BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO, INC.'S
MEMORANDUM CONTRA
MOTION TO DISMISS

On August 29, 2012, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed an application (Application) with this honorable Public Utilities Commission of Ohio (Commission), seeking determination of a charge for wholesale capacity services pursuant to the newly adopted state compensation mechanism, authority for a deferral of the difference between such charge and the market prices for capacity services currently being received by Duke Energy Ohio, and approval of a tariff pursuant to which such deferral could subsequently be recovered.

On October 4, 2012, a motion to dismiss the Application was filed by the Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the city of Cincinnati, Ohio Partners for Affordable Energy, the Greater Cincinnati Health Council, the Ohio Manufacturers' Association, the Kroger Company, Industrial Energy Users-Ohio, Cincinnati Bell, Inc., Wal-Mart Stores East LP, and Sam's East Inc. (collectively, Movants). While Movants contend that the Application

violates existing stipulations, such contention is categorically false. As Duke Energy Ohio demonstrates herein, the motion to dismiss should be denied.

I. Standard of Review

Movants' motion should be rejected as defective; it cannot satisfy the applicable standard of proof. Civil Rule 12(B) sets forth the underlying theories for motions to dismiss:[1]

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19 or Rule 19.1.[2]

Here, it cannot be said that the Commission lacks personal jurisdiction over the parties or that this is an improper venue in which to address the sought-after relief. Further, service of process and failure to join a party are not at issue. As such, the only two possible criteria on which the motion can be based are a lack of subject matter jurisdiction or the failure, by the Company, to state a claim in its Application upon which relief can be granted.

As to the first of these two possible criteria, Movants have the burden of proving that the Application "fails to raise any action cognizable by the [Commission]."[3] As discussed herein, the Commission undeniably has subject matter jurisdiction over Ohio's state compensation mechanism, deferral authority, and tariff approval. Indeed, as the Ohio Supreme Court has

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[1] Although the Commission is not bound to follow the Rules of Civil Procedure, it has concluded that they should be taken as instructive. See, *In the Matter of the Complaint of S.G. Foods, Inc., Pak Yan Lui, and John Summers v. FirstEnergy Corp., et al.*, Case No. 04-28-EL-CSS, Entry (March 7, 2006), Finding 64. Duke Energy Ohio further states that the motion to dismiss is procedurally defective in that it is not limited to the pleadings and instead seeks to introduce extrinsic evidence. See Civ.R. 8 and 12(B).

[2] Civ.R. 12(B).

[3] *State ex rel. Bush v. Spurlock*, (1989), 42 Ohio St.3d 77, 80.

consistently found, the Commission has "broad and complete" authority over public utilities.[4] And as the Commission routinely acknowledges, it "has 'exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service.'"[5]

With regard to the possible criterion that the Company has failed to state a claim upon which relief can be granted, the Commission must first accept, as true, the content of the Application. And, thereafter, the Commission can only dismiss the Application for failure to state a claim if it appears beyond doubt that Duke Energy Ohio "can prove no set of facts that would permit the Commission to provide the requested relief."[6] But as discussed herein, Movants have not demonstrated, beyond doubt, that there are no facts entitling Duke Energy Ohio to the relief – just and reasonable compensation for the wholesale capacity services it provides pursuant to a state compensation mechanism – requested in its Application.

II. Movants' Explanation of Background is False and Misleading

Movants spend many pages of their motion to dismiss explaining to the Commission the history of several cases. Among those cases are two that were specific to Duke Energy Ohio. The explanations by Movants are, however, incomplete and misleading.

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[4] See, *e.g.*, *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, (1991), 61 Ohio St.3d 147, 150-151.

[5] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio, et al.*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, *et al.*, at pg. 7 (September 25, 2012)(internal citations omitted). See also, *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 pg. 12 (July 2, 2012)("Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction"); *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.*, Opinion and Order, at pg. 8 (January 23, 2012)(various filings for a standard service offer, accounting authority, rider amendment, deferral recovery mechanism, and capacity compensation within the Commission's jurisdiction).

[6] *Cleveland Electric Illuminating Co. v. Public Utilities Commission* (1996), 76 Ohio St.3d 521, 524. See also, *In the Matter of the Complaint of Industrial Energy Users-Ohio v. The Midwest Independent Transmission System Operator, Inc.*, Case No. 10-1398-EL-CSS, Opinion and Order (June 8, 2011).

The primary proceeding pointed to by Movants is that in which the Commission recently approved Duke Energy Ohio's current electric security plan (ESP).[7] Movants indicate, correctly, that the Commission's approval of the ESP was based upon the filing of a stipulation, agreed to by many of the intervenors in the case. However, the accuracy ends there.

Movants make much of their assertion that the Application in the current proceedings conflicts with the stipulation in the ESP docket. They carefully quote from that stipulation but then misstate the import of those quotes.

- The motion to dismiss describes the stipulation as "establishing the wholesale capacity charge for [competitive electric retail service (CRES)] providers."[8] This is correct in respect of the charges from PJM Interconnection LLC (PJM) to such providers. But this statement is under a heading that wrongly asserts that Duke Energy Ohio "stipulated to [Reliability Pricing Model (RPM)] priced capacity."[9] As will be described, a careful reading of the actual language of the stipulation demonstrates that Duke Energy Ohio did not so stipulate.
- The motion to dismiss quotes from paragraph I.B of the stipulation, wherein there is language stating that Duke Energy Ohio would provide capacity to PJM at the Reliability Pricing Model (RPM) price. This quote is misleading; the Movants intentionally eliminated the first words of the sentence in question. Critically, the sentence begins with the phrase "For purposes of this paragraph… ." What is the purpose of paragraph I.B? That paragraph refers solely to what would occur if the

[7] *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.*
[8] Joint Motion to Dismiss, at pg. 4.
[9] Id, at 2.

Commission rejects Duke Energy Ohio's ***next*** ESP application. It has no relevance whatsoever at this time.

- The motion to dismiss quotes from paragraph II.B, which is at least relevant to the present circumstance as it establishes what the wholesale supply auction winners will pay for capacity. However, Movants then misinterpret this language, claiming that the quoted provision "explicitly provided for capacity to be priced at RPM prices ... ,"[10] even though, in reality, the provision only addresses the amount to be charged to auction winners. This corresponds to similar language in the stipulation in paragraph IV.A, which addresses the amount to be charged to CRES providers.
- After correctly quoting portions of the stipulation, the motion to dismiss asserts that Duke Energy Ohio "has asked the Commission to set aside the capacity pricing portion of the Stipulation, in favor of a cost-based capacity charge."[11] Nowhere in the Application has Duke Energy Ohio asked the Commission to set aside the portion of the ESP stipulation that set the price to be paid by auction winners and CRES providers for capacity obtained through PJM. Nowhere in the Application has Duke Energy Ohio asked the Commission to authorize charging auction winners and CRES providers for capacity on a cost basis.

The distinction here is essential: The stipulation in Duke Energy Ohio's ESP proceeding addressed the amount to be paid by auction winners and CRES providers, whereas the current Application asks the Commission to authorize, *inter alia*, the amount pursuant to which the Company would be compensated for fulfilling its Fixed Resource Requirement (FRR) obligations, deferral, and a rider for future recovery of said amounts. As the Commission

[10] Id, at 5.
[11] Id, at 13.

recently confirmed, it has the obligation "to ensure that the jurisdictional utilities receive just and reasonable compensation for the services that they render."[12] The stipulation says nothing about the charge for FRR wholesale capacity services under a compensation mechanism or about how or whether Duke Energy Ohio receives "just and reasonable compensation" for such services. Thus, Movants cannot legitimately complain that the issues in the Application were already resolved in the ESP stipulation, or that Duke Energy Ohio's filing of the Application constitutes a violation of that stipulation. It should also be recognized that enabling receipt of just and reasonable compensation for FRR capacity services via a bifurcated or two-part pricing structure is not new; this is precisely the approach taken by the Commission itself in recent proceedings involving a similarly situated utility.[13]

Movants similarly assert that the Application violates the stipulation that was approved in Duke Energy Ohio's transmission rider proceedings.[14] This assertion is even more nonsensical than the one concerning the ESP stipulation. Movants correctly point out that Duke Energy Ohio agreed, in the transmission-related stipulation, not to seek approval from the Federal Energy Regulatory Commission (FERC) of a wholesale capacity charge based on cost. It is patently obvious that Duke Energy Ohio has not done so. The Application here was filed with the Commission, not with the FERC. Moreover, the commitment in the transmission rider proceedings upon which Movants rely was simply – and only – a restriction on the venue for a filing on this topic. It was not a substantive prohibition to any such filing.

It must also be noted that Movants are demanding that Duke Energy Ohio not be allowed to "separate the capacity price provision of the Stipulation from the rest of the settlement

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[12] *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 pp. 28-29 (October 17, 2012).
[13] *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.*
[14] *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-EL-RDR, *et al.*

package. To alter one provision of the Stipulation undermines and destroys the entire agreement bargained for." Here, Movants are themselves doing exactly what they accuse Duke Energy Ohio of requesting. Movants apparently did not review the precise wording carefully and are now seeking to alter the import of the language in both stipulations. They cannot be allowed to do so, as such alteration would undermine and destroy the entire agreement bargained for by Duke Energy Ohio. The stipulations must stand, as written and approved by the Commission. The transmission stipulation does not prohibit the Application, as filed with the Commission. The ESP stipulation does not prohibit an Application for a cost-based capacity charge under a mechanism that allows Duke Energy Ohio the just and reasonable compensation to which it is entitled, under the Commission's traditional regulatory authority, for fulfilling its FRR obligations.

III. Public Policy Requires Strong Public Utilities and Consistent Decisions

In the motion to dismiss, Movants argue the merits on the basis of public policy issues. First, they address the additional dollars that would, under the Application, be required from customers. While Duke Energy Ohio is cognizant of that issue, it is also imperative that the public utility serving those customers has the opportunity to remain financially viable. Without approval of the Application, Duke Energy Ohio loses money every day that it remains in operation while fulfilling its FRR obligation. Indeed, as set forth in the Application, absent the relief requested in these proceedings, the Company will be operating with a substantial loss and an estimated annual average ***negative*** 8.9 percent return on equity through May 31, 2015.[15] Such dire circumstances cannot continue without triggering unfortunate outcomes, including severe losses of Ohio jobs and tax revenues. The Commission has recently recognized this principle, in finding that unusually low returns on equity are not sufficient to ensure a utility the ability to

[15] Application, at para. 15.

fulfill its service obligations.[16] Public policy requires a balancing of various interests, which sometimes compete with one another. The Commission, as the government arbiter, cannot be concerned with only one side of the equation. Importantly, the Commission's own mission statement confirms that ensuring financial integrity and service reliability in the Ohio utility industry is one of the critical elements of its job.

Movants' second policy argument relates to the need to "respect the precedential value of all [Commission] decisions... ."[17] While Duke Energy Ohio agrees with the principle of consistency and strong precedents, it is entirely inappropriate to focus only on one precedential decision while ignoring others. Movants mockingly describe the Application as a "me too" request, as one in which Duke Energy Ohio seeks to "cherry pick" from the efforts of other utilities. But it is only a question of following precedent. The Commission has acknowledged the unique position of FRR entities in providing a non-retail service for which just and reasonable compensation is owed. It has further established, pursuant to the RAA, a state compensation mechanism for FRR entities, which mechanism should apply to Duke Energy Ohio just as it would to any other FRR entity in the state. If precedent is to be respected, it should all be respected so as to avoid the unintended consequence of discriminatory treatment.[18]

IV. The Application is Not a Belated Application for Rehearing

Movants, contending that the substance of the Application is contrary to the ESP stipulation, equate it to an application for rehearing. As described above, the Application addresses an issue that was not raised in the ESP stipulation; it is not contrary, just not included.

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[16] *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 pg. 23(July 2, 2012). See also, Concurring Opinion of Commissioner Roberto, at pg. 3 ("cost-based compensation mechanism is necessary and appropriate").

[17] Joint Motion to Dismiss, at pg. 16.

[18] See, *In the Matter of the Application of Ohio Power Company for Approval of Amendment to its Corporate Separation Plan,* Case No. 12-1126-EL-UNC, Finding and Order, at pg. 15 (October 17, 2012)(consistent application of prior Commission decisions involving similar issues).

The ESP stipulation clearly covers the amount for capacity that auction winners and CRES providers will be charged. It clearly does not cover the cost to Duke Energy Ohio for providing wholesale capacity consistent with its FRR obligations or the recovery of such costs. The Application thus cannot be considered to be an Application for Rehearing, belated or not.

V. The Doctrines of *Res Judicata* and Collateral Estoppel are Inapplicable

The Movants devote a significant portion of their motion to dismiss on claims of the application of two legal doctrines, *res judicata* and collateral estoppel, to these proceedings. The Movants argue that Duke Energy Ohio's recently approved ESP established the Company's price for capacity as the fixed zonal capacity price set under the PJM RPM process and that, therefore, the Company's application cannot proceed, under either of the aforementioned legal doctrines.[19] Movant's argument fails both legally and factually.

A. Doctrines Inapplicable to Legislative Administrative Proceedings

The doctrine of *res judicata*, including collateral estoppel, cannot be applied to deny a litigant of their due process rights. As the Ohio Supreme Court has found, "[t]he main thread which runs throughout the determination of the applicability of *res judicata*, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be "heard" in the due process sense."[20] And the doctrine cannot be applied in connection with all proceedings before the Commission. Rather, "[*r*]*es judicata*, whether issue preclusion or claim preclusion, applies to those administrative proceedings which are 'of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding.'"[21]

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[19] Joint Motion to Dismiss, at pg. 21.
[20] *Goodson v. McDonough Power Equipment, Inc.*, (1983), 2 Ohio St.3d 193, 200-201 (internal citations omitted). See also, *Armeigh v. Baycliffs Corporation*, (1998), 81 Ohio St.3d 247, 249.
[21] *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, (1987), 31 Ohio St.3d 260, 263.

The prior proceedings, on which Movants rely for purposes of seeking to collaterally estop the instant proceedings, were not judicial in nature. Indeed, as the Commission itself has acknowledged, ratemaking is a legislative function.[22] As such, an order approving standard service offer rates or an order approving transmission riders undeniably reflects the exercise of legislative power and does not involve the exercise of judicial or quasi-judicial authority. Consequently, the administrative proceedings in which such legislative power was exercised, and on which Movants rely in seeking dismissal of the Application, are not ones to which the doctrine of *res judicata* or collateral estoppel can be applied.[23] For this reason alone, the Commission must reject Movants' claim. But rejection is further warranted based upon a review of the specific elements required for either *res judicata* or collateral estoppel.

B. Elements of Collateral Estoppel are Not Met

As the Supreme Court has succinctly instructed:

> To successfully assert collateral estoppel or issue preclusion, a party must plead and prove that (1) the party against whom estoppel is sought was a party or in privy with a party to the prior action; (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; (4) the issue must have been identical to the issue involved in the prior suit.[24]

Stated another way, the application of collateral estoppel requires a determination, in a subsequent action between the same parties or their privies, that a fact or point that was actually and directly at issue in a previous action was passed upon and actually determined by a court of competent jurisdiction.[25]

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[22] *State of Ohio, ex rel. Industrial Energy Users- Ohio v. The Public Utilities Commission of Ohio et al.*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, *et al.*, at pp. 5-6 (September 25, 2012). See also cases cited therein.

[23] *The Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 844 F.Supp.2d 873, 881 (2012), citing, *State Corp. Com. v. Wichita Gas Co.*, 290 U.S. 561, 569 (rate-setting is a classic legislative action).

[24] *Fort Frye Teachers Assn., OEA/NEA v. State Employment Relations Board*, (1998), 81 Ohio St.3d 392, 395 (internal citations omitted).

[25] *McCabe Corp. v. Ohio Environmental Protection Agency*, 2012 Ohio 3643, * P8 (internal citations omitted).

Furthermore, it is undeniable that, "[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."[26] In this regard, controlling precedent confirms that decisions adopting stipulations are not determinations on the underlying issue and thus do not give rise to claims of collateral estoppel. "An issue is not actually litigated...if it is the subject of a stipulation between the parties."[27]

In claiming that Duke Energy Ohio is collaterally estopped from pursuing the issues raised in its Application, Movants rely solely upon the prior ESP proceeding. The first question thus becomes whether there was a fact or point that was actually and directly at issue in Duke Energy Ohio's ESP proceeding that was also passed upon and actually determined by the Commission. There was not.

Significantly, the ESP proceeding was resolved through a stipulation. Thus, no facts or issues were actually litigated such that collateral estoppel could be properly invoked here. Moreover, when the Commission approved the ESP stipulation, it subjected the entire package comprising the parties' agreement to its standard three-pronged test. The issues under consideration in the Commission's adoption of the ESP stipulation were (1) whether the stipulation was the product of serious bargaining among capable and knowledgeable parties, (2) whether the stipulation, as a package, benefits ratepayers and the public interest, and (3) whether the settlement package violates any important regulatory principle or practice.[28] In considering the ESP stipulation under R.C. 4928.143, the Commission did not directly determine the issue of

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[26] *Thompson v. Wing*, 70 Ohio St.3d 176, 185 (1994).

[27] *State ex rel. Davis et al. v. Pub. Employees Retirement Board et al.*, 120 Ohio St.3d 386, 394 (2008), citing 1 Restatement of the Law 2d, Judgments, Section 27, Comment e. See also *Consolo et al. v. City of Cleveland, et al.*, 103 Ohio St.3d 362 (2004).

[28] *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.*, Opinion and Order (November 22, 2011), at 42-44.

the just and reasonable compensation to which Duke Energy Ohio is entitled, under Chapters 4905 and 4909 of the Revised Code, for fulfilling its obligations as an FRR entity.[29] In fact, the Commission made no such determination at all.

The ESP stipulation involved the standard service offer under which Duke Energy Ohio would provide competitive retail electric service.[30] But the provision of capacity consistent with an FRR obligation is not a competitive retail electric service. Rather, as the Commission has confirmed, it is a wholesale service to which the market-based pricing contemplated under Chapter 4928, Revised Code, is inapplicable.[31] It is apparent that the services at issue in the ESP proceeding are not the same services as those that form the basis of the Application. As such, the Commission could not have previously considered the issue of the just and reasonable compensation to which the Company is entitled in providing a non-retail service. That issue was not before the Commission. To be clear, with regard to capacity, the ESP stipulation addressed *only* the charges by PJM to suppliers for capacity.

Duke Energy Ohio's ESP established a standard service offer for competitive retail electric service pursuant to R.C. 4928.143. In contrast, these proceedings seek an order from the Commission, under the authority of R.C. 4905.04, R.C. 4905.05, R.C. 4905.06, and R.C. 4905.26, establishing the amount of the cost-based charge for intra-state wholesale capacity, consistent with the newly adopted state compensation mechanism.[32] These proceedings are separate and dissimilar. As the Commission's Opinion and Order in Case No. 10-2929-EL-UNC

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[29] *Vectren Energy Delivery of Ohio, Inc. v. Public Utilities Commission of Ohio*, 2007-Ohio-1386, ¶30 (neither *res judicata* nor collateral estoppel applicable in a subsequent proceeding where the issues litigated therein did not involve any point of law or fact that was passed upon by the Commission in an earlier proceeding).

[30] See R.C. 4928.141 ("an electric distribution utility shall provide consumers...a standard service offer of all competitive retail electric services" and such standard service offer shall be in accordance with R.C. 4928.142 or 4928.143).

[31] *In the Matter of the Commission Review of the Capacity Charges for Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing, at pg. 28 (October 17, 2012).

[32] *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 (July 2, 2012). *Emphasis added.*

confirms, "although Chapter 4928, Revised Code, provides for market-based pricing for retail electric generation service, those provisions do not apply because, as we noted earlier, capacity is a wholesale rather than a retail service."[33] The Commission thereafter determined that "the state mechanism shall be based on the costs incurred by the FRR entity for its FRR capacity obligations... ."[34] In so doing, the Commission reasoned that it has an obligation to ensure that an FRR entity receives just and reasonable compensation for the services it renders.[35] The Commission also adopted this new methodology, in reliance upon traditional rate-making principles, to establish a just and reasonable cost for the provision of capacity by an FRR entity.[36]

Here, Duke Energy Ohio is seeking just and reasonable compensation for the unique services that it provides as an FRR entity, further relying upon a formulaic methodology that the Commission has just recently found appropriate to fairly and reasonably compensate a similarly situated utility. Thus, contrary to Movants' claims, the issue of a charge for Duke Energy Ohio, pursuant to Chapters 4905 and 4909 of the Revised Code and consistent with the state compensation mechanism under the RAA, was not fully and fairly litigated as part of the Company's ESP. Duke Energy Ohio was not heard on this issue and it was not directly determined. Duke Energy Ohio's wholesale price for capacity as an FRR entity simply was not part of the ESP proceeding. Thus, Duke Energy Ohio's due process would be violated should the Commission find that this issue was litigated, directly determined, and essential to the judgment in the prior action.

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[33] Id. at 22.
[34] *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 (July 2, 2012), at page 23.
[35] Id. at 22. See also, Concurring Opinion, at pg. 3 ("a cost-based compensation method is necessary and appropriate")(July 2, 2012).
[36] Id. (Under Ohio law, "all charges for service *shall* be just and reasonable.")(Emphasis added.)

C. Elements of *Res Judicata* are Not Met

Similarly, the doctrine of *res judicata* is not applicable here.[37] Under the doctrine of *res judicata*, a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.[38] There must be an identity of claims that have been passed upon by a court of competent jurisdiction before *res judicata* can be applied.[39] And in assessing the applicability of *res judicata*, the determinative factor is whether the same evidence would sustain both causes of action. If the causes of action rely upon different evidence, *res judicata* does not bar the second action.[40]

Again, the claims at issue in the prior and pending proceedings are separate and distinct: one addressing retail pricing and one addressing wholesale pricing. In connection with the ESP proceeding, the stipulated claims upon which the Commission rendered an Opinion and Order concerned Duke Energy Ohio's provision of competitive retail electric service. And, consistent with the applicable statutory requirements and associated Commission rule requirements, that ESP and the Company's underlying application concerned only a retail price for capacity as provided under a standard service offer.[41] The evidence needed to support the ESP stipulation is

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[37] It is also important to recognize that, to bar an action on the basis of *res judicata*, the Commission would have to look beyond the content of the pleadings. Thus, under standard procedure, the motion for such an outcome would have to be presented as part of a motion for summary judgment, not a motion to dismiss. Importantly, motions for summary judgment are not granted by the Commission. See *In the Matter of the Complaint of Debra and Andrew Dennewitz and State Farm Fire & Casualty Company, v. East Ohio Gas Company dba Dominion East Ohio*, Case No. 07-517-GA-CSS, Entry (October 27, 2007), at p. 9-10, ("There is no summary judgment provision in the Commission's Administrative Provisions and Procedures at Chapter 4901-1 of the Ohio Administrative Code," and "[w]hen faced with a summary judgment motion, the Commission has denied the motion where it has jurisdiction and reasonable grounds for complaint are stated." Id, citing *In the Matter of the Complaint of Don Holmes v. United Telephone Company of Ohio dba Sprint*, Case No. 03-253-TP-CSS, Entry (November 9, 2005).).

[38] *Grava v. Parkman Township*, (1995), 73 Ohio St.3d 379, 382.

[39] See, *e.g.*, *Vectren Energy Delivery of Ohio, Inc. v. Public Utilities Commission of Ohio*, 2007-Ohio-1386, ¶30.

[40] *Norwood v. McDonald*, (1943), 142 Ohio St. 299, XX, *rev'd on other grounds*, *Grava, supra.*

[41] *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.*, Supplemental Testimony of William Don Wathen Jr., at pg. 12 (October 28, 2011)(requested ESP included a retail price for capacity).

that previously discussed; namely, whether the stipulation was the product of serious bargaining among capable and knowledgeable parties; as a package, benefitted ratepayers and the public interest; and was not in violation of any important regulatory principle or practice.[42] And the evidence needed to support an ESP is that set forth in R.C. 4928.143 and Commission rule requirements adopted pursuant thereto. Importantly, the evidence would necessarily include the market-based pricing limitations applicable to a standard service offer in the form of an ESP.

In contrast, these proceedings seek establishment of a cost-based compensation mechanism for Duke Energy Ohio's provision of wholesale capacity, under Chapters 4905 and 4909 of the Revised Code and consistent with the existing state compensation mechanism as provided for under RAA.[43] Duke Energy Ohio's cost of providing the wholesale capacity service under a state compensation mechanism was not addressed in the ESP stipulation. Neither was the recovery of such costs. The parties, including Duke Energy Ohio, did not have an opportunity to fully and fairly litigate the claim of just and reasonable compensation for the provision of non-retail services. Further, the evidence to support the requests, or claims, contained in the current Application is not the same as that needed to approve a stipulation or a standard service offer for competitive retail electric service. Therefore, *res judicata* cannot apply to bar the instant proceedings.

The language of the law allowing for the filing of an ESP is also relevant to this argument. R.C. 4928.143(B)(2) sets forth a list of the matters that an ESP **may** include. "The plan **may** provide for or include, without limitation, any of the following."[44] The items included within that list encompass a variety of matters relating to the utility's distribution, generation, and transmission service. The authorizing statute indisputably does **not** require an ESP to either

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[42] See footnote 28, *supra*.
[43] *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 pg. 22 (July 2, 2012).
[44] R.C. 4928.143(B)(2) (emphasis added).

include all such matters affecting a utility's provision of service or forever lose the right to include such matters in a separate proceeding. Nevertheless, under Movants' theory that the Application here is barred, under *res judicata,* because it was not included within the ESP stipulation, a utility would have to include all possible topics in its proposal for a standard service offer of competitive retail electric service. Surely the legislature did not intend such a result, or it would have used the word "shall" rather than "may." In drafting this section as permissive, the General Assembly continued to afford the Commission with broad discretion in its exercise of regulatory authority. As the Ohio Supreme Court instructs, *res judicata* should not be applied so rigidly "as to defeat the ends of justice or so as to work an injustice."[45]

VI. The Commission has Jurisdiction to Grant the Relief Requested in the Company's Application

Movants finally claim that the Commission lacks subject matter jurisdiction over the Application as the Commission is without authority to grant the relief requested therein. Specifically, and with an inaccurate portrayal of the filing, Movants contend that the Commission can only authorize a phase-in of charges, on a non-bypassable basis, under R.C. 4928.144 and such provision is not implicated here as the Application was not filed under R.C. 4928.141, *et seq.*

Duke Energy Ohio does not dispute that R.C. 4928.144 addresses the ability of the Commission to phase in an electric distribution utility's standard service offer prices or rates. But Duke Energy Ohio's Application patently does not seek a phase-in of any prices or rates previously approved under a standard service offer. Rather, it seeks the establishment of a charge, under Chapters 4905 and 4909 of the Revised Code and consistent with Ohio's state compensation mechanism, for its costs in supplying capacity pursuant to the Company's FRR obligations. Notably, the authority requested herein has not been sought pursuant to the standard

[45] *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 490 (2001).

service offer provisions codified at R.C. 4928.141, *et seq.*, as such provisions are irrelevant. Indeed, the Commission has expressly found that its authority to establish a cost-based compensation mechanism for FRR entities arises under traditional ratemaking principles, as reflected in Chapters 4905 and 4909 of the Revised Code.[46] Consequently, Duke Energy Ohio was correct in filing this Application independent of a request for approval of a standard service offer.

Furthermore, Duke Energy Ohio notes that much of Movants' argument in respect of the Commission's jurisdiction is predicated solely upon litigation positions that are being advanced in different proceedings, including Case No. 10-2929-EL-UNC.[47] But the Commission has recently rejected these arguments, reaffirming its ability to authorize deferrals under R.C. 4905.13.[48]

As noted above, Movants have inaccurately described the proposals set forth in the Application, suggesting that Duke Energy Ohio is statutorily precluded from seeking to defer, for future recovery, costs incurred in providing a service or otherwise fulfilling its obligations as a public utility. In so doing, Movants ignore well-established regulatory precedent. Indeed, the Commission has routinely and consistently approved deferrals and riders for subsequent recovery of such deferred amounts. And it has done so outside of the provisions of R.C. 4928.141, *et al.*[49]

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[46] Id, Opinion and Order, at pg. 22 (July 2, 2012)(state compensation mechanism not subject to provisions of Chapter 4928 as capacity is not a retail service) and Entry on Rehearing, at pg. 28 (October 17, 2012)(Commission's regulatory authority under Chapters 4905 and 4909, Revised Code, authorizes the Commission "to use its traditional regulatory authority to approve rates that are based on cost, such that the resulting rates are just and reasonable, in accordance with Section 4905.22, Revised Code").

[47] Joint Motion to Dismiss, at pg. 24.

[48] *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 pg. 43 (October 17, 2012).

[49] See, *e.g., In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Transmission Cost Recovery Rider*, Case No. 09-256-EL-UNC (institution of rider to recover deferred transmission costs); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC (institution of rider to

Implying that there are public policy considerations, Movants conclude by urging the Commission to maintain the integrity of the ESP stipulation for the benefit of Ohioans.[50] But through this Application, Duke Energy Ohio is not seeking to alter any provisions of that stipulation. Again, the Company has confirmed, in the Application, that suppliers will continue to be charged, by PJM, for capacity at market-based prices, in compliance with the ESP stipulation. Thus, Movants' concerns are misplaced. And Movants' focus is unfairly and unreasonably limited.

The Commission has confirmed its obligation to ensure that public utilities' rates are lawful; that "jurisdictional utilities receive just and reasonable compensation for the services they render."[51] And the Commission has recognized that certain pricing structures can "prove insufficient to yield reasonable compensation" in respect of FRR capacity obligations.[52] Consistent therewith, and to ensure its financial integrity, Duke Energy Ohio seeks to establish a charge, based upon its costs, associated with its unique FRR obligations, related accounting authority to defer the difference between its costs and market-based pricing, and approval of tariff for subsequent recovery of said deferred amounts. As Movants concede, public policy considerations are indeed important. But they cannot be so narrowly applied as to deny a public utility the compensation it is lawfully due for fulfilling its obligations and rendering service.

Public policy considerations support the Application.

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recover deferred riser replacement costs); *In the Matter of the Joint Application of The East Ohio Gas Company d.b.a. Dominion East Ohio, Columbia Gas of Ohio, Inc., Vectren Energy Delivery of Ohio, Northeast Ohio Natural Gas Corp., and Oxford Natural Gas Company for Approval of an Adjustment Mechanism to Recover Uncollectible Expenses*, Case No. 03-1127-GA-UNC (institution of uncollectible expense rider).

[50] Joint Motion to Dismiss, at pg. 25 (October 4, 2012).

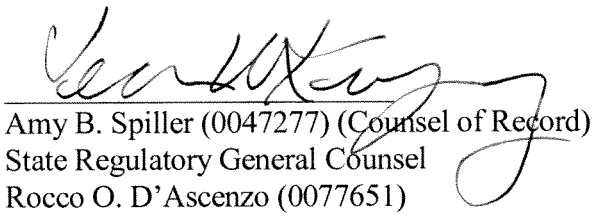
[51] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing, at pg. 28 (October 17, 2012).

[52] Id, at 31 (RPM-based pricing found to be insufficient in allowing for just and reasonable compensation for FRR capacity obligations).

VII. Conclusion

For the reasons set forth herein, Duke Energy Ohio, Inc., respectfully requests that the Commission deny the motion to dismiss the above-referenced proceedings.

Respectfully submitted,
DUKE ENERGY OHIO, INC.



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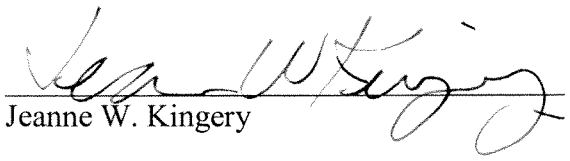
I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 19th day of October, 2012, to the following parties.



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