Before

**The Public Utilities Commission of Ohio**

In the Matter the Application of Duke Energy )

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

Pursuant to Revised Code Section 4909.18 )

In the Matter of the Application of Duke Energy )

Ohio, Inc., for Approval to Change Accounting ) Case No. 12-2401-EL-AAM

Methods )

In the Matter of the Application of Duke Energy )

Ohio, Inc., for the Approval of a Tariff for a ) Case No. 12-2402-EL-ATA

New Service )

# REPLY TO DUKE ENERGY OHIO, INC.’S MEMORANDUM CONTRA

# INDUSTRIAL ENERGY USERS-OHIO’S MOTION TO INTERVENE

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# INDUSTRIAL ENERGY USERS-OHIO’S MOTION TO INTERVENE

On July 2, 2012, the Public Utilities Commission of Ohio (“Commission”) approved a state compensation for Ohio Power Company.[[1]](#footnote-1) The Industrial Energy Users of Ohio (“IEU-Ohio”) has contested the Commission’s decision to invent and apply a cost-based ratemaking methodology for generation capacity service and will not repeat its positions in this pleading.

Shortly after the Commission approved a state compensation mechanism to increase the price of capacity in Ohio Power Company’s service territory, on August 29, 2012, Duke Energy Ohio, Inc. (“Duke”) filed an application with the Commission to increase its capacity charges by over $770 million (“Application”).

On August 30, 2012, IEU-Ohio filed a Motion to Intervene and Memorandum in Support (“Motion”). Although IEU-Ohio has intervened and contributed to the development of several recent Duke proceedings,[[2]](#footnote-2) Duke served a Memorandum Contra IEU-Ohio’s Motion on September 4, 2012. Duke’s Memorandum Contra, however, does not appear to have been formally docketed and accepted by the Commission, as it cannot be viewed on the Commission’s website. For that reason alone, the Commission should give no weight to Duke’s Memorandum Contra. In the event that the Commission determines that Duke’s Memorandum Contra was properly filed, IEU-Ohio addresses Duke’s arguments below.

Under Section 4903.221, Revised Code, the Commission will consider four criteria upon applications to intervene in its proceedings:

1. The nature and extent of the prospective intervenor’s interest;
2. The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
3. Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
4. Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

The Supreme Court of Ohio has determined that “intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”[[3]](#footnote-3) IEU-Ohio’s Motion demonstrated that each of the above criteria are satisfied.

Duke claims that IEU-Ohio’s Motion should be denied because it fails to demonstrate that IEU-Ohio meets any of the four criteria.[[4]](#footnote-4) Regarding the first two criteria, Duke mainly relies on the same flawed argument: Duke claims that the Motion did not assert that IEU-Ohio has members in Duke’s service territory that will be effected by the Application.[[5]](#footnote-5) For purposes of clarifying any ambiguity, IEU-Ohio stated in its Motion that IEU-Ohio’s members purchase substantial amounts of electric and related services from Ohio’s electric distribution utilities (“EDU”). IEU-Ohio has members located in the service territories of each investor owned utility in Ohio — including the service territory of Duke. A current listing of IEU-Ohio member companies is available on IEU-Ohio's website at <http://www.ieuohio.org/member_list.aspx> (this link was included in the Motion). Duke can readily identify IEU-Ohio members in its service territory on IEU-Ohio’s website.

Duke then attacks the Motion’s claim that the Application will impact the price of electricity, claiming that “these proceedings will not have an impact on existing prices.”[[6]](#footnote-6) Duke’s argument is not even factually correct because IEU-Ohio did not limit its interest to the impact on “existing” prices, and Duke’s Application would increase the price of capacity by over $770 million (before carrying charges). Moreover, although Duke is requesting authority to defer collection of its requested capacity price increase, Duke’s Application seeks to increase the existing price of capacity, a service that impacts the price of electricity.

Duke also claims that IEU-Ohio’s statement that it will promote the furtherance of policy in these proceedings is irrelevant because Duke did not file its Application pursuant to Chapter 4928, Revised Code. Duke’s argument is at odds with the Commission’s Opinion and Order approving a state compensation for Ohio Power Company.[[7]](#footnote-7) The Capacity Order authorized Ohio Power Company to increase the price of capacity charged to competitive retail electric service (“CRES”) providers, but, in furtherance of state policy (Section 4928.02, Revised Code), the Commission directed Ohio Power Company to defer for future collection the difference between Ohio Power Company’s “cost” of capacity and the PJM Interconnection LLC (“PJM”) reliability pricing model (“RPM”) capacity price.[[8]](#footnote-8) Duke’s Application contains a similar proposal; thus, state policy is of integral importance in these proceedings.

Duke’s claims with respect to the third and fourth criteria also lack merit. Duke claims that because “these proceedings seek approval of a tariff to collect for services not previously covered by a tariff and do not seek any increases; thus no hearing is required under R.C. 4909.18 unless the Application may be unjust or unreasonable.”[[9]](#footnote-9) First, Duke has not articulated how IEU-Ohio’s intervention would delay these proceedings. Rather, Duke has claimed that a hearing is not required. Even assuming, *arguendo*, that the Commission heeds Duke’s absurd claim that a hearing is not required in these proceedings, the Supreme Court of Ohio, in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, ¶16 (2006), determined that the absence of a hearing is not a ground for denying intervention, stating:

Even if no hearing was scheduled or contemplated when the Consumers' Counsel sought to intervene, her motions and accompanying memoranda properly addressed the relevant criteria of R.C. 4903.221. In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.

Regardless, a hearing is required. Contrary to Duke’s claim, the Application seeks an increase in rates. In the Stipulation submitted by Duke and several intervenors — including IEU-Ohio — to resolve Duke’s electric security plan (“ESP”), Duke committed to charge the final zonal clearing price (“FZCP”) for capacity, the RPM-based price, during the term of its ESP. Duke’s ESP is set to expire on May 31, 2015. Because Duke seeks to modify and increase the price for capacity charged during the duration of its ESP, Duke’s Application is a request to increase rates. Accordingly, a hearing is required and IEU-Ohio is entitled to participate in such hearing with the full rights afforded to intervening parties.

Even if Duke’s Application is not for an increase in rates, the Application does not appear to be just or reasonable for several reasons. Thus, a hearing is required. First, as stated above, Duke previously committed to charge the RPM price for capacity during the duration of its ESP.[[10]](#footnote-10) Duke’s Application violates the ESP Stipulation. As a signatory party to the ESP Stipulation, IEU-Ohio must be permitted to intervene in this proceeding so that IEU-Ohio may enforce the terms of the bargain agreed to by Duke in its ESP Stipulation.

Second, through a separate Stipulation and Recommendation (the Base Transmission Rider Stipulation), Duke committed to not seek a cost-based capacity filing at the Federal Energy Regulatory Commission (“FERC”).[[11]](#footnote-11) Duke’s commitment is for the period between January 1, 2012 and May 31, 2016. The Commission approved that Stipulation on May 25, 2011. Duke’s Application appears to be unjust and unreasonable in light of its BTR Stipulation commitment.

Third, the Application indicates that Duke is seeking to recover the cost of capacity provided by its generating units for the period of August 1, 2012 to May 31, 2015.[[12]](#footnote-12) Because Duke’s revenue requirement was calculated as if it had a cost-based rate from August 1, 2012 (and it is currently September); Duke’s Application seeks to retroactively increase rates. Such a request is not just and reasonable.

Fourth, while Duke claims its rate increase requires “no more than arithmetic modifications”[[13]](#footnote-13) because the Commission approved a state compensation mechanism for Ohio Power Company, Duke ignores the fact the Ohio Power Company’s “arithmetic” was the subject of witness testimony, weeks of hearings, and Ohio Power Company’s “arithmetic” was ultimately rejected. Moreover, the Application appears to contain several “arithmetic” errors. For example, Application, Attachment A, contains a list of the generating units, which allegedly are being relied upon to provide capacity for Duke’s service territory. The list, however, in Attachment A contains Beckjord Units 1 through 6, which are scheduled for retirement in 2015.[[14]](#footnote-14) Thus, Duke’s request is not just and reasonable because it seeks to recover costs for units, which will not be used and useful during the duration of the charge sought by Duke.

Fifth, Duke’s Application also appears to be unjust and unreasonable because it violates state corporate separation requirements,[[15]](#footnote-15) state prohibitions against subsidies, federal prohibitions against affiliate abuse (Edgar Standards), and conflicts with representations made by Duke in its FERC application to divest generating assets (FERC Application). Duke’s FERC Application, which requested that Duke be authorized to divest generating assets in October 2012, was approved on September 5, 2012. Accordingly, the generating units listed on Attachment A will not be owned by Duke—the assets will be owned by Duke’s affiliated companies. The Application’s request that Duke’s affiliates receive above-market cost-based capacity compensation would provide Duke’s affiliates with an undue affiliate preference in violation of Ohio law. Such a revenue stream would also provide Duke’s affiliates an unlawful subsidy. It is incredible that Duke has advanced such a position given that its own affiliated companies, Duke Energy Commercial Asset Management and Duke Energy Retail, recently stated, “allowing a competitive, unregulated [affiliate] Genco to receive above-market capacity revenues from the regulated EDU flies in the face of the policies of this state and would have a serious negative impact on the ability of unaffiliated CRES providers . . . the proposed contract . . . is in violation of Ohio’s corporate separation laws.”[[16]](#footnote-16) Incredibly, these are the very affiliates which will own the generating units which are the subject of Duke’s proposed cost-based rates.

Finally, Duke’s Application conflicts with representations that Duke made in its FERC Application. To support approval of the FERC Application, FERC stated:

We find that the Proposed Transaction will not adversely affect wholesale rates. **The Applicants represent that Duke Ohio has no captive wholesale customers and its wholesale sales are made under market-based rate authorizations.** The Commission has previously stated that, when there are market-based rates, the effect on rates is not of concern. ***The effect on rates is not of concern in these circumstances because market-based rates will not be affected by the seller’s cost of service* and, thus, will not be adversely affected by the Proposed Transaction.**[[17]](#footnote-17)

FERC further stated:

***Based on Applicants’ representations, we find that the Proposed Transaction will not result in cross-subsidization*** of or the pledge or encumbrance of utility assets for the benefit of an associate company.

**The Commission’s focus, as it pertains to cross-subsidization, has “been on preventing a transfer of benefits from a public utility’s captive customers to shareholders of the public utility’s holding company.**” ***Applicants represent that Duke Ohio does not have any captive wholesale customers* *and its wholesale sales are at market-based rates*.** Applicants also represent that their retail customers have full retail choice.[[18]](#footnote-18)

While Duke’s FERC Application represented that it would charge market-based wholesale rates and not subsidize its affiliates, the Application flies in the face of that representation, requesting authority to establish a non-bypassable above-market revenue stream for its affiliated companies.[[19]](#footnote-19)

Because the Application appears to be unjust and unreasonable, the Commission must, at a minimum, set the matter for hearing (if the Commission does not dismiss the Application outright, as the requested relief violates the terms of prior stipulations). IEU-Ohio’s experience will contribute to the full and complete development of a record in this proceeding. IEU-Ohio has expertise regarding the operation of the PJM capacity market and the reliability assurance agreement. Further, as is evident by IEU-Ohio’s testimony and pleadings in Ohio Power Company’s Capacity Case, IEU-Ohio’s interests and positions are unique to IEU-Ohio; thus no other party may adequately represent IEU-Ohio’s interest in this proceeding.

Therefore, Duke’s Memorandum Contra should be rejected and IEU-Ohio should be granted intervention in these proceedings.

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**CERTIFICATE OF SERVICE**

#### I hereby certify that a copy of the foregoing *Reply to Duke Energy Ohio, Inc.’s Memorandum Contra Industrial Energy Users-Ohio’s Motion to Intervene*, was served upon the following parties of record this 11th day of September, 2012, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

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1. *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, Opinion and Order at 23 (Jul. 2, 2012) (hereinafter “Capacity Order”). [↑](#footnote-ref-1)
2. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Opinion and Order (Nov. 22, 2011) (hereinafter “*Duke ESP II*”); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs,* Case Nos. 11-2641-EL-RDR, *et al.,* Opinion and Order (May 25, 2011); *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order (Feb. 23, 2011). [↑](#footnote-ref-2)
3. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, ¶ 20 (2006). [↑](#footnote-ref-3)
4. Duke Memorandum Contra at 1. [↑](#footnote-ref-4)
5. Duke Memorandum Contra at 1-3. [↑](#footnote-ref-5)
6. Duke Memorandum Contra at 3. [↑](#footnote-ref-6)
7. Capacity Order, Opinion and Order at 23 (Jul. 2, 2012)

   [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. Duke Memorandum Contra at 3-4. [↑](#footnote-ref-9)
10. *Duke ESP II*, Stipulation and Recommendation at 6-7, (Oct. 24, 2011). [↑](#footnote-ref-10)
11. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs,* Case Nos. 11-2641-EL-RDR, *et al.,* Stipulation and Recommendation at ¶20 (Apr. 26, 2012). [↑](#footnote-ref-11)
12. Application at 8. [↑](#footnote-ref-12)
13. Application at 9. [↑](#footnote-ref-13)
14. *Duke Energy Ohio 2011 Long-Term Forecast Report*,Case No. 11-1439-EL-FOR at 133 (Jul. 15, 2011). [↑](#footnote-ref-14)
15. Sections 4928.02 and 4928.17, Revised Code, and Rule 4901:1-37-09, Ohio Administrative Code, prohibit an EDU from providing an affiliate an undue preference, a competitive advantage, and subsidies. [↑](#footnote-ref-15)
16. *ESP II*, Initial Brief of Duke Energy Commercial Asset Management and Duke Energy Retail Sales at 11. [↑](#footnote-ref-16)
17. *Order Authorizing Disposition of Jurisdictional Facilities re Cinergy Corp., et al*, 140 FERC ¶61,180 at 15 (Sep. 5, 2012) (FERC Docket EC12-90-000). [↑](#footnote-ref-17)
18. *Id.* at 21. [↑](#footnote-ref-18)
19. Application at 10. [↑](#footnote-ref-19)