

**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
)	

**COMMENTS ON DUKE ENERGY OHIO, INC.'s
APPLICATION BY THE KROGER CO.**

I. INTRODUCTION

Pursuant to the Attorney Examiner Entry issued October 3, 2012, establishing a procedural schedule, The Kroger Co. (Kroger) hereby submits its comments on Duke Energy Ohio, Inc.'s (Duke) Application for approval to establish a capacity change, and related accounting authority, filed on August 29, 2012 (Application). Despite the agreement that Duke reached in 2011 in its electric security plan proceeding, which established the rates customers would pay over a three-year period ending May, 2015,¹ Duke's Application seeks to charge customers an additional \$776 million for capacity under the guise of a "newly adopted state compensation mechanism" in the form of a deferral.² As explained further below and in the

¹ *In The Matter 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) (ESP Order) (adopting the Stipulation and Recommendation filed on October 24, 2011) (ESP Stipulation).

² Application at 2, 9.

Joint Motion to Dismiss and Joint Reply to Duke Energy's Memorandum Contra, both of which are incorporated herein by reference in their entirety,³ Duke's Application is in direct violation of the ESP Stipulation approved (with minor modifications) by the Public Utilities Commission of Ohio (Commission) in Duke's recent ESP proceeding,⁴ and Duke's RTO Realignment Stipulation adopted by the Commission on May 25, 2011,⁵ and should be denied.

II. COMMENTS

A. Duke's Application Violates Duke's Commitments in its ESP Stipulation

Duke's Application violates Duke's ESP Stipulation approved by the Commission on November 22, 2011.⁶ Under the ESP Stipulation, Duke agreed, among other things, to promptly transition to market pricing and charge the market-based Reliability Pricing Model ("RPM") rate for capacity provided to CRES providers to serve shopping load in exchange for, among other things, being allowed to collect \$330 million from customers for its stabilization charge. Duke cannot now request to increase its benefits under the negotiated agreement without correspondingly increasing the benefits to the other signatory parties to the agreement.

Specifically, although Duke originally proposed under its ESP to collect its embedded costs of providing capacity to all customers in its territory, plus a reasonable rate of return, on a

³ See Joint Motion to Dismiss by Signatory Parties (October 4, 2012) and Joint Reply to Duke Energy's Memorandum Contra by Signatory Parties (October 26, 2012).

⁴ Id.

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Rider RTO and Associated Tariffs*, Case No. 11-2641, et al. (RTO Realignment), Opinion and Order at 14-16 (May 25, 2011) (RTO Realignment Order).

⁶ Id.

non-bypassable basis for a term of nine years and five months,⁷ Duke ultimately agreed to a market-based RPM rate for capacity in its ESP Stipulation through May 2015.

As explained in the Joint Motion to Dismiss,⁸ the issue of establishing a cost-based capacity charge or a RPM-priced capacity charge was expressly addressed in the ESP Stipulation in which capacity priced at RPM prices was adopted. More importantly, Duke initially argued that a cost-based rate should be established as the Commission's state mechanism,⁹ but abandoned its original proposal in favor of reaching a settlement and incorporating the RPM-priced capacity charge into its agreed-upon standard service offer.¹⁰

Accordingly, it is clear that Duke agreed to provide capacity for its fixed resource requirement (FRR) obligation based on the PJM reliability pricing model.¹¹ There was no option or condition whereby Duke was entitled to receive a cost-based rate or was authorized to modify the capacity pricing mechanism established by the ESP during the term of the ESP. Rather, the capacity charge and associated compensation to Duke was balanced out by other provisions of the ESP Stipulation favorable to Duke, such as the non-bypassable stability charge that authorizes Duke to collect \$330 million from customers over the term of the ESP.¹²

⁷ Duke ESP Proceeding, Application at 26, Volume 1 at 10 (June 20, 2011) (ESP Application).

⁸ Joint Motion to Dismiss at 2-7.

⁹ ESP Application at 25-26.

¹⁰ ESP Stipulation at 6-8.

¹¹ The prices of which were known to Duke when Duke signed the Stipulation in October 2011.

¹² ESP Stipulation at 16.

B. Duke's Application Violates Duke's Commitments in its RTO Realignment Stipulation

Duke's Application also violates its RTO Realignment Stipulation adopted by the Commission on May 25, 2011.¹³ Duke filed an application for approval to transfer from the Midwest Independent System Operator to PJM on April 26, 2011. Simultaneously, Duke filed a Stipulation and Recommendation in which Duke agreed not to seek approval from the Federal Energy Regulatory Commission (FERC), pursuant to Section 8.1 of PJM's Reliability Assurance Agreement (RAA), of a wholesale capacity charge based upon its costs as a fixed resource requirement entity for the period between January 1, 2012 and May 31, 2016.¹⁴ As noted in the Joint Motion to Dismiss,¹⁵ this agreement was the second commitment by Duke to affirmatively forego seeking or collecting a cost-based rate for capacity.

Despite these commitments, Duke uses its status as an FRR entity and the provision of PJM's RAA as authority to request the exact thing prohibited by the agreements—compensation based on a cost-based capacity charge.

C. Duke's Claim that a Hearing is Unnecessary Should be Rejected

In its Application, Duke contends that its Application is for a new service, is not for an increase in rates, and thus, a hearing is unnecessary.¹⁶ Duke further argues that the Commission is only authorized to set the matter for hearing if it first determines that Duke's Application may be unjust or unreasonable.¹⁷ Duke's arguments are without merit and should be rejected.

¹³ RTO Realignment Order at 14-16 (May 25, 2011).

¹⁴ RTO Realignment, Stipulation and Recommendation at ¶20 (April 26, 2011) (RTO Realignment Stipulation).

¹⁵ Joint Motion to Dismiss at 8.

¹⁶ Application at 5-6; also see Duke's Motion to Vacate the October 3, 2012 Entry at 4 (October 9, 2012).

¹⁷ Id.

As explained in the Joint Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Vacate,¹⁸ incorporated herein by reference in its entirety, the Application is for an increase in rates. Duke's Application seeks Commission authority to establish deferrals to account for the difference between the amount currently being collected by Duke for capacity service and Duke's cost of providing that capacity.¹⁹ Additionally, the Application explicitly requests authority "for the future recovery of the deferred amounts."²⁰ As previously noted,²¹ the Supreme Court has determined that a request to establish deferrals for future recovery of those deferred amounts is akin to a request for a rate increase.²²

Additionally, contrary to Duke's arguments, capacity is not a new service, and the establishment of a charge and the amount of the charge for capacity service are not new. Indeed, Duke's RTO Realignment and ESP commitments in 2011 established the price of such service, which is currently being collected. It is this existing rate that Duke now seeks to modify or amend.²³ Specifically, Duke is requesting that the PUCO determine that the rate for capacity services associated with its FRR obligations be amended and increased to \$224.15/Mw-Day, calculated utilizing the formula established in the AEP capacity case.²⁴ This would alter the current rate for capacity that Duke is authorized to charge under its existing Retail Capacity Rider.

Duke has failed to establish that requesting an additional amount for the same capacity service through a deferral mechanism, the deferred amount of which will be collected from

¹⁸ Joint Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Vacate (October 16, 2012) (Joint Memo Contra Motion to Vacate).

¹⁹ Application at 4-6.

²⁰ Application at 2.

²¹ Joint Memo Contra Motion to Vacate at 6-7.

²² See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853; *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164.

²³ Application at 5-6.

²⁴ Application at 4; 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 (July 2, 2012).

customers in the future through an additional rider, is a new service or not an increase in rates. Accordingly, Duke's request for the issuance of an order without a hearing should be denied.

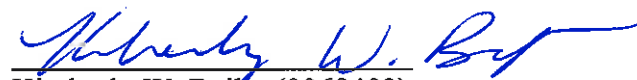
III. CONCLUSION

Duke's Application seeks to relitigate prior cases and undo commitments made by Duke in settlements filed by Duke in those proceedings. Despite the clear presence of contested issues regarding the appropriate compensation for capacity, including the appropriate state compensation mechanism for pricing such capacity, Duke elected to not litigate its original request for cost-based capacity pricing, and instead, agreed to RPM pricing and other benefits, including other financial compensation in the magnitude of \$330 million. Duke was well aware of what it was agreeing to and what it was agreeing to forego with regard to compensation for capacity service. As such, any attempt by Duke to relitigate those prior proceedings and collect an additional \$776 million from customers is barred by res judicata and collateral estoppel and should be rejected.²⁵

²⁵ See Joint Motion to Dismiss at 18-23.

WHEREFORE, for the reasons stated herein and as discussed in the Joint Motion to Dismiss and Joint Reply to Duke Energy's Memorandum Contra, Kroger respectfully requests that the Commission deny Duke's Application in its entirety.

Respectfully Submitted,

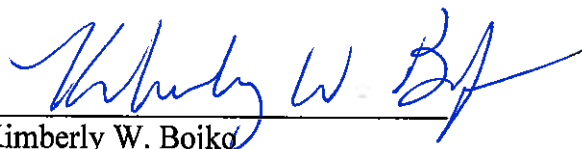


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 2nd day of January, 2012 by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.



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Summary: Comments Comments on Duke Energy Ohio, Inc's Application by the Kroger Co.
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