

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for the Establishment of a)	Case No. 12-2400-EL-UNC
Charge Pursuant to Revised Code Section)	
4909.18.)	

In the Matter of the Application of Duke)	Case No. 12-2401-EL-AAM
Energy Ohio, Inc., for Approval to Change)	
Accounting Methods.)	

In the Matter of the Application of Duke)	Case No. 12-2402-EL-ATA
Energy Ohio, Inc., for the Approval of a)	
Tariff for a New Service.)	

**JOINT REPLY TO DUKE ENERGY'S MEMORANDUM CONTRA
BY
SIGNATORY PARTIES**

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I. INTRODUCTION

The Undersigned Parties (“Movants”),¹ including consumer advocates representing the approximately 611,000 residential utility consumers of Duke Energy Ohio Inc. (“Duke” or “the Company”), submit this Reply to the Memorandum Contra that Duke filed on October 19, 2012, against the Joint Motion to Dismiss Duke’s Application. This Reply is submitted to prevent unjust retail electric service rates from

¹ The Office of the Ohio Consumers’ Counsel, the Ohio Energy Group, the Ohio Partners for Affordable Energy, The Kroger Company, the City of Cincinnati, Greater Cincinnati Health Council, Ohio Manufacturers’ Association, Wal-Mart Stores East LP and Sam’s East, Inc., Cincinnati Bell, Inc. and the Industrial Energy Users-Ohio.

being imposed on customers of Duke, in direct violation of the Stipulation agreed to by Duke and numerous parties and approved by the PUCO less than one year ago.²

Duke's Memorandum Contra provides no valid reason why the Public Utilities Commission of Ohio ("PUCO" or "Commission") should not grant the Joint Motion to Dismiss Duke's Application to collect \$776 million (plus carrying charges) from customers—about \$150-\$200 per year for three years for a typical residential customer. As explained in the Joint Motion to Dismiss, Duke's Application is barred by the following: two Commission-approved Stipulations; the statutory deadline for the filing of applications for rehearing; the doctrines of res judicata and collateral estoppel; and public policy. Accordingly, the Commission should grant the Joint Motion to Dismiss, filed October 4, 2012.

II. THE RULES OF CIVIL PROCEDURE NEED NOT BE STRICTLY APPLIED.

As an initial matter, Duke attempts to stringently apply a standard of review that is tied to the Civil Rules of Procedure. The Company argues that the Motion to Dismiss must satisfy the requirements of Civil Rule 12(B).³ While the Commission may use the civil rules, where practicable,⁴ the Commission has recognized that it is not bound by the

² *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., Stipulation and Recommendation (Oct. 24, 2011) ("Stipulation"), *approved*, Opinion and Order (Nov. 22, 2011) ("Duke ESP Proceeding").

³ Duke Memorandum Contra at 2-3 (October 19, 2012). Duke also argues that the Motion to Dismiss must satisfy the requirements of Civil Rule 8.

⁴ Cf., R.C. 4903.082 (without limiting the Commission's discretion, the rules of civil procedure should be used wherever practicable).

rules of civil procedure. Even Duke concedes this in a footnote.⁵ Rather, the Commission has the discretion to regulate the practice and procedure of all matters brought before it,⁶ and may rule upon motions without strictly adhering to the civil rules. Thus, even if a motion to dismiss would not be granted under the civil rules, the Commission may, in its discretion, grant such a motion upon a showing of good cause. As demonstrated in the remaining sections below, the Movants have demonstrated good cause for the Commission to dismiss Duke's application.

Further, even if the Commission viewed the Civil Rules as instructive in this case, Duke's Application should be dismissed on numerous grounds as outlined in the Motion to Dismiss. In the Joint Motion, Movants sufficiently explained how Duke failed to state a claim upon which relief could be granted. As outlined in the Joint Motion to Dismiss, Duke's Application should be dismissed on numerous grounds. The Motion to Dismiss also addresses the Commission's lack of jurisdiction over part of the subject matter at issue in Duke's request, explaining that the Commission does not have jurisdiction to grant the accounting authority Duke requests or to establish Duke's proposed non-bypassable charge.⁷ Accordingly, even if the Civil Rules were binding upon the

⁵ *Pro Se Commercial Properties v. The Cleveland Electric Illuminating Co.*, Case No. 07-1306-EL-CCS, Entry on Rehearing at 9 (November 5, 2008) (citing *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.* (1982), 2 Ohio St.3d 62); Duke Memorandum Contra at fn 1.

⁶ Ohio Admin. Code 4901-1-14.

⁷ A number of Signatory Parties to this pleading continue to contest the PUCO's authority to: (1) allow an EDU an opportunity to collect "transition revenue" beyond the term provided by law and contrary to prior settlements resolving any transition revenue claim and (2) invent and apply a cost-based ratemaking methodology for purposes of substantially increasing an EDU's compensation for generation capacity. See *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, Applications for Rehearing filed by IEU-Ohio, OCC and OEG (Aug. 1, 2012). See also *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., Applications for Rehearing filed by IEU-Ohio, OCC, and OEG (Sept.7, 2012).

Commission (which they are not) the Motion to Dismiss meets one or more of the grounds justifying dismissal of Duke's application.

III. THE DUKE ESP STIPULATION ESTABLISHED CAPACITY RATES TO BE PAID BY SSO CUSTOMERS BASED UPON RPM PRICES AND PROVIDED COMPENSATION TO DUKE FOR ITS FRR OBLIGATIONS OVER THE ESP TERM.

Duke takes issue with the Movants' argument that its Application in this proceeding violates the Duke ESP Stipulation.⁸ Specifically, Duke alleges that 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."⁹ Duke's allegations, however, are flatly contradicted by the terms of the Stipulation, the testimony presented by Duke's own witnesses in the ESP case, the Commission's Order adopting the ESP Stipulation, and the tariffs Duke implemented to carry out the Stipulation. Duke's unsubstantiated claims should be summarily rejected.

A. The Terms of the Stipulation Link Retail SSO Rates to Wholesale Capacity Rates.

As explained in the Joint Motion to Dismiss, numerous sections of the Stipulation addressed how competitive retail electric service ("CRES") providers and wholesale supply auction winners will be charged PJM RPM-based prices for capacity, including Sections II.B, and IV.A. But the Stipulation also explicitly linked retail SSO rates to those wholesale capacity prices.

⁸ Memorandum Contra at 3-7.

⁹ Memorandum Contra at 6.

In Stipulation Section II.B, Duke agreed to supply capacity to PJM, which PJM would then charge to wholesale supply auction winners, based on the final zonal capacity price (“FZCP”) in the unconstrained RTO region:

Acknowledging Duke Energy Ohio’s status as an FRR entity in PJM, the Parties agree that Duke Energy Ohio shall supply capacity to PJM, which, in turn, will charge for capacity to all wholesale supply auction winners for the applicable time periods of Duke Energy Ohio’s ESP with the charge for said capacity determined by the PJM RTO, which is the FZCP in the unconstrained RTO region.¹⁰

Section IV.A of the Stipulation echoed Duke’s commitment to supply capacity to PJM, which would in turn charge CRES providers for capacity at the PJM price. The provision stated as follows:

Consistent with Section II.B., above, the Parties agree that Duke Energy Ohio shall supply capacity resources to PJM, which in turn, will charge for capacity resources to all CRES providers in its service territory for the term of the ESP, with the exception of those CRES providers that have opted out of Duke Energy Ohio’s FRR plan, for the period which they opted out. The Parties further agree that during the term of the ESP, Duke Energy Ohio shall charge CRES providers for capacity as determined by the PJM RTO, which is the FZCP in the unconstrained RTO region, for the applicable time periods of its ESP.¹¹

Importantly, the ESP Stipulation also drew a link between Duke’s commitments regarding the wholesale capacity price for CRES providers and the price of capacity (and energy) to Duke’s SSO customers. Specifically, Section II.C of the Stipulation permitted Duke to implement two riders to recover the costs of serving SSO load—Rider RC (Retail Capacity) and Rider RE (Retail Energy). These riders were fashioned so that the

¹⁰ Stipulation at Section IIB (Oct. 24, 2011).

¹¹ Id. at Section IVA. See also Duke’s SSO supplier agreement (Attachment F to the Stipulation) which confirms at Section 3.1(b) that SSO Suppliers will purchase capacity from Duke at the FZCP.

revenues collected would equal the auction clearing prices, as converted into retail rates.

Section II.C reads as follows:

Duke Energy Ohio will implement Rider RC (Retail Capacity) and Rider RE (Retail Energy) to recover the costs associated with servicing its SSO load, with the aggregate sum of the revenues under said riders equal to the auction clearing prices, as converted into retail rates. Rider RC shall recover the cost of capacity consistent with paragraph B above***Rider RC and Rider RE are unconditionally bypassable by all non-SSO customers. Rider RC and Rider RE will be put into effect through updated rates for each of the PJM planning years for which all tranches for the delivery period have been approved by the Commission.

The aggregate revenues provided under Riders RC and RE are to be “converted into retail rates” through the formula attached to the Stipulation.¹² A review of this attachment shows that the underlying capacity price for calculating Rider RC is based on PJM’s FZCP.

Therefore, it is clear that Rider RC covers the capacity portion of the auction price and Rider RE covers the energy portion of the auction price. That auction price is set under the provisions of Sections II.B and IV.A, which is based upon RPM pricing, and not Duke’s embedded cost of capacity. Duke’s disingenuous claim that the Stipulation says nothing about the charge to customers or the recovery of costs for providing FRR wholesale capacity services is contradicted by, inter alia, the terms of the Stipulation. While the Stipulation may not use the exact term “compensation for FRR capacity,” the scope of the Stipulation clearly encompassed just and reasonable compensation in light of Duke’s Stipulation commitments, including its wholesale capacity commitments.

¹² Attachment B, Ex. 1B at 2.

B. The Testimony of Duke’s Witnesses Wathen and Janson in the ESP Proceeding States That Duke Will Receive Just and Reasonable Compensation for its FRR Obligations at the Retail Level Through Riders RC and ESSC.

To support and explain the ESP Stipulation, Duke presented several witnesses, including witnesses Wathen and Janson. Their testimony makes clear that capacity pricing for Duke’s SSO customers was to be based on market pricing. In addition, their testimony confirms that Duke would receive just and reasonable compensation for its FRR services as a result of the ESP Stipulation.

Mr. Wathen explained that Rider RC was the mechanism established to compensate Duke for capacity provided to SSO customers. Specifically, Mr. Wathen stated that “Rider RC is the mechanism to establish the capacity component of Duke Energy Ohio’s ESP. As described above, *the total cost of capacity included in the SSO supply procured in the CBP auction is a product of the FZCP***.*”¹³

Mr. Wathen went on to address how Rider RC in the Stipulation differed from the Rider RC contained in the Company’s Application:

As originally proposed and as described in my Direct Testimony, the Rider RC was to be predicated upon a formula rate for developing the fixed costs, including a reasonable rate of return, associated with the Company’s Legacy Generating Assets that, under the Company’s proposal, would have been effectively dedicated to Ohio customers. Essentially, Rider RC would have been a ‘cost based’ charge for the capacity needed to serve all customers. ***[R]ather than customers paying for capacity at Duke Energy Ohio’s embedded cost of service for the nine-year and five-month period proposed in the Application, they will now be paying market-based prices for capacity in perpetuity.¹⁴

¹³ *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 8 (Oct. 28, 2011) (emphasis added).

¹⁴ Id. at 10.

This point is reiterated later when Mr. Wathen explains how customers will be paying a market rate instead of cost-of-service and that it will be bypassable:

At a basic level, this change [from the cost based charge for capacity as proposed by the Company in its Application to an auction-determined retail capacity price] means that customers will be paying a market price for capacity instead of the cost-of-service based charge proposed by Duke Energy Ohio in its Application. The Company's Application in these proceedings proposed a long-term ESP, with a non-bypassable cost of service-based price to determine the retail price for capacity.

During the settlement discussions of this case, the Parties made it clear that a market price for the SSO service was preferred. This necessitated a change to the Company's proposed Rider RC. The change to Rider RC in the ESP means that customers will pay a market price for capacity at the FZCP for the FRR duration and will pay a market price for capacity established by competitive auction following that term. In either case, the price for capacity will be without reference to Duke Energy Ohio's cost of service. The Company is agreeing to implement a full CBP to determine the retail price for its SSO.”¹⁵

The testimony of Ms. Janson, President of Duke Energy Ohio, also explicitly confirms that Duke agreed to be compensated for capacity based on RPM prices:

In the Stipulation and Recommendation, the parties recognized Duke Energy Ohio's obligations as an FRR entity and, for the term of the ESP, Duke Energy Ohio will supply capacity resources to PJM, which, in turn, will charge wholesale suppliers for capacity. But the charge applicable to these wholesale suppliers will not reflect Duke Energy Ohio's costs of service as defined above. Rather, the charge will be predicated upon PJM's capacity market pricing structure. To clarify, Duke Energy Ohio bears the obligation to provide the capacity resources necessary to serve all customers in our footprint for the term of the ESP and the Company will be compensated for capacity resources based upon competitive PJM prices.¹⁶

¹⁵ Id. at 12-13 (Oct. 28, 2011).

¹⁶ *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 Witness Janson at 4-5 (Oct. 28, 2011).

Hence, Duke's testimony confirms that Duke would receive just and reasonable compensation for its FRR services as a result of the ESP Stipulation.

Mr. Wathen also addressed another provision of the ESP Stipulation, the establishment of the Electric Service Stability Charge Rider ("ESSC"), which Duke notably fails to mention in its Memorandum Contra. The Signatory Parties agreed to pay Duke an addition \$110 million per year for three years through Rider ESSC "to provide stability and certainty regarding Duke Energy Ohio's provision of retail electric service as an FRR entity while continuing to operate under an ESP."¹⁷ The ESSC was created as a non-bypassable rider to allow Duke to recover \$330 million in addition to the capacity revenues it will receive from CRES providers and SSO customers for its capacity.

Witness Wathen described the ESSC rider and explained why it was necessary:

From the Company' perspective, the need for Rider ESSC is simple. Duke Energy Ohio is required to supply capacity for the Company's entire footprint until at least the 2015/2016 PJM planning year. And Duke Energy Ohio will satisfy this obligation, in part with its Legacy Generation Assets***. Although the ESP contained in this Stipulation will result in a full competitive bid for Duke Energy Ohio's SSO price, and Duke Energy Ohio is committing to transfer its generating assets to an affiliate or subsidiary, that transfer will take time and the Company must continue to meet its PJM capacity obligation. Moreover, as part of the negotiation in the settlement of this ESP, the Company has agreed not to participate in auctions for its own SSO load with the Legacy Generating Assets as a resource. Accordingly, the Company has agreed that its Legacy Generation Assets will only participate in the wholesale PJM day-ahead and real-time energy markets for the first three calendar years of the ESP. Rider ESSC is a means of providing economic stability and certainty during the term of the ESP, while recognizing the value of Duke Energy Ohio's commitment of its capacity and its commitment to legally

¹⁷ Duke ESP Stipulation at 16. OCC, IEU-Ohio, FirstEnergy Solutions, and OMA expressly took no position regarding the ESSC, and did not support or oppose it. See footnote 5.

separate its Legacy Generation Assets so that an unfettered and fully competitive market will exist in its service territory.¹⁸

Duke's witness Janson also provided testimony on the ESSC, specifically linking the ESSC to the objective of protecting Duke's financial security:

The Commission has recently acknowledged that stability and certainty are important under the law, both from the perspective of customers and from the perspective of the distribution utility and its investors. Rider ESSC, as agreed to by the signatory parties, is intended to ensure the availability of adequate, reliable, and reasonably priced electricity supply and rate stability and certainty in respect of retail electric service. *The amount is further intended to protect the Company's financial integrity and ensure that the overall revenue under the ESP is adequate to Duke Energy Ohio in its provision of an SSO.* As I understand, Rider ESSC is permitted and authorized under R.C. 4928.143(B)(2)(d) as stabilizing and providing certainty in regard to retail electric service. I further understand that Rider ESSC is consistent with the Commission's authority under R.C. 4928.143(B)(1), which authorizes an ESP to include provisions relating to the supply and pricing of generation service.¹⁹

Duke's testimony confirms that the ESSC was intended to compensate Duke for its FRR obligations: Duke is "required to supply all the capacity for customers in our footprint."²⁰ Thus, the ESSC was meant to provide Duke with "economic stability and certainty" in satisfying its FRR capacity commitment. Duke's misleading claim that the Stipulation did not address compensation for its FRR capacity commitment should be rejected.

¹⁸ Supplemental Testimony of Witness Wathen at 18.

¹⁹ Supplemental Testimony of Witness Janson at 14 (Oct. 28, 2011) (emphasis added).

²⁰ Id. at 4.

C. In Approving the ESP Stipulation, The Commission Recognized That it Was Establishing Capacity Charges for SSO Customers and Compensating Duke for its FRR Capacity Obligations.

The Commission's order approving the ESP stipulation recognizes that Duke agreed to charge market-based capacity prices to customers.²¹ The Commission appropriately describes Duke's initial Application as seeking an "unavoidable capacity charge" that would allow Duke to "recover the costs of supply capacity and a reasonable rate of return."²² However, Duke's initial proposal regarding capacity was significantly changed under the Stipulation. As discussed above, in lieu of a cost-based capacity charge proposed in its Application, Duke agreed instead to provide capacity to PJM, and PJM would then provide capacity to wholesale supply auction winners based on RPM pricing. Under the Stipulation, SSO customers would receive capacity priced as a derivative of the wholesale prices charged to supply auction winners.

In describing the ESP Stipulation, the Commission accurately characterizes Duke's commitment to SSO supply: "Duke shall supply capacity to PJM, which, in turn, will charge for capacity to all wholesale supply auction winners for the applicable time periods of Duke's ESP with the charge for said capacity determined by the PJM RTO, which is the FZCP in the unconstrained RTO region."²³ Additionally, the Commission identifies the concept that Duke is to supply capacity resources to all CRES providers in its service territory for the term of the ESP, with PJM charging the CRES providers for

²¹ *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 (Nov. 22, 2011).

²² *Id.* at 8.

²³ *Id.* ¶2 (b) at 11-12.

capacity as determined by the PJM RTO which is the FZCP.²⁴ Moreover, the Commission describes how capacity supplied by Duke at RPM pricing to PJM will translate into capacity supplied to SSO load customers:

Duke will implement it (sic) retail capacity rider (Rider RC) and retail energy rider RE) to recover the costs associated with serving its SSO load with the aggregate sum of the revenues under Rider RC and RE equal to the auction clearing prices, as converted into retail rates. Rider RC shall recover the cost of capacity and Rider RE shall recover all remaining auction costs***.²⁵

The Commission also recognizes that the ESSC supplements the revenues that Duke is to receive for its FRR commitments. The Commission appropriately notes that the ESSC compensates Duke for providing retail electric service, protects Duke's financial integrity, and ensures that the overall revenue under the ESP is adequate for Duke's provision of an SSO.²⁶

There is no doubt that the Commission recognized that, in approving the Stipulation, it was approving capacity pricing for retail SSO customers and that pricing was specifically tied to wholesale capacity based on RPM pricing. Additionally, the Commission understood that Duke would receive additional compensation for its FRR commitment in the form of the ESSC. Duke's false protestations otherwise should be given no weight.

²⁴ Id. ¶4 at 18.

²⁵ Id. at 12.

²⁶ Id. at 47.

D. Duke's Commission-Approved Tariffs Implementing the Stipulation Clearly Establish That the Capacity Charge to be Paid by SSO Customers is Based Upon PJM's Determined Wholesale FZCP.

When the Commission approved Duke's ESP Stipulation, it ordered Duke to file copies of its tariffs to implement provisions of the Stipulation.²⁷ On December 21, 2011, Duke filed copies of its tariffs, in final form, which Duke alleged were "consistent with the Opinion and Order issued by the Commission on November 22, 2011."²⁸ Duke's tariff pages for Rider RC, Sheet No. 111, provide that it is applicable to all retail jurisdictional customers who receive generation service from Duke under the Standard Service Offer.

The tariff also indicates that capacity rates will be calculated based on the wholesale FZCP for the duration of the ESP. The tariff clarifies that the wholesale FZCP for the rate effective period will be converted into retail rates using the methodology provided for in the Stipulation.²⁹ Rider RE, on Duke's tariff Sheet No. 112, applies to all retail jurisdictional customers receiving generation as SSO customers. It states that it is the residual calculation flowing from the overall SSO auction results, after deducting the cost of capacity.

Thus, Duke's tariffs themselves provide insight into just what issues the ESP Stipulation resolved. Contrary to Duke's claims, the tariffs leave no doubt that Duke set the capacity charge to be paid by SSO customers, based on the PJM determined wholesale FZCP, a market-based pricing approach. These tariffs were approved by the

²⁷ Id. at 51.

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., Duke Tariff Filing (Dec. 22, 2011).

²⁹ See Duke Stipulation Attachment B, Exhibit 1, page 2.

Commission, and have been effective since January 1, 2012, collecting rates and charges from Duke's SSO customers accordingly.

As such, Duke's arguments that the ESP Stipulation did not address whether Duke receives just and reasonable compensation for its FRR capacity obligations are baseless and inaccurate and should be rejected. The terms of the Stipulation, the testimony presented by Duke's own witnesses in the ESP case, the Commission's Order adopting the ESP Stipulation, and the tariffs Duke implemented to carry out the Stipulation are clear: the issue of just and reasonable compensation for Duke's FRR capacity obligations has already been resolved.

IV. THE COMMISSION EXPRESSLY LIMITED ITS HOLDINGS IN THE AEP OHIO CAPACITY CASE ORDER TO AEP OHIO.

Duke argues that, in Case No. 10-2929-EL-UNC, the Commission adopted a "new methodology...to establish a just and reasonable cost for the provision of capacity by an FRR entity."³⁰ Duke asks the Commission to apply that methodology to it. But the AEP Ohio Capacity decision was not a generic Commission decision that would apply to all electric distribution utilities, including Duke. Indeed the Commission, in December of 2010, established the docket in that case to address AEP Ohio's application filed at FERC which proposed changes to compensation for capacity costs.³¹

The Commission itself recently confirmed that its decision in AEP Ohio's Capacity Case was just that—a decision that applied to AEP Ohio's compensation for capacity costs. In its Entry on Rehearing in the AEP Ohio Capacity Case, the

³⁰ Memorandum Contra at 13.

³¹ See *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 ¶5 (Dec. 8, 2010).

Commission explicitly limited its holding on a state compensation mechanism to AEP

Ohio. Specifically, the Entry on Rehearing provides:

The Commission initiated this proceeding *solely to review AEP-Ohio's capacity costs* and determine an appropriate capacity charge for *its FRR obligations*. *We have not considered the costs of any other capacity supplier subject to our jurisdiction nor do we find it appropriate to do so in this proceeding.*³²

Duke settled the matters it now seeks to address in this case in its ESP Stipulation.

The AEP Ohio capacity case, as the Commission has made clear in its recent Entry on Rehearing, does not serve as a basis for permitting Duke to reopen these matters.

V. PUBLIC POLICY DICTATES THAT THE COMMISSION DISMISS DUKE'S APPLICATION.

Duke argues that while it is cognizant that its request would require customers to pay an additional \$776 million plus interest³³ (in spite of the fact that Duke signed a settlement resolving the compensation it would receive for its FRR capacity), it is “imperative that the public utility serving those customers has the opportunity to remain financially viable.”³⁴ As noted by Duke’s subsidiaries, Duke Energy Commercial Asset Management (“DECAM”) and Duke Energy Retail Sales (“DER”),³⁵ there is nothing in the policy of the state that requires or allows the Commission to base an order on a utility’s threats that it requires a specific return on equity for its generation services.

³² Entry on Rehearing at ¶77 at 32 (emphasis added). See also *id.* at 58 (“This proceeding was initiated by the Commission for the purpose of reviewing AEP Ohio’s capacity charge for its FRR obligations.”)

³³ Duke appears to no longer stand by its position that its filing does not seek to increase rates to customers. See Duke Application at ¶11 (where Duke claimed that “this Application seeks no increase in amounts to be paid by customers.”) Accordingly, where a rate increase is requested, an evidentiary hearing is required under R.C. 4909.18, should the PUCO not grant the Joint Motion to Dismiss.

³⁴ Memorandum Contra at 7.

³⁵ *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, DER and DECAM Reply Brief at 7.

After all, Duke, like all other electric distribution utilities in Ohio, has an obligation to provide necessary and adequate electric service and facilities.³⁶ And Duke must provide consumers a standard service offer of all competitive retail electric services necessary to maintain essential electric service.³⁷

Moreover, as of August 2, 2012, Duke maintained high investment grade credit ratings from S&P, Moody's & Fitch.³⁸ The outlook from both Fitch and Moody's was stable. Since Duke continues to be viewed favorably by rating agencies, there is no emergency justifying the implementation of some additional recovery mechanism. Cyclical declines in profitability are simply part of the competitive market, especially in the volatile commodity market for electricity.

Further, Duke claims that the Commission should follow the AEP Ohio precedent in approving its request in this case.³⁹ But Duke's desire to be treated like AEP Ohio is far from sufficient to justify disregarding a Commission-approved settlement. The Commission has repeatedly indicated that it values stipulations, acting to preserve the

³⁶ See R.C. 4905.22; R.C. 4928.02(A)(it is a policy of the state to ensure the availability to customers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service).

³⁷ R.C. 4928.141(A).

³⁸ Duke Second Quarter 2012 Earnings Review and Business Update (August 2, 2012).

³⁹ Memorandum Contra at 8.

integrity of the stipulations on many occasions.⁴⁰ The Commission should not undermine the value of stipulations by allowing Duke to ignore the agreement it made. That agreement is embodied in the language of the Stipulation itself, Duke's own testimony, the Commission's Order adopting the Stipulation, and Duke's tariffs. Instead, the Commission should uphold the precedential value of all its decisions, including its decision to adopt the Stipulation in the Duke ESP case.

If AEP Ohio had lost its Capacity Case and had been required to charge only RPM as the state compensation mechanism, and the undersigned Signatory Parties had then asked to be relieved of their agreement to pay the \$330 million ESSC, Duke would undoubtedly have protested that the Stipulation must be honored. The Signatory Parties are asking for nothing less.

VI. THE APPLICATION VIOLATES RES JUDICATA AND COLLATERAL ESTOPPEL, DESPITE DUKE'S ARGUMENTS TO THE CONTRARY.

Duke argues that the doctrines of res judicata and collateral estoppel do not apply to bar its request in this case.⁴¹ Duke is incorrect for a number of reasons. Duke initially argues the doctrine of res judicata "cannot be applied in connection with all proceedings

⁴⁰ *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order at 33-38 (Dec. 12, 1996); *In the Matter of the Application of The Toledo Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service*; *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service*; *In the Matter of the Complaint of Benedictine High School et al., Complainants, v. The Cleveland Electric Illuminating Company, Respondent*; *In the Matter of the Commission's Investigation into the Financial Condition, Rates, and Practices of The Cleveland Electric Illuminating Company*; *In the Matter of the Commission's Investigation into the Financial Condition, Rates, and Practices of The Toledo Edison Company*, Case No. 95-299-EL-AIR, Opinion and Order at 244-246 (Apr. 11, 1996); *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedule of Ohio Power Company and Related Matters*, Case No. 93-101-EL:-EFC, Opinion and Order at 91-96 (May 25, 1994); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Cincinnati Gas & Electric Company and Related Matters*, Case No. 83-17-GA-GCR, Opinion and Order at 16-19 (July 3, 1984).

⁴¹ Memorandum Contra at 9-16.

before the Commission,” but only those of a judicial nature.⁴² But the Duke ESP proceeding was clearly judicial in nature and provided parties the opportunity to litigate the issues. In the Duke ESP proceeding, the PUCO provided notice, held an evidentiary hearing, and provided parties the opportunity to introduce evidence. Thus, the PUCO acted in its judicial capacity in resolving the ESP proceeding. Consequently, collateral estoppel and res judicata may be used to bar litigation of Duke’s request.⁴³

Duke also argues that the elements of res judicata and collateral estoppel are not met, largely because Duke alleges that the issues raised in this case were not already litigated and the evidence presented in this case differs from that presented in the Duke ESP case.⁴⁴ But, as explained above 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 Stipulation, Duke’s testimony, the Commission 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,⁴⁵ but as part of the settlement Duke agreed to forego cost based capacity in lieu of market based capacity 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 new allegations in this proceeding that it is receiving inadequate capacity

⁴² Memorandum Contra at 9.

⁴³ *Superior’s Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d at 135.

⁴⁴ Memorandum Contra at 10-16.

⁴⁵ 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.

compensation, which will cause it to operate at a significant loss.⁴⁶ 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. As noted in the Motion to Dismiss, res judicata precludes not only re-litigation of issues raised and decided in a prior action. 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.”⁴⁷

The Supreme Court of Ohio has stated that:

A party can not 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.⁴⁸

Hence, the scope of these doctrines is broad and, as explained in detail in the Motion to Dismiss, 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 Commission to establish a state compensation mechanism—was part of the legal authority Duke relied on to seek a cost-based rate for

⁴⁶ See Application at ¶15.

⁴⁷ *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.

⁴⁸ *Covington and Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, 237-38.

capacity in its filed ESP. The facts are the same, the law is the same, and the parties are the same.

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 notion that the state mechanism (or methodology for establishing the state mechanism) was a new creation by the Commission in 2012, after the approval of its ESP, is just inaccurate.⁴⁹ In its Entry in 2010, the Commission "expressly adopt[ed] as the state compensation mechanism for the Companies [AEP Ohio] the current capacity charges established by the three-year capacity auction conducted by PJM."⁵⁰ The Commission explained further that it found "that a review is necessary in order to determine the impact of the proposed change to AEP-Ohio's capacity charges. As an initial step, the Commission seeks public comment regarding the following issues: (1) what changes to the current state mechanism are appropriate to determine the Companies' FRR capacity charges to Ohio competitive retail electric service (CRES) providers; (2) the degree to which AEP-Ohio's capacity charges are currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charges upon CRES providers and retail competition in Ohio."⁵¹ Clearly, the issue of an appropriate capacity charge for AEP Ohio was fully raised and litigated, and was known to the industry in

⁴⁹ Memorandum Contra at 8, 10-15 (Specifically, on page 15 of its Memorandum Contra, Duke misleadingly claims: "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.")

⁵⁰ See supra n.30, Entry at 2.

⁵¹ Id.

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.”⁵² The Ohio Supreme Court has held that PUCO proceedings “characterized by notice, hearing, and the making of an evidentiary record” are quasi-judicial proceedings.⁵³ Moreover, the doctrine can also be applied in cases concluded by settlement.⁵⁴ Therefore, res judicata and collateral estoppel bar Duke’s requests in this case.

VII. THE ISSUE OF WHETHER THE COMMISSION HAS JURISDICTION TO GRANT THE RELIEF REQUESTED BY DUKE IS STILL PENDING BEFORE THE COMMISSION.

Duke argues that the Commission reaffirmed its ability to authorize deferrals under R.C. 4905.13 in the recent Entry on Rehearing in Case No. 10-2929-EL-UNC.⁵⁵ But, in that case, the Commission also explicitly withheld a decision on whether the costs deferred under AEP Ohio’s state compensation mechanism could be recovered through a non-bypassable charge to retail customers. Specifically, the Commission stated:

The Commission notes that several of the parties have spent considerable effort in addressing the mechanics of the deferral

⁵² *Superior’ Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133 (syllabus).

⁵³ *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.

⁵⁴ *Scott v. East Cleveland* (1984), 16 Ohio App. 3d 429, 476 (Ct. App.).

⁵⁵ Memorandum Contra at 17.

recovery mechanism, such as whether CRES providers or retail customers should be responsible for payment of AEP-Ohio's deferred capacity costs, whether such costs should be paid by non-shopping customers as well as shopping customers, and whether the deferral results in subsidies or discriminatory pricing between non-shopping and shopping customers. We find that all of these arguments were prematurely raised in this case. The Capacity Order did not address the deferral recovery mechanism. Rather, the Commission merely noted that an appropriate recovery mechanism would be established in the ESP 2 Case and that any other financial considerations would also be addressed by the Commission in that case. The Commission finds it unnecessary to address arguments that were raised in this proceeding merely as an attempt to anticipate the Commission's decision in the ESP 2 Case. Accordingly, the requests for rehearing or clarification should be denied.⁵⁶

Therefore, the issue of whether the PUCO has jurisdiction to grant the relief that Duke requests in this case is still unresolved by the Commission, and will not be resolved until the Commission issues a substantive Entry on Rehearing in AEP Ohio's ESP case. And notably, a number of parties joining the Joint Motion to Dismiss contend that the Commission does not have such jurisdiction.

VIII. CONCLUSION

For the reasons discussed above, the Commission should grant the Joint Motion to Dismiss. Doing so would protect customers from an unlawful \$776 million increase in rates. Additionally, dismissing the Application would reaffirm the Stipulation that was agreed to by Duke and numerous parties (including the PUCO Staff) and approved by the Commission. The Stipulation was final, and it should not be reopened to subject customers to additional rate increases solely because another utility received what Duke perceives to be a better deal.

⁵⁶ Entry on Rehearing at 50-51.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Dismiss* was served on the persons stated below via electronic transmission this 26th day of October 2012.

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This foregoing document was electronically filed with the Public Utilities

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Case No(s). 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ATA

Summary: Reply Joint Reply to Duke Energy's Memorandum Contra by Signatory Parties