear errors in their original filing. The PUCO should, thus, follow its well-established precedent and limit any revenue requirement to no more than that requested in Duke’s application.

## J. The PUCO Should Not Use Actual Data To Calculate A New Revenue Requirement Each Year.

Duke suggests that an option for the PUCO to consider is that the PUCO could choose to use actual data, calculating a new revenue requirement each year to measure the difference between the cost of providing FRR capacity service and the actual revenue collected from PJM for such service.[[225]](#footnote-226) But as OCC Witness Hornby testified, this is not reasonable.[[226]](#footnote-227) Mr. Hornby testified that a true-up gives Duke a guarantee of collecting this amount.[[227]](#footnote-228) Under generally accepted ratemaking, a utility is given an opportunity to collect its costs and earn a reasonable return—it is not give a guarantee of dollar for dollar recovery.[[228]](#footnote-229) Mr. Hornby also noted that collection with no true-up is consistent with the PUCO’s treatment of the Rate Stability Rider in the AEP Ohio ESP proceeding.[[229]](#footnote-230)

## K. Duke Erred In Calculating Its Proposed Return On Equity On Only The Operations Of The Generation Portion Of Duke.

Duke contends that its Return on Equity (“ROE”) should be calculated on the operations of the generation portion of Duke.[[230]](#footnote-231) Duke reasons that the projected returns on equity for the legacy generation segment of Duke are the only assets that should be considered by the PUCO because these assets are dedicated to providing FRR capacity service.[[231]](#footnote-232) But if the PUCO decides Duke is entitled to some compensation for generation capacity above what was agreed to in the Duke ESP Stipulation (FZCP prices), the financial integrity consideration and the return on equity and cost of capital determination must be based on Duke *as a whole*, and not just on the generation assets of Duke. OCC has already set forth the various reasons why this treatment would be appropriate.[[232]](#footnote-233)

Duke has not carried through with its intention indicated in the PUCO-approved ESP Stipulation to transfer the generation assets out of Duke Energy Ohio.[[233]](#footnote-234) Therefore, there has been no legal separation of the generation assets and there is no legal or operational entity that owns the generation assets of Duke Energy Ohio.[[234]](#footnote-235)

In addition, Duke is requesting a traditional revenue requirement (i.e. rate base-rate of return) rate making approach to determine its capacity charges associated with its FRR obligation to PJM. As such, this approach is effectively asking the PUCO to treat Duke’s generation assets as a regulated entity.[[235]](#footnote-236) If Duke’s request is approved, these generation assets will not be subject to competitive market pricing and hence will face less risk than independent power producers. As a result, the appropriate entity to use for evaluating the ROE and cost of capital is Duke.[[236]](#footnote-237)

Finally, investors of Duke are looking at the risks of Duke Energy Ohio as an *integrated entity*. At this time, given there is no corporate separation, they do not evaluate the risks of the generation portion of the business separately from the transmission and distribution business.[[237]](#footnote-238) Indeed the PUCO has found it improper to attempt to identify different levels of risk associated with the different services provided by a regulated electric utility as the investor must invest in the utility as a whole.[[238]](#footnote-239)

## L. Duke’s Proposed ROE If 11.15% Is Not Supported By Dr. Vander Weide’s Equity Cost Rate Study.

 Duke contends that its proposed ROE of 11.15% is supported by Dr. Vander Weide’s equity cost rate studies. However, Dr. Vander Weide justified this figure using a proxy group of pipeline companies. These pipeline companies are all Master Limited Partnerships (“MLPs”). MLPs represent a much different business entity than Duke. [[239]](#footnote-240) Further, these equity cost rate results for these companies are highly variable and unbelievable. To this end, Dr. Vander Weide eliminated 36% of his equity cost rate results in order to justify his reported equity cost rate of 12.6%.[[240]](#footnote-241)

 In addition, Dr. Vander Weide’s equity cost rate results for his group of electric utilities are inflated. This inflation is primarily due to: (1) the use of the overly optimistic and upwardly-biased projected EPS growth rates of Wall Street analysts in his Discounted Cash Flow approach; (2) excessive base interest rates and market risk premiums used in his Risk Premium and CAPM approaches; and (3) the addition of an unwarranted flotation cost adjustment to his equity cost rate results.[[241]](#footnote-242)

 In contrast, OCC witness Dr. Woolridge performed an equity cost rate study on Dr. Vander Weide’s proxy group of twenty-four electric utilities and employed the DCF and CAPM approaches.[[242]](#footnote-243) After performing this analysis, Dr. Woolridge determined an equity cost rate range of 7.5% to 8.9%, and he used 8.75% as a point estimate ROE.[[243]](#footnote-244) In arriving at this figure, Dr. Woolridge emphasized that current interest rates and capital costs are a historically low levels.[[244]](#footnote-245) If the PUCO grants the Duke’s Application, it should receive no more than an 8.75% ROE, per Dr. Woolridge’s recommendation.

 Duke’s proposed ROE of 11.15% is not supported. It is not supported by the AEP Ohio Capacity Case decision, as that decision is not applicable to or appropriate for Duke. It is also not supported by Dr. Vander Weide’s equity cost rate study. The PUCO should find that Duke is not entitled to any additional compensation above the FZCP in providing capacity to the marketers within its service territory. However, if the PUCO grants Duke’s Application, it should receive no more than an 8.75 ROE.[[245]](#footnote-246)

# CONCLUSION

The PUCO should reject outright Duke’s bold proposal to collect an additional $729 million (plus interest) from customers to compensate it for its embedded cost of capacity. If the PUCO rules that Duke is entitled to collect its embedded cost of capacity, it should determine that $729 million (plus interest) is not a just and reasonable revenue requirement. Rather, it should conclude that Duke has vastly overstated its revenue requirement by seeking unlawful retroactive rate increases, failing to credit consumers for ESSC revenues they have been paying since January 1, 2012, and making numerous errors in its schedules.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of the foregoing Reply Brief has been served electronically upon those persons listed below this 30th day of July 2013.

 */s/ Maureen R. Grady*\_\_\_\_\_\_\_\_\_

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1. Duke Application at 4, 8, 10. [↑](#footnote-ref-2)
2. See *In the Matter of the Application of Duke Energy Ohio 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 No. 11-3549-EL-SSO), et al., (“Duke ESP”), Stipulation and Recommendation (Oct. 24, 2011), approved, Opinion and Order (Nov. 22, 2011). [↑](#footnote-ref-3)
3. R.C. 4928.38. [↑](#footnote-ref-4)
4. *In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues, 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 55(approving a market development period for five years). [↑](#footnote-ref-5)
5. *Keco Indus. Inc. v. Cincinnati & Suburban Bell Tel. Co*. (1957), 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465; *Lucas County Comm’rs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 686 N.E.2d 501. [↑](#footnote-ref-6)
6. Signatory Parties include: Office of the Ohio Consumers’ Counsel, the Ohio Energy Group, the City of Cincinnati, the Ohio Partners for Affordable Energy, Greater Cincinnati Health Council, Ohio Manufacturers’ Association, The Kroger Company, Industrial Energy Users-Ohio, Cincinnati Bell, Inc. and Wal-Mart Stores East LP and Sam’s East Inc. [↑](#footnote-ref-7)
7. See Duke Initial Brief at 39. [↑](#footnote-ref-8)
8. See Duke Initial Brief at 39-43. [↑](#footnote-ref-9)
9. Duke Initial Brief at 39. [↑](#footnote-ref-10)
10. Duke Initial Brief at 41. [↑](#footnote-ref-11)
11. Duke Initial Brief at 41*.* Duke also relies upon these cases to support the following: “‘An issue is not actually litigated … if it is subject of a stipulation between the parties.’” Duke Initial Brief at 43. [↑](#footnote-ref-12)
12. *Kirkhart v. Keiper* (2004), 101 Ohio St. 3d 377, 378 (citation omitted). [↑](#footnote-ref-13)
13. *Davis* (2008), 120 Ohio St. 3d 386, 394(“because we did not actually decide FCPDO’s post incorporation status in either *Van Dyke* or *Mallory*, PERB abused its discretion in holding that appellees were collaterally estopped from raising their claims.”). [↑](#footnote-ref-14)
14. *Davis* at 393. [↑](#footnote-ref-15)
15. *Davis* at 393. (citing *Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 185). [↑](#footnote-ref-16)
16. *Davis* at 394 (“failure to raise or contest the issue in *Van Dyke* and *Mallory* was tantamount to a stipulation in those cases”). [↑](#footnote-ref-17)
17. Id. [↑](#footnote-ref-18)
18. *Davis* at 394*.* (citing *Goodson v. McDonough Power Equip.* (1983), 2 Ohio St. 3d 193, 201)(Emphasis added). [↑](#footnote-ref-19)
19. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, 342 (“Collateral estoppel has been applied to commission proceedings.”)[*Holzemar*, 96 Ohio St. 3d at 133 (“‘an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.’”)(citation omitted).] [↑](#footnote-ref-20)
20. *Davis* (2008), 120 Ohio St.3d 386, 394 (“‘an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action’”). [↑](#footnote-ref-21)
21. 103 Ohio St.3d at 365. [↑](#footnote-ref-22)
22. See Direct Testimony of Wathen at 4-10 (June 20. 2011)(describing the formula for the original Rider RC as being derived through a traditional ratemaking revenue requirement). Rider RC, under the stipulation, changed from a cost based calculation to a calculation derived from wholesale capacity based on RPM. See Stipulation at Attachment B, Exhibit 1, page 2. [↑](#footnote-ref-23)
23. See Application at ¶15. [↑](#footnote-ref-24)
24. *American Home Products Corporation v. Roger W. Tracy* (2003), 152 Ohio App.3d 267 (Ct. Apps., 10th Dist., 2003); *Ron Thomas, Sr. v. Restaurant Developers Corp*. (1997), 1997 Ohio App. LEXIS 3062. [↑](#footnote-ref-25)
25. *Covington and Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, 237-38. [↑](#footnote-ref-26)
26. See Duke Initial Brief at 41. [↑](#footnote-ref-27)
27. See OCC Initial Brief at 8-13; Entry on Rehearing at ¶77. [↑](#footnote-ref-28)
28. *Superior’ Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133 (syllabus). [↑](#footnote-ref-29)
29. *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 2006-Ohio-5853 at ¶19 (quoting *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 311, 315); *Office of Consumers’ Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244. [↑](#footnote-ref-30)
30. *Scott v. East Cleveland* (1984), 16 Ohio App. 3d 429, 476 (Ct. App.). [↑](#footnote-ref-31)
31. Duke Initial Brief at 38. [↑](#footnote-ref-32)
32. Id. [↑](#footnote-ref-33)
33. Id. at 39. [↑](#footnote-ref-34)
34. FERC Docket No. ER10-1562 (June 25, 2010). [↑](#footnote-ref-35)
35. FERC Docket No. ER10-2254 (August 16, 2010). [↑](#footnote-ref-36)
36. PUCO Case No. 11-2641-EL-RDR, et al., Stipulation and Recommendation (April 26, 2011). [↑](#footnote-ref-37)
37. PUCO Case No. 11-3549-EL-SSO, Application, (June 20, 2011). [↑](#footnote-ref-38)
38. PUCO Case No. 11-3549-EL-SSO, Stipulation and Recommendation, (October 24, 2011). [↑](#footnote-ref-39)
39. Duke Initial Brief at 30. [↑](#footnote-ref-40)
40. Id. [↑](#footnote-ref-41)
41. Duke Brief at 32. [↑](#footnote-ref-42)
42. Id. [↑](#footnote-ref-43)
43. OCC Ex. 1 at 51. [↑](#footnote-ref-44)
44. AEP Ohio ESP Order at 52. [↑](#footnote-ref-45)
45. Id. (Emphasis added). [↑](#footnote-ref-46)
46. Id. [↑](#footnote-ref-47)
47. Id. [↑](#footnote-ref-48)
48. October 17 Entry on Rehearing at 10. [↑](#footnote-ref-49)
49. Id. [↑](#footnote-ref-50)
50. Id. at 11. [↑](#footnote-ref-51)
51. Id. [↑](#footnote-ref-52)
52. Id. [↑](#footnote-ref-53)
53. Id. at 11-12. [↑](#footnote-ref-54)
54. Case No. 10-2929-El-UNC, Entry (December 8, 2010). [↑](#footnote-ref-55)
55. Duke Initial Brief at 3. [↑](#footnote-ref-56)
56. Id. [↑](#footnote-ref-57)
57. Duke continues to assert that FRR capacity service is a generation service but “non-competitive” generation and thus not subject to regulation under R.C. Chapter 4928. As explained in detail in OCC’s Initial Brief at 15-17, the PUCO expressly found “it unnecessary to determine whether capacity service is considered a competitive or non-competitive service under Chapter 4928, Revised Code.” (citing to OCC Ex. 1 at 13). [↑](#footnote-ref-58)
58. Duke Initial Brief at 8. [↑](#footnote-ref-59)
59. Duke Initial Brief at 3. [↑](#footnote-ref-60)
60. Duke Initial Brief at 1. [↑](#footnote-ref-61)
61. See *Utility Serv. Partners, Inc. v. Pub. Util. Comm.,* 124 Ohio St.3d 284 at ¶12; *Cincinnati N.O. & T.P. Ry. Co. v. Pub. Util. Comm.,* 31 Ohio St.2d 81, 86. [↑](#footnote-ref-62)
62. *Columbus S. Power Co. v. Pub. Util. Comm*. (1933), 67 Ohio St.3d 535. [↑](#footnote-ref-63)
63. OCC Initial Brief at 46-49. [↑](#footnote-ref-64)
64. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at ¶4 (Dec. 8, 2010). [↑](#footnote-ref-65)
65. The PUCO found that AEP Ohio was already recovering capacity costs through the provider of last resort charges approved under the ESP. Id. This finding was affirmed in the PUCO’s October 17, 2012 Entry on Rehearing at ¶¶28-31. [↑](#footnote-ref-66)
66. Rehearing was granted in response to numerous parties’ assertions that the PUCO lacked jurisdiction to establish rates under the general supervisory sections of the Code. [↑](#footnote-ref-67)
67. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at ¶27, 35, 71, 134 (Oct. 17, 2012). [↑](#footnote-ref-68)
68. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at ¶21 (Dec. 12, 2012). [↑](#footnote-ref-69)
69. [*Columbus S. Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St.3d 535, 620 N.E.2d 835](http://www.lexis.com/research/buttonTFLink?_m=2caecc43769918e809a471b925092f7e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b67%20Ohio%20St.%203d%20535%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=1303e20b6d94578faa48e138f3e8da7d);   [*Pike Natural Gas Co. v. Pub. Util. Comm*. (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444](http://www.lexis.com/research/buttonTFLink?_m=2caecc43769918e809a471b925092f7e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=20&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b68%20Ohio%20St.%202d%20181%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=101156eedd3d07426a7537c6709ad664); [*Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820](http://www.lexis.com/research/buttonTFLink?_m=2caecc43769918e809a471b925092f7e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=21&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b67%20Ohio%20St.%202d%20153%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=db4716cef36b79d327178e4dd3dc7403); and [*Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St.2d 302, 18 Ohio Op.3d 478, 414 N.E.2d 1051](http://www.lexis.com/research/buttonTFLink?_m=2caecc43769918e809a471b925092f7e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=22&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b64%20Ohio%20St.%202d%20302%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=ebd928f14f22af5b923609a6b3d6a526). [↑](#footnote-ref-70)
70. See, e.g., 1960 OAG No. 1842 (1960). [↑](#footnote-ref-71)
71. *IEU Ohio v. Pub. Util. Comm.*,117 Ohio St.3d 486, 490, 2008-Ohio 990. [↑](#footnote-ref-72)
72. Id. [↑](#footnote-ref-73)
73. Id. at 491. [↑](#footnote-ref-74)
74. Id., citing to *Ohio Consumers’ Counsel v. Pub. Util. Comm.,* 109 Ohio St.3d 328, 2006-Ohio-2110, ¶38. [↑](#footnote-ref-75)
75. Duke Initial Brief at 51. [↑](#footnote-ref-76)
76. Id. [↑](#footnote-ref-77)
77. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at ¶27, 35, 71, 134, (Oct. 17, 2012). [↑](#footnote-ref-78)
78. See, e.g*., In the Matter of the Self Complaint of Paramount Natural Gas Company Concerning Its Existing Tariff Provisions Regarding Charges for Installing a Positive Shut off Dri*p, Case No. 98-1590-AGA-SLF, Entry at ¶4 (Dec. 3, 1998*); In the Matter of the Self-Complaint of the Ottoville Mutual Telephone Company Concerning Certain of Its Rates and Charges*, Case No. 89-1424-TP-SLF, Entry at ¶5 (Dec. 19, 1989). [↑](#footnote-ref-79)
79. *In the Matter of the Self-Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order at 6 (Aug. 15, 2012). [↑](#footnote-ref-80)
80. Id. [↑](#footnote-ref-81)
81. Id. [↑](#footnote-ref-82)
82. See*, In the Matter of the Self-Complaint of Akron Thermal Limited Partnership*, Case No. 04-1298-HT-SLF, Finding and Order (Nov. 3, 2004), where the PUCO approved a fuel cost surcharge rider, subject to refund, and only pending the determination of a base rate case of the company; *In the Matter of the Self-Complaint of Paramount Natural Gas Company Concerning its Existing Tariff Provisions Regarding Charges for Installing a Positive Shut Off Drip*, Case No. 98-1590-GA-SLF, Finding and Order (Jan. 14,1999), where the PUCO approved a charge applicable solely to those customers requiring installation of a positive shut-off drip device; *In the Matter of the Self-Complaint of Columbia Gas of Ohio, Inc. Concerning Certain of its Existing Tariff Provisions*, Case No. 93-1569-GA-SLF, Entry (Dec. 7,1995), where the Commission approved the transfer and exchange of certain facilities between Suburban and Columbia, but without any cost to customers; and *In the Matter of the Application of Ohio Gas Company to Establish a Charge for Bad Checks and a Charge for Reconnection of Service After Regular Business Hours,* Case No. 87-2068-GA-SLF, Entry (Jan. 10, 1989), where the Commission approved a $10.00 charge to be applied to customers who issue checks or other instruments backed by insufficient funds. [↑](#footnote-ref-83)
83. See, e.g*., In the Matter of Phase II of the Commission’s Investigation into the Regulatory Framework for Competitive Telecommunications Services in Ohio*, Case No. 86-1144-TP-COI, Finding and Order at 25-26 (Aug. 2, 1988). [↑](#footnote-ref-84)
84. *In the Matter of the Self-Complaint of the Ottoville Mutual Telephone Company Concerning Certain of Its Rates and Charges*, Case No. 89-1424-TP-SLF, Entry at 4 (Dec. 19, 1989). [↑](#footnote-ref-85)
85. Duke continues to assert that FRR capacity service is a generation service but “non-competitive” generation and thus not subject to regulation under R.C. Chapter 4928. As explained in detail in OCC’s Initial Brief at 15-17, the PUCO expressly found “it unnecessary to determine whether capacity service is considered a competitive or non-competitive service under Chapter 4928, Revised Code.” (citing to OCC Ex. 1 at 13). [↑](#footnote-ref-86)
86. See, e.g., *Dayton St. Trans. Co. v. DP&L* (1937), 57 Ohio App. 299; *Cleveland Tel. Co. v. Cleveland* (1918), 98 Ohio St. 358. [↑](#footnote-ref-87)
87. *Union Gas & Electric Co*. (1913), 14 Ohio N.P. (n.s.), 31 Ohio Dec. 567. [↑](#footnote-ref-88)
88. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing at ¶71 (Oct. 17, 2012). [↑](#footnote-ref-89)
89. Duke Initial Brief at 3. [↑](#footnote-ref-90)
90. See IEU Ex. 9, and Direct Testimony of Duke witness B. Keith Trent at 9, Schedule 8.1, Section D.8 of the Reliability Assurance Agreement. [↑](#footnote-ref-91)
91. IEU Ex. 9. [↑](#footnote-ref-92)
92. IEU Ex. 9. [↑](#footnote-ref-93)
93. Duke Initial Brief at 8-9. [↑](#footnote-ref-94)
94. See, for example, OCC Initial Brief at 19, Kroger Initial Brief at 4-24, OEG Initial Brief at 5, RESA and IGS Initial Briefs at 10, PUCO Staff Initial Brief at 12. [↑](#footnote-ref-95)
95. PUCO Staff Initial Brief at 6. [↑](#footnote-ref-96)
96. See Duke Initial Brief at 30. [↑](#footnote-ref-97)
97. Duke Initial Brief at 33. [↑](#footnote-ref-98)
98. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing at ¶71 (Oct. 17, 2012). [↑](#footnote-ref-99)
99. See OCC Initial Brief at 19-20. [↑](#footnote-ref-100)
100. IEU Ex. 9. [↑](#footnote-ref-101)
101. PUCO Staff Brief at 12. [↑](#footnote-ref-102)
102. OEG Brief at 2. [↑](#footnote-ref-103)
103. See, e.g., *In the Matter of the 1995 Electric Long Term Forecast Report of the Cincinnati Gas & Electric Company*, Case No. 95-203-EL-FOR et al., Opinion and Order at 49-50 (Dec. 19, 1996). [↑](#footnote-ref-104)
104. Duke Initial Brief at 34. [↑](#footnote-ref-105)
105. Duke Initial Brief at 17. [↑](#footnote-ref-106)
106. Id. at 17-18. [↑](#footnote-ref-107)
107. Id. at 20. [↑](#footnote-ref-108)
108. Even if one were to accept Duke’s doom and gloom predictions for its generating assets (which OCC does not) slightly negative returns on equity for a discrete period of time do not necessarily equate to a constitutional taking. Indeed this Commission has on several occasions ordered low or negative rates of return. For instance in the Ohio Cumberland Gas Company 2002 rate case, the Commission approved an overall rate of return of 1.55%. *In the Matter of the Application of Ohio Cumberland Gas Company for an Increase in Rates*, Case No. 02-1200-GA-AIR, Opinion at 4 (Jan. 23, 2003. And in an earlier case, in 1987, the PUCO determined that a negative 48.57 overall rate of return was “fair and reasonable.” *In the Matter of the Application of the West Millgrove Gas Company for an Increase in Rates and Charges*, Case No. 87-671-GA-AIR, Opinion and Order at 6-7 (Dec. 23, 1987). [↑](#footnote-ref-109)
109. R.C. Title 49. [↑](#footnote-ref-110)
110. Id. [↑](#footnote-ref-111)
111. See R.C. Title 49, which articulates the duties of the PUCO. [↑](#footnote-ref-112)
112. See *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008), 119 Ohio St.3d 301, 302, 893 N.E.2d 824; *East Gas Ohio Company v. Pub. Util. Comm.*, 137 Ohio St. 225, 238, 28 N.E.2d 599 (1940) (holding that the constitutionality of statutes is the province of the courts not the Commission.) [↑](#footnote-ref-113)
113. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008) , 119 Ohio St.3d 301, 302, 893 N.E.2d 824 (Citation omitted) (Emphasis added). [↑](#footnote-ref-114)
114. See *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, generally. [↑](#footnote-ref-115)
115. *In the Matter of the Application of the Cincinnati Gas & Electric Company*, Case No. 72-415-Y, 1975 Ohio PUC LEXIS 1, at \*35-36 (October 17, 1975); *In the Matter of the Complaint of WorldCom Inc.*, Case No. 03-324-AU-PWC, 2003 Ohio PUC LEXIS 368, at \* 12 (August 19, 2003); *In the Matter of the Complaint of the City of Reynoldsburg*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 429, at \*36 (April 5, 2011); *Monongahela Power Co. v. Schriber* (S.D. Ohio 2004), 322 F. Supp.2d 902, 911. [↑](#footnote-ref-116)
116. *In the Matter of the Complaint of WorldCom Inc.*, Case No. 03-324-AU-PWC, 2003 Ohio PUC LEXIS 368, at \* 12 (August 19, 2003). [↑](#footnote-ref-117)
117. *In the Matter of the Complaint of the City of Reynoldsburg*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 429, at \*36 (April 5, 2011). [↑](#footnote-ref-118)
118. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at 9 (January 11, 2011). [↑](#footnote-ref-119)
119. *In the Matter of the Application of the Cincinnati Gas & Electric Company*, Case No. 72-415-Y, 1975 Ohio PUC LEXIS 1, at \*35-36 (October 17, 1975). [↑](#footnote-ref-120)
120. Id. [↑](#footnote-ref-121)
121. Id. at \*3-4. [↑](#footnote-ref-122)
122. Id. [↑](#footnote-ref-123)
123. Id. at \*35. [↑](#footnote-ref-124)
124. Id. [↑](#footnote-ref-125)
125. Id., citing *Smyth v. Ames*, 169 U.S. 466, 457 (1898); *Bluefield Water Works and Service Co. v. Pub. Util. Comm.*, 262 U.S. 679, 690; 43 S. Ct. 675; 67 L. Ed. 1176 (1923); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310; 109 S. Ct. 609; 102 L. Ed. 2d 646 (1989). [↑](#footnote-ref-126)
126. See Initial Brief ofOCC at 44-46. [↑](#footnote-ref-127)
127. See R.C. 4928.398; OCC Initial Brief at 49-50. [↑](#footnote-ref-128)
128. *Market Street Railway Co. v. Railway Comm. Of Cal.*, 324 U.S. 548. 554; 65 S. Ct. 770; 89 L. Ed. 1171 (1945). [↑](#footnote-ref-129)
129. Id. [↑](#footnote-ref-130)
130. Id. at 566. [↑](#footnote-ref-131)
131. Id. [↑](#footnote-ref-132)
132. Id. at 567. [↑](#footnote-ref-133)
133. Id. [↑](#footnote-ref-134)
134. Duke Initial Brief at 20. [↑](#footnote-ref-135)
135. Id. [↑](#footnote-ref-136)
136. For example, see OEG Initial Brief at 16, Kroger Initial Brief at 6, 27, FES Initial Brief at 14, IEU Initial Brief at 48. [↑](#footnote-ref-137)
137. OCC Initial Brief at 8-13. [↑](#footnote-ref-138)
138. OCC Initial Brief at 27. [↑](#footnote-ref-139)
139. Id. at 25. [↑](#footnote-ref-140)
140. See Direct Testimony of Duke witness B. Keith Trent at 21. 100% of Duke’s load shops because Duke bid out 100% of its Standard Service Offer service. All of Duke’s SSO customers are served by alternate LSEs. (Direct Testimony of Duke witness B. Keith Trent at 21). [↑](#footnote-ref-141)
141. Case No. 10-2929-EL-UNC, Direct Testimony of AEP Ohio witness William A. Allen at 5 (March 23, 2012). [↑](#footnote-ref-142)
142. AEP Ohio’s Standard Service Offer customers are already paying AEP Ohio for capacity through standard offer rates. However, the PUCO failed to recognize that they (customers) are already paying AEP Ohio for capacity in the AEP Ohio Capacity Case. OCC contends that requiring non-shopping customers to pay capacity deferrals for the discount provided to marketers will, under the mechanism devised by the PUCO, eventually force customers to pay twice for capacity. OCC contends that this result is unjust and unreasonable, and it is under appeal at the Ohio Supreme Court in Case No. 13-228. [↑](#footnote-ref-143)
143. OCC Initial Brief at 25. [↑](#footnote-ref-144)
144. Id. at 26. [↑](#footnote-ref-145)
145. Note the table in OEG’s Brief summarizing major distinctions between AEP Ohio and Duke, at 17. [↑](#footnote-ref-146)
146. Duke Brief at 36. [↑](#footnote-ref-147)
147. OCC Ex. 3, Entry on Rehearing, page 32, at ¶77. [↑](#footnote-ref-148)
148. IEU Ex. 9. [↑](#footnote-ref-149)
149. See Case No. 11-346-EL-SSO, Opinion and Order at 36 (Aug. 8, 2012). [↑](#footnote-ref-150)
150. Direct Testimony of OCC witness David J. Effron at 6. [↑](#footnote-ref-151)
151. See Case No. 11-346-EL-SSO, Opinion and Order at 36 (Aug.8, 2012). [↑](#footnote-ref-152)
152. Duke Initial Brief at 31. [↑](#footnote-ref-153)
153. Duke Ex. 1 at 1. [↑](#footnote-ref-154)
154. Duke Initial Brief at 16. [↑](#footnote-ref-155)
155. Duke Initial Brief at 45. [↑](#footnote-ref-156)
156. Id. [↑](#footnote-ref-157)
157. Id. [↑](#footnote-ref-158)
158. The limitations placed upon governmental action by the federal and state equal protections clauses are essentially the same. *McCrone v. Bank One Corp.,* 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 7. [↑](#footnote-ref-159)
159. *Nordinger v. Hahn* (1992), 112 S. Ct. 2326, 120 L. Ed.2d 1. [↑](#footnote-ref-160)
160. Duke Initial Brief at 45. [↑](#footnote-ref-161)
161. *Dandridge v. Williams* (1970), 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L.Ed.2d 491. [↑](#footnote-ref-162)
162. See OCC Initial Brief at 21-28. [↑](#footnote-ref-163)
163. Joint Motion to Dismiss at 2-10. [↑](#footnote-ref-164)
164. Id. at 2-7. [↑](#footnote-ref-165)
165. See Duke Energy Ohio, Inc., Docket Nos. ER10-1562-000, ER10-2254-000. [↑](#footnote-ref-166)
166. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs*, Case No. 11-2641 et al. [↑](#footnote-ref-167)
167. Duke Initial Brief at 23. [↑](#footnote-ref-168)
168. Id. [↑](#footnote-ref-169)
169. Duke Initial Brief at 50. [↑](#footnote-ref-170)
170. This is an implicit acknowledgement that Duke’s application is an effort to improve on the settlement in Case No. 11-3549-EL-SSO, et al. after it saw the Commission’s order in the AEP capacity case. [↑](#footnote-ref-171)
171. Duke Initial Brief at 48-49. [↑](#footnote-ref-172)
172. Id. at 48. [↑](#footnote-ref-173)
173. Id. at 48-49. [↑](#footnote-ref-174)
174. Id. at 49. [↑](#footnote-ref-175)
175. FAS 71, ¶9. [↑](#footnote-ref-176)
176. *See* *Ohio Consumers’ Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, *generally*, *see also*, *OCC v. PUC of Ohio*, 16 Ohio St.3d 21 at fn1, 475 N.E.2d 786, (1985), where this Court held: “[w]e are compelled to recognize that accounting changes have a substantial practical impact on ratemaking. Although the station connections expenses resulted from events occurring within the test-year period, characterization of those expenses after the test-year period has the practical effect of manipulating a test-year component after the test year and effectively creates a test-year loophole. This demonstrates how inextricably accounting methodologies are linked to the rates consumers may be compelled to pay.” [↑](#footnote-ref-177)
177. Duke Application at ¶2a (footnote omitted) at ¶8, ¶19. [↑](#footnote-ref-178)
178. Id. at ¶14. [↑](#footnote-ref-179)
179. Duke Application at ¶17. [↑](#footnote-ref-180)
180. *In re: Columbus Southern Power Co.,* 128 Ohio St.3d 512, 515, 2011-Ohio 1788, ¶11. [↑](#footnote-ref-181)
181. *Columbus v. Pub. Util. Comm*. (1921), 103 Ohio St. 79, 135, 133 N.E. 800. [↑](#footnote-ref-182)
182. Duke Initial Brief at 50. [↑](#footnote-ref-183)
183. Id. [↑](#footnote-ref-184)
184. *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 No. 11-346-EL-SSO et al. Entry on Rehearing at ¶28 (Jan. 30, 2013). [↑](#footnote-ref-185)
185. OCC Initial Brief at 24-25. [↑](#footnote-ref-186)
186. See discussion supra. [↑](#footnote-ref-187)
187. Duke Initial Brief at 60. [↑](#footnote-ref-188)
188. Tr. IV-public, at page 882. [↑](#footnote-ref-189)
189. Tr. V-public, at page 884. [↑](#footnote-ref-190)
190. See Direct Testimony of Duke witness Julie M. Cannell at 19; Direct Testimony of Duke witness Stephen G. DeMay at 5; Direct Testimony of Duke witness William Don Wathen at 19. [↑](#footnote-ref-191)
191. Direct Testimony of Duke witness B. Keith Trent at 11. [↑](#footnote-ref-192)
192. Id. [↑](#footnote-ref-193)
193. Id. [↑](#footnote-ref-194)
194. Id. [↑](#footnote-ref-195)
195. Duke Initial Brief at 64. The forecasted energy margin was derived from the June 28, 2012 commercial business model run. [↑](#footnote-ref-196)
196. Duke Initial Brief at 57. [↑](#footnote-ref-197)
197. Duke Initial Brief at 58. [↑](#footnote-ref-198)
198. See OCC Initial Brief at 86-90; 96-105. [↑](#footnote-ref-199)
199. See Direct Testimony of Duke witness Wathen at 9-10; 12-13. [↑](#footnote-ref-200)
200. See OCC Initial Brief, footnote 347. [↑](#footnote-ref-201)
201. Tr. IV-public, page 913. [↑](#footnote-ref-202)
202. See Direct Testimony of PUCO Staff witness Ralph L. Luciani at 3 (“Staff does not support the institution of a cost-based capacity rate for Duke Energy Ohio”). Indeed the PUCO Staff did not even mention Luciani’s analysis in its Initial Brief. [↑](#footnote-ref-203)
203. Tr. V-public, page 1085. [↑](#footnote-ref-204)
204. Tr. V-public, at page 1107. [↑](#footnote-ref-205)
205. Dr. Zhang indicated that sometimes runs are done more than daily. Tr. V-public, at page 1089. [↑](#footnote-ref-206)
206. Tr. V-public, at page 1085. [↑](#footnote-ref-207)
207. Tr. V-public, at page 1106. [↑](#footnote-ref-208)
208. Id. [↑](#footnote-ref-209)
209. Tr. V-public, at page 1107. [↑](#footnote-ref-210)
210. Mr. Luciani’s model is the eastern interconnection model which includes much more than Duke specific plants. Tr. IX-public at 2406. Mr. Luciani’s model uses a standard PROMOD data set. Tr. IX-public, at page 2407. [↑](#footnote-ref-211)
211. Tr. IX-public, at page 2408. [↑](#footnote-ref-212)
212. Direct Testimony of Staff witness Ralph L. Luciani at 11-12. [↑](#footnote-ref-213)
213. Tr. IX-public, at page 2398. [↑](#footnote-ref-214)
214. Tr. IX-public, at page 2399-2402. [↑](#footnote-ref-215)
215. Tr. IX-public, at page 2426. [↑](#footnote-ref-216)
216. Tr. IX-public, at page 2343. [↑](#footnote-ref-217)
217. See, e.g., *Arrowhead Hills Utilities Corp.*, Case No. 88-279-WW-AIR, Opinion and Order (Dec. 20, 1988); *Columbia Gas of Ohio*, Case No. 82-1151-GA-AIR, Opinion and Order (Nov. 9, 1983); *Toledo Edison Company*, Case No. 80-377-EL-AIR, Opinion and Order (Apr. 9, 1981). [↑](#footnote-ref-218)
218. See *In the Matter of the Norlick Place Water Company for an Increase in Rates and Charges*, Case No. 90-1507-WW-AIR, Opinion and Order at 7 (May 23, 1991)(citing to *Arrowhead Hills Utilities Corporation*, Case No. 88-279-WW-AIR (Dec. 20, 1988); *Columbia Gas of Ohio*, Case No. 82-1151-GA-AIR (Nov. 9, 1983); *Toledo Edison Company*, Case No. 80-377-EL-AIR (Apr. 9., 1981); *In the Matter of the Cleveland Electric Illuminating Company*, Case No. 81-41-HT-AIR, Opinion and Order at 39-41 (Jan. 13, 1982)(citing to *Ohio Power Company*, Case No. 80-367-EL-AIR, Opinion and Order (Apr. 1, 1981) ; *Ohio Water Service*, Case No. 85-841-WW-AIR, Opinion and Order at 8-9 (June 3, 1986). [↑](#footnote-ref-219)
219. *In the Matter of the Application of The West Millgrove Gas Company for an Increase in Rates and Charges*, Case No. 87-671-GA-AIR, Opinion and Order at 6-7 (Dec. 23, 1987); *In the Matter of the Application of Arrowhead Hills Utilities Corporation for an Increase in Rates and Charges*, Case No. 88-279-WW-AIR, Opinion and Order at 7-8 (Dec. 20, 1988). [↑](#footnote-ref-220)
220. *In the Matter of the Application of the West Millgrove Gas Company for an Increase in Rates and Charges*, Case No. 87-671-GA-AIR, Opinion and Order at 6-7 (Dec. 23, 1987); accord *, In the Matter of the Application of Arrowhead Hills Utilities Corporation for an Increase in Rates and Charges*, Case No. 88-279-WW-AIR, Opinion and Order at 7-8 (Dec. 20, 1988) (adopting a negative 3.27% return on equity as “fair and reasonable”). [↑](#footnote-ref-221)
221. *In the Matter of the Application of Columbia Gas of Ohio, Inc.,* Case No. 84-67-GA-AIR, Opinion and Order at 56 (May 21, 1985). [↑](#footnote-ref-222)
222. See OCC Initial Brief at 46. [↑](#footnote-ref-223)
223. *In the Matter of the Application of Columbia Gas of Ohio, Inc.,* Case No. 82-1151-GA-AIR, Opinion and Order at 51-52 (Nov. 9, 1983). [↑](#footnote-ref-224)
224. Id. [↑](#footnote-ref-225)
225. Duke Initial Brief at 58. [↑](#footnote-ref-226)
226. OCC witness J. Richard Hornby at 37. [↑](#footnote-ref-227)
227. Id. [↑](#footnote-ref-228)
228. Id. [↑](#footnote-ref-229)
229. Id; see *In the Matter of the Application of Columbus Southern 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 No. 11-346-EL-SSO, et al., Opinion and Order at 32; 35-37. [↑](#footnote-ref-230)
230. Duke Brief at 54. Note that on page 56 of its Brief Duke erroneously asserts that the PUCO has “now ruled that such capacity services are not competitive retail electric services.” This assertion is inaccurate and wrong as the PUCO has not made a determination as to whether capacity service is “competitive” or “noncompetitive.” See OCC Ex. 1 at 13. [↑](#footnote-ref-231)
231. Duke Brief at 56. [↑](#footnote-ref-232)
232. OCC Brief at 77-79. [↑](#footnote-ref-233)
233. *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 No. 11-3549-EL-SSO, et al., Opinion and Order at 29-31 (Nov. 22, 2011). [↑](#footnote-ref-234)
234. Direct Testimony of OCC witness Dr. J. Randall Woolridge at 12. [↑](#footnote-ref-235)
235. Id. [↑](#footnote-ref-236)
236. Id. [↑](#footnote-ref-237)
237. Id. [↑](#footnote-ref-238)
238. See, e.g., *In the Matter of the Application of Dayton Power & Light Co.*, Case No. 83-193-EL-CMR,

Opinion and Order at 13 (Nov.6, 1984); *In re: Dayton Power & Light*, Case No. 83-777-GA-AIR, Opinion

and Order at 47-49 (Aug. 7, 1984). [↑](#footnote-ref-239)
239. Direct Testimony of OCC witness Dr. J. Randall Woolridge at 67. [↑](#footnote-ref-240)
240. Id. [↑](#footnote-ref-241)
241. Id. at 68. [↑](#footnote-ref-242)
242. Id. at 15. [↑](#footnote-ref-243)
243. Id. [↑](#footnote-ref-244)
244. Id. [↑](#footnote-ref-245)
245. Id. [↑](#footnote-ref-246)