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

REPLY COMMENTS OF DUKE ENERGY OHIO, INC.

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Pursuant to an entry filed on October 3, 2012 (Entry), the attorney examiner established a procedural schedule for the referenced proceedings that included the filing of comments and reply comments. Comments were filed by Staff of the Public Utilities Commission of Ohio (Staff); Ohio Partners for Affordable Energy (OPEA); The Kroger Company (Kroger); Ohio Power Company (AEP Ohio); FirstEnergy Solutions (FES); Industrial Energy Users-Ohio (IEU-Ohio); the Ohio Manufacturers' Association (OMA); the city of Cincinnati (City); Exelon Generation Company LLC and Constellation New Energy, Inc. (jointly, Exelon); the Retail Energy Supply Association (RESA); and Interstate Gas Supply (IGS). Comments were also submitted jointly by the Office of the Ohio Consumers' Counsel (OCC) and the Ohio Energy Group (OEG). For purposes of these reply comments, the above-referenced entities will be collectively referred to as the Commenting Parties.

Consistent with the Entry, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby submits to the Honorable Public Utilities Commission of Ohio (Commission) the following reply comments. As the comments of various Commenting Parties are, to a large degree, duplicative, these reply comments have been organized with reference to topic rather than author.

I. INTRODUCTION

The Commission has recently affirmed its obligation to ensure that jurisdictional utilities are justly and reasonably compensated for the services that they provide, having issued its decision outlining the embedded costs that a Fixed Resource Requirement (FRR) entity is entitled to recover in exchange for providing capacity services.[1] The Commission had never

[1] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012).

before provided for such an avenue of relief for FRR entities. Duke Energy Ohio – also an FRR entity – initiated these proceedings subsequent to that Commission decision in light of the undeniable fact that it is not being sufficiently compensated for its unique capacity obligations. Indeed, absent the relief requested through its Application, Duke Energy Ohio will realize a negative return on equity (ROE) through May 31, 2015.[2] A number of parties have filed comments, including arguments either that: (1) Duke Energy Ohio is not entitled to the same treatment as AEP Ohio or (2) because the Commission lacked the authority to grant AEP Ohio relief, Duke Energy Ohio is not entitled to similar treatment. These comments – and all other arguments by the Commenting Parties – should be rejected. Duke Energy Ohio does not currently receive sufficient compensation for its cost of providing capacity consistent with its obligations as an FRR entity. These costs are real and impact the financial viability of the Company. It is within the authority of the Commission – and indeed it is the Commission's responsibility under Ohio law – to grant relief in the form of the capacity charge requested in the Application filed in these proceedings.

II. CONSISTENCY WITH OTHER DUKE ENERGY OHIO DECISIONS

A. Duke Energy Ohio's Application is compatible with the Stipulation and Recommendation approved by the Commission in Case No. 11-3549-EL-SSO, *et al.*

A common theme in the various initial comments is that Duke Energy Ohio's Application in these proceedings is precluded by the Stipulation and Recommendation that was approved in respect of the Company's current electric security plan (ESP) in Case No. 11-3549-EL-SSO, *et al.* (ESP Stipulation).[3] Indeed, the Commenting Parties contend that, through this Application,

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[2] Application, at pp. 8-9 (Aug. 29, 2012).

[3] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*

Duke Energy Ohio is attempting to void its prior agreements and unilaterally revise just one provision of the ESP Stipulation. More specifically, the Commenting Parties maintain that the ESP Stipulation reflects an unchangeable agreement on the Company's part to be compensated for capacity at market-based prices.[4] But as demonstrated herein, these contentions are erroneous.

To appreciate the error in the position advanced by the Commenting Parties, it is critical to first appreciate what the Company's ESP represents – it is a standard service offer (SSO) of competitive retail electric service. As the Ohio legislature has instructed through its enactment of R.C. 4928.141, *et seq.*, an electric distribution utility must offer an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, in the form of either a market rate offer (MRO) or an ESP. In the event an ESP is proposed, such a plan may only include the listed, statutorily permissible elements. In fact, as the Ohio Supreme Court has found, the Commission cannot approve, for inclusion in an ESP, any elements that are not **expressly** identified in R.C. 4928.143(B)(2)(a) through (i).[5] And as the Commission has repeatedly stressed, the provision of capacity consistent with a utility's obligations as an FRR

[4] *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, *et al.*, Initial Comments of Staff, at pg. 5 (Jan. 2, 2013). See, also, OPAE Initial Comments, at pg. 2 (Jan. 2, 2013); Kroger Initial Comments, at pg. 2 (Jan. 2, 2013); OCC/OEG Initial Comments, at pg. 2 (Jan. 2, 2013); FES Initial Comments, at pp. 1, 3 (Jan. 2, 2013); Exelon Letter to Docketing (Jan. 2, 2013); RESA Letter to Docketing (Jan. 2, 2013) and Motion to Intervene, at pg. 4 (Oct. 15, 2012); and IEU Initial Comments, at pg. 7, incorporating previously filed motion to dismiss (Jan. 2, 2013). It is noted that the City and OMA submitted, as substantive comments, a reference to the previously filed motion to dismiss. Notwithstanding any procedural deficiencies with such a submission and IEU's general reference to said motion, Duke Energy Ohio includes these three entities as having commented on whether the ESP Stipulation bars these proceedings.

[5] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 520-521 (2011)(an ESP cannot include "any provision," but for those set forth in R.C. 4928.143(B)(2)).

entity is not a competitive retail electric service.[6] This characterization is dispositive of the type of service for which Duke Energy Ohio is now seeking just and reasonable compensation.

In confirming its authority to implement a cost-based charge for capacity services provided by an FRR entity, the Commission has found that such services are "not a retail electric service as defined by Ohio law."[7] As the Commission reasoned, although customers benefit from the service in due course, it is "appropriately viewed as an intrastate wholesale matter" between the FRR entity and suppliers active in the former's service territory.[8] In addition to not being a retail electric service, the provision of capacity by an FRR entity also is not a competitive service. Indeed, as the Commission has declared, "capacity service should be considered as non-competitive...based on the simple factual observation that 'no other entity may provide this service during the term' of the FRR plan."[9] As such, determination of the appropriate compensation for capacity provided by an entity with an FRR obligation cannot, under the directives of the Ohio Supreme Court and the determinations of the Commission, be included in an SSO that takes the form of an ESP.

Despite the interpretations advanced by the Commenting Parties, Duke Energy Ohio's ESP Stipulation does not in any way address the total compensation that Duke Energy Ohio should receive for providing noncompetitive capacity services consistent with its obligation as an FRR entity through the term of its current ESP. Rather, the ESP Stipulation only established that,

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[6] *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)("[a]lthough Chapter 4928, Revised Code, provides for market-based pricing for retail electric generation service, those provisions do not apply [to capacity services provided by an FRR entity] because, as we noted earlier, capacity is a wholesale rather than a retail service") and Entry on Rehearing, at pg. 29 (Oct. 17, 2012)(provisions of Chapter 4928, Revised Code, that restrict the Commission's regulation of competitive retail electric services are not applicable to capacity service, which is a wholesale generation service).

[7] Id, Opinion and Order, at pg. 13 (July 2, 2012).

[8] Id.

[9] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of the Public Utilities Commission of Ohio, at pg. 9 (Sept. 25, 2012).

during the term of the current ESP, PJM Interconnection LLC (PJM) would charge both wholesale supply auction winners and competitive retail electric service (CRES) providers for capacity at the final zonal capacity price (FZCP) in the unconstrained regional transmission organization (RTO) region.[10] The discreet capacity charges between PJM and suppliers, as identified in the ESP Stipulation, were succinctly described in the Supplemental Testimony of Julia S. Janson in support of that stipulation. Therein, Ms. Janson confirmed that which the document clearly stated: that PJM would charge suppliers market-based rates for capacity.[11] Staff contends that Ms. Janson also stated that the Company had agreed, in the context of the ESP, to accept market-based pricing as full compensation for its capacity obligations. However, a reading of the ESP Stipulation confirms that this is not the case. Although Ms. Janson's testimony described what PJM would pay for capacity, the ESP Stipulation says absolutely nothing about what compensation Duke Energy Ohio would receive for capacity. It only addresses what the CRES providers and wholesale supply auction winners will pay to PJM. And in this regard, it is important to recognize that, as would be the case absent the ESP Stipulation, Duke Energy Ohio will provide PJM sufficient capacity to support the total load obligation in its territory and, without a prevailing state compensation mechanism, will receive PJM's FZCP for that capacity. Accordingly, Ms. Janson's testimony was not a concession of settlement terms but instead a factual statement related to PJM-administered tariffs that were not before the Commission and not part of the ESP Stipulation. Thus, notwithstanding arguments to the contrary,[12] the ESP Stipulation excluded any reference to the charges that might appropriately be

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[10] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, ESP Stipulation at Sections II.B. and IV.A (Oct. 24, 2011). See also, Opinion and Order correcting Section IV.A. (Nov. 20, 2011).

[11] Id, Supplemental Direct Testimony of Julia S. Janson, pg. 4, l. 22-23 (Oct. 28, 2011).

[12] OPAE Initial Comments, at pg. 2 (Jan. 2, 2013).

owing to Duke Energy Ohio in return for providing wholesale FRR capacity services, which services the Commission has explicitly confirmed are not competitive retail electric services subject to regulation under Chapter 4928.[13]

The Commenting Parties' misguided rationale on this point appears to proceed as follows: The ESP Stipulation says nothing about compensating Duke Energy Ohio for its capacity services as an FRR entity. Therefore, it must be true that the parties to the ESP Stipulation agreed that Duke Energy Ohio would provide such wholesale services at no charge. Following this logic would result in absurd results. The ESP Stipulation says nothing about paying Duke Energy Ohio for meter reading, moving underground facilities, tree trimming, or a host of other issues. Should Duke Energy Ohio therefore remain uncompensated for these services? Of course not. Addressing such issues would have been inappropriate in an ESP, where the statutes governing an ESP relate to the provision of competitive retail electric service. The Commenting Parties err in suggesting that the failure of the ESP Stipulation to address FRR entity capacity services provides any indication of the parties' intent.

In furtherance of their claim that the ESP Stipulation bars these proceedings, the Commenting Parties also suggest that Duke Energy Ohio accepted compensation pursuant to Rider ESSC (Electric Service Stability Charge) in exchange for agreeing to receive market-based pricing for capacity.[14] This is incorrect. As explained above, the only capacity pricing detailed, and agreed upon, in the ESP Stipulation for the term of the ESP concerns the charge **by** PJM **to** both wholesale auction suppliers and CRES providers.[15] Rider ESSC is intended, by its express

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[13] *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) and Entry on Rehearing, at pg. 29 (Oct. 17, 2012).

[14] FES Initial Comments, at pp. 3, 5 (Jan. 2, 2013); OPAE Initial Comments, at pg. 2 (Jan. 2, 2013); Staff Initial Comments, at pg. 5 (Jan. 2, 2013); and Kroger Initial Comments, at pp. 2-3 (Jan. 2, 2013).

[15] Compare, FES Initial Comments, at pp. 1, 3 (Jan. 2, 2013); Staff Initial Comments, at pg. 5 (Jan. 2, 2013); and Kroger Initial Comments, at pg. 2 (Jan. 2, 2013).

terms, to provide stability and certainty in Duke Energy Ohio's provision of **competitive retail** electric service, as authorized under R.C. 4928.143(B)(2)(d). The Stipulation does not discuss Rider ESSC as in any way intended to compensate Duke Energy Ohio for providing wholesale capacity services:

> 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**.[16]

Duke Energy Ohio's capacity services as an FRR entity are, according to the Commission, **not** a competitive retail electric service. Thus, Rider ESSC does not – and **could** not – compensate Duke Energy Ohio for the provision of noncompetitive capacity services as an FRR entity.[17] Indeed, even Staff recognizes that Rider ESSC relates to Duke Energy Ohio's provision of an SSO, which must, by law, be an offer of competitive retail electric service.[18] And Staff's recognition is consistent with the Commission's determination that utilities are entitled to separate and distinct compensation for the separate and distinct services they provide.[19]

Asserting a variation on the preceding comment, FES maintains that the Commission approved a state compensation mechanism for Duke Energy Ohio in the context of its ESP

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[16] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Supplemental Direct Testimony of Julia S. Janson, pg. 14 (Oct. 28, 2011)(emphasis added).

[17] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d at 520-521 (2011).

[18] Staff Initial Comments, at pg. 5 (Jan. 2, 2013). See also, R.C. 4928.141 (utility must offer a standard service offer of competitive retail electric service).

[19] *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)(adopting a cost-based state compensation mechanism to ensure that charges for capacity service are just and reasonable). 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*, Opinion and Order, at pg. 31 (Aug. 8, 2012)(adopting a separate retail stability rider that "promotes stable retail electric service prices and ensures customers certainty regarding retail electric service" approved pursuant to R.C. 4928.143(B)(2)(d)) and Entry on Rehearing, at 23 (Jan. 30, 2013).

proceeding, comprising Rider ESSC and the Company's receipt of market-based pricing for its capacity services. And FES now comments that the Company has failed to provide any basis for altering this mechanism.[20] But as discussed above, the ESP Stipulation says nothing about the compensation the Company is to receive for fulfilling its noncompetitive FRR capacity obligations. Again, the capacity service that forms the basis for the Application in these proceedings is not a retail electric service subject to regulation under Chapter 4928 of the Revised Code. As such, pursuant to the Commission's own confirmed logic, the Commission would have been without authority, in the context of the Company's ESP, to establish a compensation mechanism applicable to such capacity services.[21] Conversely, as discussed above, Rider ESSC relates only to the provision of stability and certainty with respect to **competitive retail** electric services. It is apparent that the Commission has not approved any compensation mechanism for Duke Energy Ohio in recognition of its FRR obligations.

FES and other Commenting Parties also maintain that the Application is barred because, in its ESP application, Duke Energy Ohio originally proposed to recover its embedded costs of capacity.[22] But what Duke Energy Ohio may have initially proposed for inclusion in its ESP does not have any bearing on what the parties agreed to or what the Commission approved. From the mere fact that an issue was proposed, it is impossible to deduce, with any certainty, the intent of any party with regard to its ultimate exclusion. Nonetheless, by law, the ESP as filed was the Company's proposal for competitive retail electric services. As the capacity service at issue is not among the permissible SSO provisions, the Commission did not approve – and in

[20] FES Initial Comments, at pg. 5 (Jan. 2, 2013).
[21] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d at 520-521 (2011). See also, *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Company*, Opinion and Order, at pg. 22 (Revised Code Chapter 4928 not applicable to wholesale capacity service; rather, the Commission is vested with jurisdiction under Revised Code Chapter 4905 to establish a cost-based mechanism).
[22] FES Initial Comments, at pg. 5 (Jan. 2, 2013); Staff Initial Comments, at pp. 4-6 (Jan. 2, 2013); and Kroger Initial Comments, at pp. 2-3 (Jan. 2, 2013).

fact admittedly lacked jurisdiction to approve – an ESP provision that compensated Duke Energy Ohio for its obligations as an FRR entity.[23]

Notwithstanding the remarks from the Commenting Parties, Duke Energy Ohio is not attempting, through these proceedings, to unilaterally deviate from its commitments in the ESP Stipulation. On the contrary, Duke Energy Ohio has confirmed in its Application that suppliers – both wholesale auction and CRES – will continue to be charged by PJM at market-based prices for capacity, thereby ensuring that there will be no disruption in the vibrant competitive market in the Company's service territory.[24]

Further, and as apparently overlooked by the Commenting Parties, 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 noncompetitive FRR capacity obligations. Thus, it is undeniable that the issues in the Application were not resolved in the ESP Stipulation and that Duke Energy Ohio's filing of the Application does not constitute a violation of that stipulation – or, as Staff described it, relitigation of a final judgment.[25] And the ESP Stipulation cannot now be improperly interpreted – as the Commenting Parties urge – so as to deprive the Commission of its obligation "to ensure that the jurisdictional utilities receive just and reasonable compensation for the services that they render."[26] And in this regard, enabling receipt of just and reasonable compensation for FRR capacity services via a bifurcated or two-

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[23] See footnotes 5-9, *supra,* and accompanying text.
[24] Application, at pg. 9 (Aug. 29, 2012).
[25] Staff Initial Comments, at pg. 14 (Jan. 2, 2013).
[26] *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 (Oct. 17, 2012).

part pricing structure is not new; this is precisely the approach taken by the Commission itself in recent proceedings involving a similarly situated utility.[27]

B. Duke Energy Ohio's Application is not precluded by the Stipulation and Recommendation approved by the Commission in Case No. 11-2641-EL-RDR, *et al.*

In their comments, some of the Commenting Parties also assert that the Application violates the stipulation that was approved in Duke Energy Ohio's transmission rider proceedings.[28] This assertion is even more nonsensical than the one concerning the ESP Stipulation. Such Commenting Parties 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.[29] 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 the Commenting Parties 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.

C. Duke Energy Ohio's Application is not precluded by the doctrine of *res judicata*, which includes collateral estoppel.

The Commenting Parties contend that these proceedings are barred by the application of the legal doctrine, *res judicata*, which includes the two basic concepts of *res judicata* or estoppel by judgment and collateral estoppel.

> The doctrine of *res judicata* is separated into two distinct principles... . First, it refers to the effect a judgment in a prior action has in a second action based upon

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[27] *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 pp. 51-52 (Aug. 8, 2012).

[28] *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.*

[29] OPAE Initial Comments, at pg. 2 (Jan. 2, 2013); Staff Initial Comments, at pg. 6 (Jan. 2, 2013); and Kroger Initial Comments, at pg. 4 (Jan. 2, 2013).

> the same cause of action. ... [T]he collateral estoppel aspect precludes the relitigation, in a second action, of *an issue*... .[30]

Specifically, several of the Commenting Parties maintain that Duke Energy Ohio's recently approved ESP established that the FZCP set under the PJM reliability pricing model (RPM) process would be the Company's price for capacity provided consistent with its FRR obligations and that, therefore, the Company's Application cannot proceed, under either of the aforementioned legal doctrines.[31] The Commenting Parties also seek application of *res judicata*, inclusive of collateral estoppel, on the ground that Duke Energy Ohio's application for approval of an ESP sought the very same relief it is seeking in these proceedings; namely, remuneration predicated upon a state compensation mechanism. These arguments are without merit.

The Application giving rise to the current proceedings concerns a compensation mechanism applicable to the provision of a noncompetitive wholesale electric service. The ESP – as reflected in its terms and conditions approved under R.C. 4928.143 – relates to the provision of competitive retail electric service. The proceedings are different and one cannot preclude the other, just as a base rate case under R.C. 4909.18 cannot bar an SSO proceeding under R.C. 4928.141, *et seq*. The further shortcomings in the Commenting Parties' arguments are discussed below, confirming that said arguments fail both legally and factually.

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[30] *Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493, 494-495 (1979)(internal citations omitted). See also, *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 453 (2010)(the two doctrines can be understood as variations on a general theme: *Res judicata* is described as claim preclusion, or the barring of an action on the basis of the claim already having been litigated. Collateral estoppel is described as issue preclusion, or the barring of an action on the basis of the issue having already been determined).

[31] See generally, Staff Initial Comments, at pp. 14-18 (Jan. 2, 2013); OCC/OEG Comments, at pg. 22 (Jan. 2, 2013); Exelon Letter to Docketing (Jan. 2, 2013); RESA Letter to Docketing (Jan. 2, 2013); and IEU-Ohio Initial Comments, at pp. 6-7, incorporating previously filed motion to dismiss (Jan. 2, 2013). It is noted that the City and OMA submitted, as substantive comments, a reference to the previously filed motion to dismiss. Notwithstanding any procedural deficiencies with such a submission and IEU-Ohio's general reference to said motion, Duke Energy Ohio includes these three entities as having commented on whether the ESP Stipulation bar these proceedings.

1. *Res judicata*, inclusive of collateral estoppel, is inapplicable to administrative proceedings that are legislative in nature.

The doctrine of *res judicata* cannot be applied to deny a litigant of its 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."[32] With regard to administrative proceedings, the doctrine is not always applicable. 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.'"[33] This distinction is critical.

In its comments, Staff correctly points out that *res judicata* and collateral estoppel both apply to Commission proceedings that are of a judicial nature.[34] However, where Staff errs is in its determination of whether the prior proceeding to which it refers was judicial or legislative in nature. Although Staff asserts that the ESP proceeding was quasi-judicial, that is not the case. As the Commission itself has acknowledged and argued elsewhere, the Ohio Supreme Court has held, repeatedly, that **ratemaking is inherently a legislative function, regardless of whether a hearing was held**.[35] As such, the Commission's orders approving SSO rates undeniably reflect the exercise of quasi-legislative power and do not involve the exercise of quasi-judicial authority. Indeed, the Commission has confirmed that its decisions establishing, *inter alia*, complex, formulaic cost-based rates and deferral recovery mechanisms following the submission of substantial, and often times conflicting, evidence do not result from the exercise of a quasi-

[32] *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 200-201(1983)(internal citations omitted). See also *Armeigh v. Baycliffs Corporation*, 81 Ohio St.3d 247, 249 (1998).
[33] *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263 (1987).
[34] *Superior's Brand Meats, Inc., v. Lindley*, 62 Ohio St.2d 133, Syllabus of Court (1980).
[35] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, *et al.*, at pp. 5-6 (Sept. 25, 2012). See also cases cited therein.

judicial or judicial function.[36] Yet, despite this unequivocal admission, Staff argues here for the application of *res judicata*, relying upon case law that is both inapplicable and unpersuasive.

In its comments, Staff cites *Scott v. East Cleveland*,[37] in which the appellate court summarily reiterated the proposition that *res judicata* may be applied to "quasi-judicial decisions made by administrative agencies."[38] But the appellate court did not conclude that *res judicata* also applies to settlements in administrative proceedings or even that it applies to every administrative proceeding. Indeed, the appellate court made no such finding whatsoever. And, as such, Staff's comments are insufficient to justify departure from controlling Supreme Court precedent and the Commission's own unambiguous interpretations.

Under Ohio precedent, it is undisputable that the administrative proceeding through which such legislative power was exercised, and on the basis of which the Commenting Parties challenge the Application, is not one to which the doctrines of *res judicata* or collateral estoppel can be applied.[39] For this reason alone, the Commission has no choice but to reject this argument of the Commenting Parties. But rejection is further warranted based upon a review of the specific elements required for either collateral estoppel or *res judicata*.

2. Elements of collateral estoppel are not met.

As the Ohio courts have 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 privity 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

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[36] Id.
[37] 16 Ohio App.3d 429 (Cuyahoga Cty. 1984).
[38] Id, at 431.
[39] *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).

necessary to the final judgment; and (4) the issue must have been identical to the issue involved in the prior suit.[40]

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.[41]

The Court has held 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."[42] In this regard, controlling precedent confirms that Commission 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."[43] In claiming that Duke Energy Ohio is collaterally estopped from pursuing the issues raised in its Application, the Commenting Parties rely solely upon the prior ESP proceeding. The first question is, therefore, whether there is a fact or issue in the Application that was actually and directly at issue in Duke Energy Ohio's ESP proceeding and 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. 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

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[40] *Board of Commissioners, Butler County v. City of Hamilton*, 145 Ohio App.3d 454, 465 (2001), citing *State ex rel. Smith v. Smith*, 110 Ohio App.3d 336 (1996). See also, *State ex rel. Davis v. Public Employees Retirement Board*, 120 Ohio St.3d, 386, 392 (2008), citing *Ft. Frye Teachers Ass'n, OEA/NEA v. State Employment Relations Board*, 81 Ohio St.3d 392, 395 (1998).

[41] *McCabe Corp. v. Ohio Environmental Protection Agency*, 2012 Ohio 3643, ¶8 (internal citations omitted).

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

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

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.[44] Thus, by considering the ESP Stipulation under R.C. 4928.143, the Commission did not directly determine the issue of 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.[45] In other words, that which was prosecuted in respect of the ESP proceeding is not that which forms the basis for these current proceedings. And collateral estoppel therefore cannot – and does not – bar the present Application.

Although a purely academic discussion, even if the Commission had been considering the substantive issues underlying the ESP Stipulation, it still would not have been determining the same issues that are relevant to the present Application. The ESP Stipulation involved the SSO under which Duke Energy Ohio would provide competitive retail electric service, as required under R.C. 4928.141.[46] But the provision of capacity consistent with an FRR obligation, which is the basis for this Application, is not a competitive retail electric service. Rather, as the Commission has confirmed, it is a noncompetitive wholesale service to which the market-based

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[44] *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, at pp. 42-44 (Nov. 22, 2011).

[45] *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).

[46] 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).

pricing contemplated under Chapter 4928, Revised Code, is inapplicable.[47] Thus, pursuant to the Commission's own rulings, the services that were at issue in the ESP proceeding are not the same services as those that form the basis of the Application. As such, even if the parties in the ESP proceeding had not entered into a stipulation, the Commission would not have been considering the issue of the just and reasonable compensation to which the Company is entitled in providing a noncompetitive, non-retail service.

Duke Energy Ohio's ESP established an SSO 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, R.C. 4905.13, R.C. 4909.18, and related sections such as R.C. 4905.22, establishing the amount of the cost-based charge for intrastate wholesale capacity, consistent with the existing state compensation mechanism.[48] These proceedings are separate and dissimilar. As the Commission's Opinion and Order in Case No. 10-2929-EL-UNC 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."[49] The Commission thereafter determined that "the state mechanism shall be based on the costs incurred by the FRR entity for its FRR capacity obligations... ."[50] 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.[51] The Commission also adopted this new methodology, in reliance upon

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[47] *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 (Oct. 17, 2012).
[48] Id, Opinion and Order (July 2, 2012)(emphasis added).
[49] Id, at 22.
[50] Id, at 23.
[51] Id, at 22. *See also* Concurring Opinion, at pg. 3 ("a cost-based compensation method is necessary and appropriate")(July 2, 2012).

traditional rate-making principles, to establish a just and reasonable cost for the provision of noncompetitive, wholesale capacity by an FRR entity.[52]

Here, Duke Energy Ohio is seeking just and reasonable compensation for the unique services that it provides as an FRR entity, similar to other FRR entities in the state, and in accordance with the formulaic methodology that the Commission has just recently found appropriate to fairly and reasonably compensate a similarly situated utility. Thus, contrary to the suggestions of the Commenting Parties, 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 PJM's Reliability Assurance Agreement (RAA), was not fully and fairly litigated as part of the Company's ESP. Duke Energy Ohio was not heard on this issue and certainly 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. Duke Energy Ohio's due process rights would be violated should the Commission find that this issue was litigated, directly determined, and essential to the judgment in the prior action.

3. Elements of *res judicata* are not met

Similarly, the doctrine of *res judicata*, or estoppel by judgment, is not applicable here. 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.[53] There must be an identity of claims that have been passed upon by a court of competent jurisdiction before *res judicata* can be applied.[54] 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*

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[52] Id. (Under Ohio law, "all charges for service *shall* be just and reasonable.")(Emphasis added.)
[53] *Grava v. Parkman Township*, 73 Ohio St.3d 379, 382 (1995).
[54] See, *e.g., Vectren Energy Delivery of Ohio, Inc. v. Public Utilities Commission of Ohio*, 2007-Ohio-1386, ¶30.

does not bar the second action.[55] And consideration of this doctrine requires adhering to the Ohio Supreme Court's instruction that *res judicata* should not be applied so rigidly "as to defeat the ends of justice or so as to work an injustice."[56]

Again, the claims at issue in the prior and pending proceedings are separate and distinct: one addressing competitive retail pricing and one addressing noncompetitive wholesale pricing. In connection with the ESP proceeding, the stipulated claims 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 competitive retail price for capacity as provided under an SSO.[57] The evidence needed to support the ESP Stipulation is 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.[58] On the other hand, 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 service, under Chapters 4905 and 4909 of the Revised Code and consistent with the existing state compensation

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[55] *Norwood v. McDonald*, 142 Ohio St. 299, 306, *rev'd on other grounds* (1943); *Grava, supra.*
[56] *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 490 (2001).
[57] *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 (Oct. 28, 2011)(requested ESP included a retail price for capacity).
[58] See footnote 46, *supra.*

mechanism as provided for under RAA.[59] Duke Energy Ohio's costs to provide the noncompetitive wholesale capacity service pursuant to its FRR obligations were not addressed in the ESP Stipulation. Neither was the recovery of such costs so addressed. 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 noncompetitive, 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 either a stipulation or an SSO 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."[60] The items included within the statute's 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 include all such matters affecting a utility's provision of service or forever lose the right to include such matters in a separate proceeding.[61] Nevertheless, under the Commenting Parties' theory that the Application here is barred, by *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 and fulfillment of its obligations. As between Duke Energy

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[59] *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).
[60] R.C. 4928.143(B)(2).
[61] *In re Application of Columbus Southern Power Company*, 128 Ohio St.3d at 520-521.

Ohio's ESP Stipulation and this Application, the claims are indeed different and the same evidence will not – and cannot – sustain both. As such, *res judicata* cannot, under applicable law, be invoked to bar these proceedings.

III. POLICY ISSUES

A. A state compensation mechanism that does not uniformly apply to similarly situated public utilities invites uncertainty and unpredictability in the regulatory arena.

Throughout their comments, the Commenting Parties attack the Application on the grounds of principle, implying that the relief requested herein must denied as an ill-fated "copycat" attempt at ratemaking.[62] In this regard, the OCC and OEG contend that these proceedings should be rejected because the decision in Case No. 10-2929-EL-UNC, which would include its underlying rationale, must necessarily be limited in its application to AEP Ohio.[63] Indeed, AEP Ohio itself also attempts to secure disparate outcomes by arguing that a state compensation mechanism must vary by FRR entity and that the outcome in its capacity case cannot, by law, be applied to any other FRR entity providing similar capacity services in the state, pursuant to the RAA.[64] These flawed comments necessitate a broader discussion of the need for predictability and consistency in regulatory proceedings, which the Supreme Court expects.

At the outset, it is noted that, historically, the Commission has often administered similar and consistent treatment among utilities. For example, in 2003, the Commission approved for Dayton Power and Light (DP&L) a rate stabilization plan (RSP), a plan the elements of which

[62] IEU-Ohio Initial Comments, at pg. 47 (Jan. 2, 2013).
[63] OCC and OEG Initial Comments, at pp. 2-3 (Jan. 2, 2013).
[64] AEP Ohio Initial Comments, at pg. 4 (Jan. 2, 2013).

were not expressly set forth in Title 49 of the Revised Code.[65] In approving this RSP in the context of an application initiated by just one utility (DP&L), the Commission encouraged similarly situated electric utilities to also seek RSPs.[66] These other electric utilities did, in fact, follow the request made in the DP&L case and separately filed RSPs, all of which were ultimately approved by the Commission.[67]

Similarly, in establishing ROEs, the Commission invokes a uniform evaluation that gives formal consideration to comparable utilities. Thus, although Ohio's utilities may not have identical ROEs, the process in which the Commission determines such ROEs is consistent, uniform, and predictable. Moreover, the Commission has determined the reasonableness of an ROE for one utility with reference to its affiliated, but non-jurisdictional, companies engaged in like transactions.[68]

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[65] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, *et al.*, Opinion and Order (Sept. 2, 2003).

[66] Id, at 29 ("[w]e encourage other electric utilities to consider such options if competitive electric markets have not fully developed in the service territory by the end of their [market development periods]").

[67] *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period*, Case No. 03-93-EL-ATA, *et al.*, The Cincinnati Gas & Electric Company's Filing in Response to the Request of the Public Utilities Commission of Ohio to File a Rate Stabilization Plan (Jan. 26, 2004); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA, *et al.*, Application (Oct. 21, 2003); and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Application (Feb. 9, 2004).

[68] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing, at pg. 37 (Oct. 17, 2012).

The Commission has also administered similar and consistent treatment among the state's natural gas utilities in respect of facility upgrades and installations, as well as timely recovery of costs incurred by the natural gas companies in performing a service.[69]

Thus, whether for comprehensive rate plans, replacements programs, ROEs, or even uncollectible expense trackers, the Commission has historically treated similarly situated utilities in a consistent fashion. Although the specific rates or methods of cost recovery may differ somewhat, the underlying regulatory principles, methodologies and processes employed by the Commission are reliable. And it is likely that this reliable, consistent approach derives from the Supreme Court's guidance and instruction. In the words of the Court, the Commission should "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law."[70]

Here, however, the Commenting Parties seemingly ignore precedent and instead encourage the Commission to inject **un**certainty and **un**predictability in the regulatory process. Indeed, accepting the statements of the Commenting Parties that the Application is barred by prior stipulations undeniably invites disparate treatment among similarly situated utilities

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[69] *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Distribution Service,* Case No. 08-72-GA-AIR, *et al.*; *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Alternative Rate Plan for a Distribution Replacement Rider to Recover the Costs of a Program for the Accelerated Replacement of Cast Iron Mains and Bare Steel Mains and Service Lines, a Sales Reconciliation Rider to Collect Differences between Actual and Approved Revenues, and Inclusion in Operating Expenses of the Costs of Certain Reliability Programs*, Case No. 07-1081-GA-ALT, *et al.*; and *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause and for Certain Accounting Treatment*, Case No. 08-169-GA-ALT, *et al.* See also, *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 (adoption of accelerated main replacement program similar to that first implemented by Duke Energy Ohio, including cost recovery) and *In the Matter of the Investigation of the Installation, Use, and Performance of Natural Gas Service Risers throughout the State of Ohio and Related Matters*, Case No. 05-463-GA-COI, Finding and Order, at finding 21 (March 12, 2008)(reciting applications made by numerous local distribution companies to adopt the same outcome as was recommended by Staff and applied to Columbia Gas Company with regard to natural gas risers).

[70] *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 64 Ohio St.3d 123, 128 (1992), citing *Cleveland Elec. Illum. Co. v. Public Utilities Commission of Ohio*. 42 Ohio St.2d 403, 431 (1975). See also, *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*, 10 Ohio St.3d 49, 51 (1984).

providing the same services. It denies the Commission the opportunity to fulfill its admitted obligation of ensuring that utilities subject to its regulation and oversight are fairly and justly compensated for the services that they provide. The outcome sought by the Commenting Parties would deny the Commission the ability to achieve its objective of ensuring financial integrity in the Ohio utility industry.[71] And this outcome should be rejected. Rather, to continue to enable consistency and predictability in the regulatory arena and to ensure the financial viability of utilities subject to its regulation, the Commission should not now be persuaded by the Commenting Parties' suggestions to engage in biased decision-making. This is especially apparent where the suggestions are asserted solely as a function of self-preservation.

Here, AEP Ohio maintains that it, alone, is entitled to recover its costs for capacity; that no other FRR entity providing similar services can receive compensation that is determined by the same formulaic methodology applied to it. But before now, AEP Ohio held steadfastly to the notion of similar treatment among similarly situated utilities. Indeed, in seeking Commission approval to transfer its generating assets, AEP Ohio remarked that it would not be in the public interest for the Commission to apply the same rule to similarly situated utilities in inconsistent manners.[72] AEP Ohio offers no justification now for a departure from its desire to preserve and protect the public interest.

Duke Energy Ohio acknowledges that the Commission, on rehearing in the AEP Ohio capacity case, clarified that its decision in respect of a capacity charge of $188.88/MW-Day applied to AEP Ohio; a clarification predicated upon the fact that the proceeding initiated in that

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[71] See http://www.puco.ohio.gov/puco/index.cfm/about-the-commission/mission-and-commitments/ (Commission mission includes "[e]nsuring financial integrity ... in the Ohio utility industry").

[72] *In the Matter of the Application of Ohio Power Company for Approval of An Amendment to Its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, Reply Comments of Ohio Power Company, at pg. 14 (Dec. 29, 2011)("it is not in the public interest for the Commission to apply the same rule to similar facts in an inconsistent manner").

case concerned AEP Ohio.[73] But in making this clarification, the Commission also reiterated its "obligation under traditional rate regulation to ensure that jurisdictional utilities receive just and reasonable compensation for the services they render."[74] Moreover, the Commission did not, in its rehearing entry, foreclose any other similarly situated utility from seeking compensation consistent with the formulaic methodology it employed in the AEP Ohio matter. Thus, there is no prohibition resulting from the AEP Ohio entry on rehearing sufficient to bar these proceedings. And certainly this conclusion is reflective of the Commission's historical propensity to administer consistent treatment among utilities.

Duke Energy Ohio agrees that the specific dollar amount of compensation to which a utility is entitled for providing capacity services should vary with regard to actual costs incurred. Indeed, Duke Energy Ohio's Application confirms that its cost-based charge is not identical to that approved for AEP Ohio.[75] But the **process**, which is predicated upon traditional regulation, should not materially differ. As noted above, the Commission and its Staff have routinely and consistently invoked similar methodologies or evaluations for purposes of setting utility rates, although such processes have yielded different resulting rates for the individual utilities. Likewise, the Commission and its Staff have routinely and consistently invoked previous Commission decisions, relating to different utilities, as support for the decision in a case under consideration. Thus, as set forth in its Application, Duke Energy Ohio is not seeking the identical charge the Commission found appropriate to justly and reasonably compensate a similarly situated utility. Rather, it is seeking the establishment of a Company-specific capacity

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[73] *In the Matter of the Commission Review of the Capacity Charge of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing, at pg. 32 (Oct. 17, 2012).
[74] Id, at 28.
[75] Application, at pg. 8 (Aug. 29, 2012)(requested cost-based charge of $224.15/MW-Day). *Cf. 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. 33 (July 2, 2012)(approved cost-based charge of $188.88/MW-Day).

charge that is derived from the formulaic methodology the Commission found reliable and appropriate in determining the sufficient level of compensation to which a similarly situated FRR entity was entitled. The Application, therefore, does not deviate from the approach expected by the Ohio Supreme Court and historically employed by the Commission.

B. The rationale underlying the decision in the AEP Ohio capacity case cannot be restricted to deny Duke Energy Ohio just and reasonable compensation.

As discussed above, various Commenting Parties reject the notion that Duke Energy Ohio is entitled to just and reasonable compensation for the noncompetitive, wholesale capacity services it is providing. In doing so, they raise arguments that have already been rejected by the Commission and ignore the rationale on which the Commission relied in arriving a state compensation mechanism. The rationale espoused by the Commission cannot be limited to AEP Ohio to the exclusion of other utilities in the state.

As the Commission has recently confirmed, it has the obligation to ensure that jurisdictional utilities are afforded just and reasonable compensation for the services they provide. And insofar as it concerns capacity service provided consistent with an FRR obligation, such a service is not a competitive retail electric service subject to regulation under Chapter 4928 of the Revised Code. Rather, because it is a service that only one entity in the service territory – the FRR entity – is providing, it is a service subject to traditional, cost-of-service principles. To accept the Commenting Parties' argument that this rationale can be applied only to AEP Ohio, to the exclusion of another FRR entity providing the exact same service in its own service territory with resultant undue financial harm, is not only illogical, but denies Duke Energy Ohio its constitutional right to equal protection under the law. And under the federal and state equal protection clauses, the government must treat all similarly situated individuals in a similar

manner.[76] "All political power is inherent in the people. Government is instituted for their equal protection and benefit."[77]

The Ohio Supreme Court has found that a statute, or in this case, a statute's application, will be upheld only if it is rationally related to a legitimate government purpose.[78] "Distinctions are invalidated only where 'they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.'"[79] In the present situation, Duke Energy Ohio and AEP Ohio both are FRR entities and both suffer serious financial harm as a direct result of that status. No legitimate state interest can possibly support allowing AEP Ohio to be relieved of that harm while forcing Duke Energy Ohio to continue to suffer it.

IV. JURISDICTION AND APPLICABLE LAW

A. The Commission is vested with jurisdiction under Chapters 4905 and 4909 to approve the proposals set forth in the Company's Application.

Although IEU-Ohio asserts that the Commission has no jurisdiction to approve the Application under Chapters 4905 and 4909 of the Revised Code,[80] it should be clearly understood that this issue has already been addressed. The Commission has repeatedly stated that it has such jurisdiction. Upon opening a recent capacity proceeding, it found:

> Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction.[81]

Its Opinion and Order in that same case confirmed the Commission's jurisdiction.

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[76] *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 140 (2008), citing *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272 (2005).
[77] Ohio Constitution, Section 2, Article 1.
[78] See, *e.g.*, *Abrino v. Johnson & Johnson*, 116 Ohio St.3d 468, 481 (2007); *In re D.B.*, 129 Ohio St.3d 104, 106 (), quoting *United States v. Eichman*, 496 U.S. 310, 312 (1990)("A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts.").
[79] *Discount Cellular, Inc. v. Public Utilities Commission*, 112 Ohio St.3d 360 (2007)(internal citations omitted) (Court upheld Commission distinction between complaints filed before and after effective date of statutory exemptions, as appellants did not show that exempting certain cellular service providers from complaint procedures was not rationally related to a legitimate state interest).
[80] IEU-Ohio Initial Comments, at pp. 9-22 (Jan. 2, 2013).
[81] *In the Matter of the Commission Review of the Capacity Charge of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry, at finding 2 (Dec. 8, 2010).

> We affirm our prior finding that Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission the necessary statutory authority to establish a state compensation mechanism.[82]

Subsequently, in an Entry on Rehearing relating to the same proceeding:

> As stated in the Initial Entry, Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction. The Commission's explicit adoption of [a state compensation mechanism] for AEP-Ohio was well within the bounds of this broad statutory authority. ...[T]he investigation initiated by the Commission in this proceeding was consistent with Section 4905.26, Revised Code, as well as with our authority under Sections 4905.04, 4905.05, and 4905.06, Revised Code.[83]

And at the Ohio Supreme Court, on the very same topic:

> The Commission has wide-ranging authority over public utilities in Ohio that this Court has described as "broad and complete." ...The Commission thus has "exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service."[84]

Contrary to IEU-Ohio's arguments concerning the Commission's jurisdiction, capacity service provided in the context of an FRR plan is not a competitive retail service subject to regulation under Chapter 4928. Indeed, as the Commission has observed, "capacity service should be considered non-competitive...on the simple factual observation that 'no other entity may provide this service during the term'" of the FRR plan.[85] Consequently, the charge applicable to such a service is not limited to market rates. The Commission's jurisdiction over the Application does not arise out of Chapter 4928; it arises out of the Commission's traditional rate regulation under Chapters 4905 and 4909 of the Revised Code. This is not the appropriate

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[82] Id, Opinion and Order, at pg. 12 (July 2, 2012).
[83] Id, Entry on Rehearing, at finding 27 (Oct. 17, 2012).
[84] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, at pp. 6-7 (Sept. 25, 2012)(internal citations omitted).
[85] Id, at 9.

forum for IEU-Ohio's arguments concerning the merits of the Commission's decision in AEP Ohio's proceedings.

B. The Commission can authorize the requested deferrals outside of R.C. 4928.144.

OPAE maintains that the Commission cannot authorize the deferral requested herein because the Commission can only authorize a phase-in of capacity charges under R.C. 4928.144 and that statutory provision relates solely to charges established in an approved SSO.[86] In other words, OPAE maintains that the Commission must first approve capacity charges in the context of an SSO before ordering that said charges be phased in. IEU-Ohio advances similar arguments regarding the Commission's authority to approval deferrals.[87] These comments are both wrong and premature.

First, R.C. 4928.144 clearly provides that the Commission "may authorize any...phase-in of any...rate or price **established under sections 4928.141 to 4928.143 of the Revised Code**... ." (Emphasis added.) Thus, for the Commission to exercise authority under R.C. 4928.144, it must be presented with a rate or price established in either an MRO or an ESP. That is, R.C. 4928.144 does not empower the Commission to phase in all charges of a distribution utility, just those established in the utility's SSO proceeding. And as has been explained above, the underlying service at issue – wholesale capacity – is not a competitive retail electric service subject to regulation under Chapter 4928. Thus, the establishment of a charge associated with wholesale capacity service is appropriately done under Chapter 4905, as the Commission has repeatedly determined. As such, the deferral provisions of R.C. 4928.144, including the phasing in of **any** SSO charge, are immaterial.

[86] OPAE Initial Comments, at pg. 3 (Jan. 2, 2013).
[87] IEU-Ohio Initial Comments, at pp. 24-25 (Jan. 2, 2013).

Second, it is undeniable that Duke Energy Ohio is not seeking immediate recovery of its costs associated with fulfilling its FRR obligations, whether through a phase-in or otherwise. Rather, the requested charge is for a new service, never before tariffed; namely, capacity service that is provided consistent with the existing state compensation mechanism and pursuant to the Company's obligations as an FRR entity. And with respect to this charge, Duke Energy Ohio is requesting authorization to create a regulatory asset and to defer, for future recovery, the incremental difference between its embedded costs for capacity and market prices. Consequently, R.C. 4928.144 does not preclude the Commission from authorizing the deferral requested herein. Rather, such request is undeniably permitted by R.C. 4905.13, which unambiguously affords the Commission authority "to prescribe the manner in which ... accounts shall be kept" and "to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. And the rider for recovery of deferred balances can be implemented in a separate proceeding for tariff amendment, given that this is a new service; one that has not previously been included in Duke Energy Ohio's Commission-approved tariffs.[88]

IEU-Ohio seems to be suggesting that R.C. 4905.13 has been rendered void by the enactment of R.C. 4928.144. But if IEU-Ohio were correct, the **only** deferrals that the Commission could ever authorize would be those related to the provision of competitive retail electric service and the Commission's power under R.C. 4905.13 would become illusory. But the legislature has not rescinded R.C. 4905.13. As the Commission understands,[89] R.C. 4905.13 enables the Commission to exercise its deferral authority as requested in these proceedings.

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[88] R.C. 4909.18. See, *e.g.*, *In the Matter of Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC.

[89] See *In the Matter of Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC.

In its discussion related to R.C. 4928.144, IEU-Ohio observes that said provision mandates the Commission's adherence to generally accepted accounting principles (GAAP). IEU-Ohio further alleges that Duke Energy Ohio's deferral request is incompatible with this statutory mandate. Although Duke Energy Ohio's deferral request is entirely compliant with GAAP, it is also important to first realize that the accounting mandates reflected in R.C. 4928.144 are inapplicable to the deferral request in these proceedings. Furthermore, it is incorrect for IEU-Ohio to contend that the Company is seeking only to defer revenue as the deferral is predicated upon a cost-based charge that is offset by certain revenues received. This circumstance is no different than the deferral authorized by the Commission in Case No. 11-346-EL-SSO, *et al.*[90] And IEU-Ohio's focus on what an inapplicable statutory provision may require is irrelevant to these proceedings.

C. The statutory provision related to emergency rate relief is not applicable to these proceedings.

In an attempt to refute the undeniable financial hardship confronting Duke Energy Ohio absent the approval of the Application, OCC and OEG contend that the Company is now violating the intent of Rider ESSC and, in such a circumstance, can only seek rate relief through emergency proceedings initiated pursuant to R.C. 4909.16.[91] IEU-Ohio similarly comments that Duke Energy Ohio must comply with the requirements of R.C. 4909.16 in order to obtain relief.[92] But OCC, OEG, and IEU-Ohio misinterpret both the ESP Stipulation and the law.

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[90] *In the Matter of the Application of Columbus Southern Power Company and Oho 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. 52 (Aug. 8, 2012)(approval of regulatory asset to defer "the incurred costs equal to the amount not collected, plus carrying charges") and *In the Matter of 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. 39 (Oct. 17, 2012)("authorization of deferral is not contrary to GAAP or prior precedent").

[91] OCC and OEG Initial Comments, at pp. 8-9 (Jan. 2, 2013).

[92] IEU-Ohio Initial Comments, at pp. 38-40 (Jan. 2, 2013).

R.C. 4909.16 provides the Commission with the ability to prevent injury to a utility through a temporary adjustment to rates. But this provision is not unlimited and thus cannot be employed to avoid undue financial harm in every circumstance. Indeed, by its clear and unequivocal terms, R.C. 4909.16 applies only to adjustments of **existing** rates.[93] Here, Duke Energy Ohio is not seeking to adjust any existing rate. Indeed, unlike AEP Ohio, Duke Energy Ohio's capacity obligation as an FRR Entity did not even exist prior to January 2012, coincident with its realignment to PJM. As discussed at length above, Duke Energy Ohio is seeking the establishment of a new charge – a charge for a service other than a competitive retail service. Duke Energy Ohio is not seeking adjustment of an existing rate.

It is curious and contradictory for the OCC and OEG to contend both that the charge at issue was provided for in an ESP and that Duke Energy Ohio must look to R.C. 4909.16 for relief. As dictated by R.C. 4928.05, the emergency rate relief provisions of R.C. 4909.16 do not apply to rates established pursuant to Chapter 4928 of the Revised Code. In other words, rates approved in the context of an MRO or ESP cannot be temporarily adjusted using the process provided for in R.C. 4909.16. Thus, if the charge at issue had been resolved by way of an ESP (which it was not), it could not legally be adjusted pursuant to the provisions of R.C. 4909.16. And these comments from the OCC, OEG, and IEU-Ohio must therefore be interpreted merely as an attempt to manufacture an objection to an otherwise statutorily permissible Application.

D. The requested cost-based charge associated with the fulfillment of Duke Energy Ohio's FRR obligations is not a request for a change in existing rates.

Kroger, OCC, and OEG all comment that the Application filed in these proceedings seeks a change in an existing rate such that a hearing is required. Alternatively, OCC and OEG suggest that the revision to an existing rate can be accomplished via a complaint case under R.C.

[93] R.C. 4909.16.

4909.28. IEU-Ohio and FES similarly maintain that the Company failed to adhere to the largely procedural requirements set forth in R.C. 4909.18 and, as such, the Application is defective.[94] As discussed herein, all of these claims are unfounded.

The charge that Duke Energy Ohio seeks to establish through these proceedings is not a charge associated with its SSO because the service at issue – the provision of capacity by an FRR entity – is not a competitive retail electric service. Thus, as discussed above at length, Duke Energy Ohio is not seeking to adjust, alter, or amend **any** rate that was approved as part of its existing ESP. Rather, the charge relates to a new service: the provision of capacity consistent with the state's existing compensation mechanism. And, as the Commission has held, a new service is not subject to the filing requirements applicable to base rate cases.[95]

Similarly, as Duke Energy Ohio is not seeking to adjust an existing rate, the complaint process set forth in R.C. 4909.28 is inapplicable.[96]

FES, IEU-Ohio, OCC, and OEG contend that the Commission is obligated here to follow the procedures set forth in Chapter 4909 of the Revised Code, which speak to, among other topics, a proposed test year and notification.[97] But R.C. 4909.18 provides that "[i]f the commission determines that said application is **for an increase in any rate, joint rate, toll, classification, charge or rental** there shall also, unless otherwise ordered by the commission, be filed with the application" specific information relating to used and useful property, sources of

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[94] Kroger Initial Comments, at pp. 4-6 (Jan. 2, 2013); OCC and OEG Initial Comments, at pp. 4-6 (Jan. 2, 2013); IEU-Ohio Initial Comments, at pp. 9-11 (Jan. 2, 2013); and FES Initial Comments, at pp. 12-13 (Jan. 2, 2013).

[95] *Cookson Pottery v. Public Utilities Commission of Ohio*, (1954), 161 Ohio St. 498, 504-505 ("an application not involving a rate increase...necessarily includes an application to either establish for the first time a new rate or to reduce the rate once established")(emphasis added). See also, *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Motion to Dismiss Submitted on behalf of the Public Utilities Commission of Ohio, at pg. 8 (Sept. 25, 2012)(Commission not required to conduct a traditional base rate case under R.C. 4909 for purposes of determining just and reasonable compensation for capacity services).

[96] By its express and unambiguous terms, R.C. 4909.28 applies only to an existing rate, fare, charge, or classification, any joint rate, or any regulation or practice.

[97] FES Initial Comments, at pp. 12-13 (Jan. 2, 2013); IEU-Ohio Initial Comments, at pp. 16-18, 20-22 (Jan. 2, 2013); and OCC and OEG Initial Comments, at pg. 4 (Jan. 2, 2013).

revenue and income, anticipated income and expense, financial condition, and notification.[98] As this language undeniably instructs, detailed submissions and notifications are required only in the context of an increase in rates. As the Commission has recently confirmed, the procedures to which these intervenors refer do not apply to a "'first-filing' of rates for a service not previously addressed in a PUCO-approved tariff."[99] Nor do they apply to an application that does not seek an increase in rates. As discussed above, Duke Energy Ohio is not seeking an increase in existing rates[100] and, as such, the detailed procedures that FES, IEU-Ohio, OCC, and OEG are urging do not apply to these proceedings.

IEU-Ohio also contends that Duke Energy Ohio failed to comply with the requirements applicable to SSOs in making its filing.[101] But as the Commission has affirmed, noncompetitive capacity services provided by an FRR entity are not subject to regulation under Chapter 4928 of the Revised Code. And, as such, these proceedings do not implicate that chapter or the filing requirements applicable thereunder.

The Company's Application is procedurally appropriate.

E. For purposes of these proceedings, Duke Energy Ohio is not required to demonstrate that its existing ESP is more favorable, in the aggregate, than the results expected under an MRO.

Both FES and IEU-Ohio contend that the Application violates Chapter 4928, Revised Code, as Duke Energy Ohio has not demonstrated that, upon receipt of cost-based charges for

[98] R.C. 4909.18 (emphasis added).
[99] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, at pg. 10 (Sept. 25, 2012). See also, R.C. 4909.18.
[100] Application, at pg. 4 (Aug. 29, 2012).
[101] IEU-Ohio Initial Comments, at pg. 22 (Jan. 2, 2013).

capacity service, its ESP would remain more favorable, in the aggregate, than the expected results of an MRO.[102] But this contention misapplies the law and should be disregarded.

The specific provision upon which FES and IEU-Ohio rely for this comment provides, in relevant part, as follows:

> [T]he commission by order shall approve or modify and approve an application filed under division (A) of [section 4928.143 of the Revised Code] if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.[103]

As this provision makes clear, for the in-the-aggregate test to be required, the application in question must have been seeking approval of an ESP, pursuant to R.C. 4928.143. Indisputably, the Application in these proceedings was not filed under that section and does not seek approval of an ESP. Further, the relevant comparison for purposes of this test is the ESP and all of its components versus the results expected under an MRO. The cost-based charge requested by Duke Energy Ohio is not a component of its ESP. The test is inapplicable.

F. The Application is not an improper request for retroactive rate recovery.

The OCC and OEG wrongly contend that the Company's Application impermissibly seeks retroactive ratemaking.[104] But these Commenting Parties misinterpret the Application and misapply widely accepted regulatory principles.

Herein, Duke Energy Ohio is seeking the establishment of a cost-based charge for the provision of a noncompetitive service. And it is seeking Commission authority to defer the difference between this cost-based rate and market prices. This concept – a deferral of incurred costs with subsequent recovery thereof – is not unique to these proceedings and does not

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[102] FES Initial Comments, at pg. 6 (Jan. 2, 2013); and IEU-Ohio Initial Comments, at pp. 22-25 (Jan. 2, 2013).
[103] R.C. 4928.143(C)(1).
[104] OCC and OEG comments, at pg. 17. IEU-Ohio also improperly asserts claims of retroactive ratemaking, which are addressed in Section VI.D., *infra*.

constitute unlawful retroactive ratemaking. Indeed, the Commission, under the broad authority afforded it by R.C. 4905.13, has routinely and consistently authorized deferrals of previously incurred costs.[105] And it has authorized subsequent recovery of such deferred costs.[106]

G. The cost-based charge requested in these proceedings is not a substitute for transition revenues.

IEU-Ohio claims that the charge requested herein is, in actuality, a transition charge that Duke Energy Ohio is precluded from receiving.[107] IEU-Ohio is wrong – the Company is not seeking any sort of transition charge, as that term is defined in R.C. 4928.39.[108]

R.C. 4928.39 clearly states that transitions costs must be those that are "directly assignable or allocable to retail electric generation service provided to electric consumers in this state." Here, however, the charge attributed to Duke Energy Ohio's FRR obligations does not pertain to a retail electric generation service and thus cannot, by law, be treated as transition revenue. Furthermore, the Commission has previously rejected precisely this argument. In its recent order concerning AEP Ohio's ESP, the Commission responded to this same claim by

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[105] See generally, *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM, Opinion and Order, at pp. 2-3 (approval to defer remediation costs incurred after January 1, 2008) and *In the Matter of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Opinion and Order, at pg. 3 (approval to defer remediation costs incurred after January 1, 2008).

[106] See generally, *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period*, Case No. 03-93-EL-ATA, *et al.* (approval of Rider DRI, applicable to capital investment in distribution business); *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 recover deferred riser replacement costs); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates, Case No. 08-709-EL-AIR, Opinion and Order* (July 8, 2009)(approval of deferral for storm restoration costs); and *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of Rider DR*, Case No. 09-1946-EL-RDR, Opinion and Order (Jan. 11, 2011)(recovery of costs incurred in September 2009).

[107] IEU-Ohio Initial Comments, at pp. 28-34 (Jan. 2, 2013).

[108] *In the Matter of 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. 56 (Oct. 17, 2012)(provision of capacity is not a competitive retail electric service; therefore, costs do not fall within statutory definition of transition charges).

holding that the amounts "over RPM auction capacity prices cannot be labeled as transition costs or stranded costs."[109] These are not transition charges and the stipulations from the Company's electric transition plan proceedings are irrelevant.[110]

V. FINANCIAL ARGUMENTS

A. The undue financial harm confronting Duke Energy Ohio is not self-inflicted, subject to being remedied simply by a transfer of assets.

In their comments, OCC and OEG contend that any financial harm to Duke Energy Ohio is self-inflicted; that it could avoid such harm by merely transferring generating assets to an affiliate. OCC and OEG inappropriately maintain that the Company is looking for a "bail out."[111] But OCC and OEG fail to fully understand the FRR obligations imposed upon Duke Energy Ohio. Their comments are misplaced.

Duke Energy Ohio is the FRR entity; it is the single entity bound by PJM tariffs and other agreements to self-supply the requisite capacity for its load zone. As the Commission appreciates, "no other entity may provide this service" for the term of the Company's FRR plan,[112] which expires on May 31, 2015. Accordingly, regardless of when the assets are transferred to an affiliate, the obligation will remain and those assets will already have been committed to fulfilling said obligations. It is thus appropriate to allow the charge through the term of the Company's FRR plan and further allow for the necessary financial support to be

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[109] *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. 32 (Aug. 8, 2012).

[110] *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP.

[111] OCC and OEG Initial Comments, at pp. 9-12 (Jan. 2, 2013).

[112] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, at pg. 9 (Sept. 25, 2012).

transferred to the asset owner.[113] Consequently, the need for fair and reasonable compensation is not a self-made circumstance, the duration of which persists only as long as the generating assets are held by the Company. Rather, the need is real, the denial of which will result in undue financial harm and illegal confiscatory treatment.

In their continued attempt to deny Duke Energy Ohio the compensation to which it entitled, OCC and OEG maintain that, as a result of the ESP Stipulation, the generating assets are effectively "unregulated" such that they are not subject to cost-based regulation.[114] And again, OCC and OEG misinterpret the ESP Stipulation, as whole.

The ESP Stipulation does make provision for competitive auctions for SSO supply and it further states that the auction product shall be a full requirements product. But the ESP Stipulation also expressly acknowledges Duke Energy Ohio's FRR commitments and, indeed, describes a process by which Duke Energy Ohio would seek to an early termination of that commitment. It is thus evident from the ESP Stipulation, which both the OCC and OEG signed, that the Company's obligations as an FRR entity were identified. Importantly, however, the ESP Stipulation did not establish the compensation to Duke Energy Ohio for these wholesale FRR services consistent with its FRR obligations. Rather, as discussed above, the ESP Stipulation only set forth the charge **by PJM to suppliers** for capacity. And even under the auction structure, Duke Energy Ohio is self-supplying capacity for its load zone through May 31, 2015, as required by PJM tariffs and agreements.

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[113] *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. 60 (approval to transfer cost-based capacity revenue to affiliated generation owner upon asset transfer).

[114] OCC and OEG Initial Comments, at pp. 12-13 (Jan. 2, 2013).

B. The just and reasonable compensation requested in these proceedings cannot be negated by prior earnings.

OCC and OEG contend that its Application should fail because the Company has, historically, had earnings in excess of "a regulated return" for the past ten years.[115] This argument is irrelevant. These proceedings relate solely the services provided by Duke Energy Ohio consistent with its FRR obligations; obligations that first arose effective January 1, 2012, when Duke Energy Ohio became an FRR entity. And as the Commission has observed in evaluating fair and reasonable compensation, the relevant financial considerations are temporal in nature. In this regard, market prices applicable to the term of Duke Energy Ohio's FRR obligation serve as the only comparison for whether the Company is being adequately compensated for the services provided consistent with that obligation. And given that the Commission has found that projected ROEs of 2.4 percent and 7.6 percent are insufficient, it necessarily follows that the projected ROE of negative 8.90 percent, for the period August 1, 2012, through May 31, 2015, is confiscatory. And in this regard, Duke Energy Ohio is unaware of any of the Commenting Parties, including Staff, having ever previously argued that a negative ROE is just and reasonable compensation for a non-competitive service.

C. RPM pricing is not a reasonable form of compensation.

FES maintains that RPM pricing is appropriate because it provides the necessary signals for the construction or retirement of generation. FES continues that, in not limiting Duke Energy Ohio to the receipt of market-based prices, the market will be distorted. FES also states that, should Duke Energy Ohio be afforded cost-based compensation for its FRR capacity services, it would be the only entity to do so.[116]

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[115] Id, at 13-17.
[116] FES Initial Comments, at pp. 11-12 (Jan. 2, 2013).

PJM's RPM is, in actuality, comprised of two different procurement methods, both of which are sanctioned by the FERC. The first is the FRR option, wherein a load serving entity such as Duke Energy Ohio commits to self-supply capacity for an initial term of five years, with an option to elect subsequent, one-year terms. Under this option, it is the FRR entity that assumes the obligation to provide sufficient capacity to meet the load obligations of its zone. Further, under this option, alternate load serving entities have the express right to opt out and commit to self-supplying capacity. The second procurement method involves the base residual auction (BRA) commonly referenced as RPM, pursuant to which PJM assumes the obligation to provide sufficient capacity.

FES argues against any FRR entity receiving more than BRA pricing for capacity dedicated under an FRR plan, stating, among other things, that there is no difference between the commitment of capacity by an FRR entity and the commitment of capacity by other capacity suppliers.[117] But FES errs in its interpretation of the RAA; there is a difference between these two types of commitments. A non-FRR supplier that has committed a unit to the BRA can buy out of its position through a PJM-administered incremental auction. However, an FRR entity has no such option.

Aside from the capacity obligation – and which entity bears that obligation – the two procurement methods provide for different forms of compensation for capacity. As discussed in Section V, *infra*, the FRR option allows for one of three different pricing mechanisms, as described in the RAA. Importantly, and as the Commission has observed, these pricing mechanisms are **not** constrained by market pricing. Rather, where the state commission determines the appropriate capacity charge, it is the applicable state regulation that provides the necessary parameters for establishing appropriate compensation. Conversely, participants in the

[117] Id, at 8-11.

BRA are compensated for their capacity consistent with the results of the auction process. And as the commitments are different, as reflected in the different pricing mechanisms adopted by PJM and approved by the FERC, it cannot be said that FRR entities **must** be limited to the receipt of market-based pricing. If that were the intent of the PJM tariffs and agreements, Section D.8 of Schedule 8.1 of the RAA would be meaningless; there would be no need for pricing alternatives applicable to FRR entities. Furthermore, FES's argument overlooks the plain fact that neither Duke Energy Ohio's generation nor its load was in the BRA for any of the PJM planning years relevant to the term of its FRR plan. As such, Duke Energy Ohio should not be compensated based upon a process in which it did not participate and that fails to recognize its commitments as an FRR entity.[118]

Arguing a related theme, IEU-Ohio suggests that the Application should be denied on the grounds that the Company has not proven that its legacy generation assets are dedicated to serving the Ohio retail load and that FRR entities can theoretically satisfy their obligations to PJM through the use of bilateral contracts rather than owned capacity.[119] IEU-Ohio is wrong on both counts. Duke Energy Ohio's verified Application in these proceedings clearly stated that its legacy generating assets are dedicated to fulfilling the Company's capacity obligations as an FRR entity. Further proof of such fact will be provided through the hearing that the Commission has scheduled. In addition, it must be understood that PJM's tariffs do not prescribe how an FRR entity is to meet its capacity supply obligation. Nor has the Commission required any particular approach to capacity supply.

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[118] See, *e.g.*, *In the Matter of the Application of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Concurring Opinion, at pg. 2 (July 2, 2012).

[119] IEU-Ohio Initial Comments, at pp. 44-47 (Jan. 2, 2013).

Duke Energy Ohio's recovery of its costs for fulfilling its FRR obligations will not distort the competitive market or erase the benefits of retail competition in Ohio. Indeed, as no other supplier is providing – or could provide – capacity in Duke Energy Ohio's service territory through the duration of its FRR plan, it is a noncompetitive service. And, as suppliers will continue to be charged market-based prices for capacity, retail competition is unaffected by these proceedings. Furthermore, if the proposals in the Application are accepted, Duke Energy Ohio will not be the only entity recovering its costs. Rather, as FES and IEU-Ohio are well aware, AEP Ohio and its Michigan affiliate – in a choice state – are receiving cost-based compensation for their similar FRR obligations.[120]

The current BRA capacity prices are not sufficient to reasonably compensate Duke Energy Ohio for the services it is providing. Indeed, the Commission has found that projected ROEs of 2.4 percent and 7.6 percent are insufficient to yield reasonable compensation.[121] In this regard, the comments of OCC and OEG suggesting that Duke Energy Ohio is not facing financial harm because it is currently viewed favorably by ratings agencies is misplaced. For the remaining period of its FRR terms, as described in the Application, Duke Energy Ohio is projecting negative ROEs. It is absurd for the OCC and OEG to contend that anticipated, substantial losses will not undermine the Company's financial viability.

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[120] *In the Matter of the Application 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). See also, *In the matter, on the Commission's own motion, to initiate a proceeding to establish a state compensation mechanism for alternate electric supplier capacity in INDIANA MICHIGAN POWER COMPANY's Michigan service territory*, Michigan Public Service Commission Case No. U-17032, Order, at pg. 32 (Sept. 25, 2012).

[121] *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).

V. PJM ISSUES

A. The RAA does not mandate rejection of the Application.

In these proceedings, FES renews its contention that the RPM Settlement Agreement and RAA do not recognize the recovery of embedded costs.[122] Although the Commission has already rejected these arguments and FES fails to justify a different outcome here, Duke Energy Ohio offers the following reply.

The RAA identifies three optional pricing alternatives. The first is a state compensation mechanism that, according to the FERC, shall prevail in a state regulatory jurisdiction that adopts such a mechanism. Thus, only in the absence of a state compensation mechanism do the remaining pricing alternatives become relevant. Without a state mechanism, the RAA makes provision for default pricing, which reflects FZCP- or market-based pricing. However, a load serving entity is permitted, under the RAA, to seek from the FERC a charge other than market, with the only caveat applicable to this third and final pricing alternative being that the method for such other charge be based upon cost or some other just and reasonable basis.[123] Thus, from a plain reading of the RAA, which is mandated by the clear and unambiguous language used therein, it is evident that a state compensation mechanism is not limited to avoided costs. Notably, there are no qualifications applicable to a state compensation mechanism, the creation of which the FERC has ceded to the state.[124] Accordingly, Duke Energy Ohio's proposal is not subject to any limitation resulting from the RAA or related PJM agreements and, as such, the Company is entitled to recovery of its embedded costs so as to avoid undue financial harm.

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[122] FES Initial Comments, at pp. 8-11 (Jan. 2, 2013).
[123] Reliability Assurance Agreement, Schedule 8.1, Section D.8.
[124] *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. 32 (Oct. 17, 2012)("neither [Section D.8 of Schedule 8.1 of the RAA] nor any other addresses whether the [state compensation mechanism] may provide for recovery of embedded costs").

IEU-Ohio suggests that the RAA does not enable the Commission to authorize the proposals set forth in the Company's Application.[125] First, IEU-Ohio reiterates an argument that the Commission has now thrice rejected; namely, that the RAA is exclusively within the jurisdiction of the FERC and does not permit the application of cost-based ratemaking to capacity services.[126] But as the Commission has explained, its jurisdiction is derived from state law and is consistent with the RAA. It is further noteworthy that the FERC has expressly deferred to the Commission with regard to a state compensation mechanism and its prevailing effect.

IEU-Ohio also maintains that the RAA does not allow the Commission to authorize the "charge" requested in these proceedings, which IEU-Ohio describes as a non-bypassable charge to which all customers would be subject.[127] IEU-Ohio misinterprets the Application and the RAA. With regard to the latter, it is important to note that the RAA does not define the state compensation mechanism, provide limitations as to how it must be developed, or dictate the manner in which it must be implemented. The RAA provides only that a state compensation mechanism, if it exists, controls. Thus, the manner in which a jurisdictional utility and FRR entity is compensated for noncompetitive capacity service is for the Commission to determine. And in this regard, it is appropriate for the Commission to evaluate the appropriate level of compensation with reference to the Company's embedded cost of service – and not its avoided costs – as the former aligns with Ohio ratemaking principles applicable to services that are not competitive electric retail services.

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[125] IEU-Ohio Initial Comments, at pp. 25-28 (Jan. 2, 2013).
[126] *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. 9 (Jul. 2, 2012), and Entry on Rehearing, at pp. 9-10 (Oct. 17, 2012); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Entry on Rehearing, at pg. 20 (Jan. 30, 2013).
[127] Id, at 26-27.

Through these proceedings, Duke Energy Ohio is a seeking a cost-based charge for capacity services, in reliance upon the Commission's admitted authority to authorize such a charge under Chapters 4905 and 4909 of the Revised Code and its reference to the RAA. Duke Energy Ohio is also seeking Commission approval to defer the difference between this cost-based charge and the market-based charges applicable to suppliers, pursuant to R.C. 4905.13. Finally, Duke Energy Ohio is seeking Commission approval of a tariff, to be initially set at zero, pursuant to which the deferred balances would be collected, pursuant to R.C. 4909.18. It is thus Ohio law that allows the creation of a deferral for subsequent recovery. And the Application in these proceedings is both consistent with the language in the RAA, which provides for a state-determined mechanism (*i.e.*, a mechanism predicated upon state ratemaking principles) and compliant with applicable state statutes.

Contrary to IEU-Ohio's argument that the commission has no jurisdiction to adjudicate issues arising under contracts,[128] Duke Energy Ohio is not seeking an adjudication of its rights and responsibilities under the RAA. Instead, it is seeking the establishment of a charge, derived from the same methodology the Commission found appropriate for purposes of determining the just and reasonable compensation to which a similarly situated FRR entity is entitled. It is seeking compensation consistent with the state mechanism, a mechanism about which the FERC has deferred to the Commission.

VI. CALCULATION OF THE CAPACITY CHARGE

A. The cost-based charge requested in the Application appropriately applies to all load in Duke Energy Ohio's service territory, including SSO load.

In its comments, FES maintains that the RAA applies only in respect of shopping load and, as such, Duke Energy Ohio cannot obtain a cost-based charge applicable to its non-shopping

[128] Id, at 28.

customers.[129] But FES's comments ignore the broad discretion that the Commission has under state law to establish rates for jurisdictional utilities. As the Commission has recently remarked:

> R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49.
>
> Indeed, 'there is perhaps no field of business subject to greater statutory and governmental control than that of the public utility.' The Commission thus has 'exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service.'[130]

The Commission has further confirmed that its jurisdiction to establish rates for the provision of services that are not competitive retail electric services derives from Chapters 4905 and 4909 of the Revised Code, provisions that enable the Commission to invoke "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."[131] R.C. 4905 and 4909 are not limited to retail rates; had the legislature intended such a limitation, it would have included the requisite restrictions in the statutory text.

Importantly, therefore, the Commission's authority to approve the charge requested in these proceedings is not limited by the RAA but, instead, derives from state law.[132] Thus, although the FERC may have relied upon the RAA for purposes of deferring to the Commission in the area of capacity pricing, the RAA does not create the jurisdictional basis for the

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[129] FES Initial Comments, at pg. 4 (Jan. 2, 2013).
[130] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission, at pg. 7 (Sept. 25, 2012)(internal citations omitted).
[131] *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-SSO, Entry on Rehearing, at pg. 28 (Oct. 17, 2012).
[132] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission, at pp. 11 (Sept. 25, 012)("[T]he Commission can exercise jurisdiction to establish a [state compensation mechanism] pursuant to its broad powers under Chapters 4905 and 4909 of the Revised Code").

Commission to approve a just and reasonable cost-based charge.[133] Rather, it is state law that is relevant here. And toward that end, the Commission has found that capacity provided pursuant to an FRR entity's obligations is not a retail electric service under Ohio law because it is not provided directly by said entity to retail customers.

Here, Duke Energy Ohio does not directly provide capacity to any of its retail customers. All SSO customers are actually served by alternate load-serving entities, which utilize the capacity that Duke Energy Ohio has dedicated under its FRR plan. Consequently, the capacity service applicable to non-shopping customers is no different than the capacity service applicable to shopping customers. Neither is a retail electric service under the Commission's reasoning and, to avoid any claimed discrimination as between shopping and non-shopping customers, Duke Energy Ohio should be fairly and justly compensated for all capacity services provided by it.

B. The cost-based charge at issue in these proceedings should not be reduced by the amount equal to the revenues collected via Rider ESSC.

FES maintains that Duke Energy Ohio failed to account for its receipt of revenues collected via its Rider ESSC, suggesting that the Company should net those revenues against its requested cost-based capacity charge. Further, FES recommends that the Company be required to withdraw its pending Application, only to resubmit a nearly identical request, revised only to account for the suggested revenue offset.[134] These comments should be disregarded.

Rider ESSC does not compensate Duke Energy Ohio for the provision of capacity service consistent with its FRR obligations. Rather, it pertains to the Company's SSO and is intended to ensure stability and certainty in the Company's **retail electric services**. And as explained above, Rider ESSC and the proposed capacity charge pertain to separate and distinct services to which

[133] See, *e.g., 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-SSO, Opinion and Order, at pp. 12-14, 22 (July 2, 2012).
[134] FES Initial Comments, at pp. 13-14 (Jan. 2, 2013).

different rate regulations apply.[135] As such, it would be inappropriate to deduct the Rider ESSC revenues from the amounts set forth in the Application. It would also be inappropriate for the Commission to order Duke Energy Ohio to withdraw its Application, only to resubmit it. A hearing has been scheduled and testimony deadlines established; there is no reason for this process to be delayed so that intervenors – particularly those that will not be affected by the Application – can minimize their pre-hearing activity.

C. Planned retirements do not require withdrawal of the Application.

FES suggests that the Application should be withdrawn and resubmitted to incorporate the impact of the planned retirements on the Company's request.[136] For the reasons previously stated, such a withdrawal and re-filing is inappropriate. Further, FES's proposal is irrelevant in that Duke Energy Ohio does not own Miami Fort 6 and the continued operation or retirement of that unit is immaterial to these proceedings. With regard to Beckjord, there is no return on or return of capital for Beckjord included in the cost-based capacity charge.

D. Duke Energy Ohio's deferral request does not violate accepted accounting principles or Commission precedent.

With reference to GAAP, IEU-Ohio criticizes the Company's deferral request. In this regard, IEU-Ohio seems to purposely obfuscate the issue by recharacterizing the relief being sought by Duke Energy Ohio in these proceedings. IEU-Ohio suggests that the Company's request is to "defer generation capacity service compensation revenue," which it defines as the difference between Duke Energy Ohio's "current compensation and the proposed level of compensation that targets a specified level of earnings in shareholders' investment plus a

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[135] *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 pp. 26 and 49 (Aug. 8, 2012)(retail stability rider approved under R.C. 4928.143 while separate cost-based capacity charge approved under Chapters 4905 and 4909).

[136] FES Initial Comments, at pg. 14 (Jan. 2, 2013).

carrying cost."[137] In actuality, Duke Energy Ohio is not seeking to defer revenue under GAAP rules. Instead, the request is to defer incurred costs (*e.g.*, operating and maintenance, depreciation, interest expense, etc.) of providing noncompetitive generation capacity service that are not recovered given the actual revenue being received for that service. Unquestionably, Duke Energy Ohio seeks to be compensated in the form of revenue for this deferred cost, but it is not "revenue" that is being deferred, only "costs;" therefore, IEU-Ohio's argument that the issue is about "deferred revenue" patently incorrect.

Another argument raised by IEU-Ohio in opposing the Application is that it believes the Company forfeited its rights to such deferral accounting when it ended regulatory accounting. IEU-Ohio repeats its flawed argument that the deferral authority being sought is for "competitive generation."[138] The Financial Accounting Standards Board's Accounting Standards Codification (ASC)) 980-20 (formerly part of Financial Accounting Standards No. 101 or FAS 101) specifies how an enterprise that ceases to meet the criteria for application of regulatory accounting (ASC 980-10, formerly Financial Accounting Standards No. 71 or FAS 71) to all or part of its operations should report the event in its U.S. GAAP financial statements. FAS 101 contains no prohibition for the "initial and continuing application" of FAS 71 if the criteria for such regulatory accounting are met. Therefore, if the criteria in FAS 71 are met, regulatory accounting should be "reapplied to all or a separable portion of the operations."[139] If Duke Energy Ohio's Application is approved, the Commission will have established – and reaffirmed in cases addressing these very issues raised by IEU-Ohio – that the capacity service at issue in these proceedings is a "non-competitive" service and qualifies for application of regulatory

[137] IEU-Ohio Initial Comments, at pp. 34-35, 37 (Jan. 2, 2013).
[138] Id, at 35-36.
[139] PWC Accounting and Reporting Manual, Section 14, Reapplication of the Regulated Operations Topic (July 19, 2011).

accounting. As such, IEU-Ohio's argument that the Company lacks the ability to implement regulatory accounting is simply incorrect.

In addition, IEU-Ohio asserts that Duke Energy Ohio "would not be permitted under [Generally Accepted Accounting Principles (GAAP)] to use deferred [*sic*] accounting, even if Duke had not discontinued regulatory accounting for its functionally or structurally separated generation business" on the basis that, "by definition, neither the deferred revenue or the carrying cost is an 'allowable cost.'"[140] As stated above, Duke Energy Ohio is not requesting a deferral of revenues but, rather, is requesting a deferral of incurred costs not recovered in current rates. Duke Energy Ohio believes that the Commission has the authority to, and should, allow future rates to recover its capacity cost based on the compensation mechanism being requested. The Company further asserts that to record a regulatory asset based on probable recovery of the deferral of previously incurred costs is fully supported by GAAP. The deferral of previously incurred costs will reduce Duke Energy Ohio's significant expected losses in the near term. As required by FAS 71, the Company also states that the recovery of the ROE will be recognized when incorporated into future rates and recovered from customers; therefore, it will not have an earnings impact on Duke Energy Ohio until that time.

An even more absurd allegation in IEU-Ohio's comments is that without regulatory accounting for generation service, Ohio law ended the Commission's authority to approve cost-based rates for generation-related services.[141] Although the Company's Application is not for a competitive service under Chapter 4928 of the Revised Code, it is worth pointing out that both the ESP and MRO provisions of that chapter provide for recovery of certain cost-based rates. As an example, in its first ESP, Duke Energy Ohio had multiple riders that related to competitive

[140] IEU-Ohio Initial Comments, at pg. 37 (Jan. 2, 2013).
[141] Id, at 35.

services for which the "actual cost" was recovered. Among them were fuel and purchased power trackers, purchased capacity trackers, and environmental compliance cost trackers. All of these trackers were cost based and all were part of the Company's price-to-compare, *i.e.*, a competitive service. IEU-Ohio's assertion to the contrary must result from an inaccurate reading of those statutes or another attempt to confuse the Commission about the actual issues at hand in these proceedings.

Another dubious comment raised by IEU-Ohio has to do with the notion that approval of Duke Energy Ohio's deferral request will result in an earnings windfall to the Company only after the ESP.[142] Here again, IEU-Ohio's purported logic seems to be based largely on the faulty notion that the Company cannot defer costs during the ESP and, therefore, the benefit of deferring costs would not be realized in earnings until these costs were recovered in future rates. This is partially true in that the earnings impact of the return on shareholders' investment will be recorded when recovered from customers as required by GAAP, whereas the earnings impact associated with the deferral of incurred costs will occur during the period of the ESP. For purposes of illustration, when costs are deferred and a regulatory asset created, the Company will debit the regulatory asset and credit expense. Crediting expense in this journal entry reduces the Company's overall expense and does, in fact, increase the Company's earnings as compared to what it otherwise would be at the time of the transaction, which is during the ESP. IEU-Ohio's perspective on the impact on Duke Energy Ohio's earnings resulting from implementation of the proposals set forth in the Application simply is neither accurate nor complete.

In a final insult to traditional ratemaking, IEU-Ohio declares that authorizing a deferral of a previously incurred expense is not allowed inasmuch as it represents retroactive ratemaking.[143]

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[142] Id, at 36-37.
[143] Id, at 37-38.

The Commission frequently approves deferral requests for costs incurred in prior periods. Even for Duke Energy Ohio, the Commission has approved, months after the incurrence of the cost, a deferral request for costs incurred in a storm. And the Company is not alone in this regard. Indeed, the Commission has historically and consistently authorized such deferrals pursuant to its broad authority under R.C. 4905.13.

E. Duke Energy Ohio is not seeking excessive carrying charges on the deferral balance.

With regard to the Company's requested deferral, IEU-Ohio comments that Duke Energy Ohio is seeking excessive carrying charges, which are predicated upon the long-term debt rate, and recommends that the Company "be required to ensure that any authorized carry charge is as low as reasonably possible."[144] Duke Energy Ohio disagrees that its request is excessive. On the contrary, the request is conservative. Indeed, in contrast, the Commission has previously authorized carrying costs on deferrals at the much higher weighted-average cost of capital.[145]

Notably most substantial outlays of cash earn the weighted-average cost of capital.[146] Here, however, the Company is requesting a debt return. And as its shareholder should recover, at a minimum, the cost of money for the cash they will need to support the FRR commitments, this request is reasonable and appropriate.

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[144] Id, at 43.

[145] See, *e.g.*, *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Opinion and Order, at pg. 23 (March 18, 2009).

[146] See, *e.g.*, *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, at pg. 43 (Oct. 17, 2012)(affirming application of WAAC to deferred balances until such time as recovery mechanism is later established, so as to ensure utility is fully compensated).

VII. CORPORATE SEPARATION AND ADVANCEMENT OF STATE POLICY

A. Duke Energy Ohio's Application does not contradict state policy.

FES comments that Duke Energy Ohio cannot be guaranteed receipt of above-market revenues for generation-related services, because such services are competitive. And FES further opines that Duke Energy Ohio must be limited to the recovery of competitive, market-based rates in order to foster competition and adhere to state law. [147]

With regard to FES's first contention, it is clear that the service at issue is not a competitive service and, consequently, any prices or rates applicable to such a service are not limited by the market.[148] Furthermore, the proposed Application will not adversely affect the development of a competitive market. Indeed, suppliers will continue to be charged market-based rates for capacity they are charged now and the manner in which they price contracts will remain undisturbed. As such, the Application will not impose any additional charges, or raise any current charges, due from retail or wholesale suppliers. Thus, the proposal has no impact on the competitive market.

Moreover, the proposed Application does advance state law by ensuring that jurisdictional utilities are justly and reasonably compensated for the services that they provide.[149] In its regulation of public utilities and utility markets, the Commission must often balance conflicting positions. As it does so, the state policies set forth in Title 49 "function as guidelines for the Commission to weigh… ."[150] Here, as Duke Energy Ohio explained in its Application,

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[147] FES Initial Comments, at pg. 7 (Jan. 2, 2013).
[148] *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, Concurring and Dissenting Opinion, at pg. 3 (July 2, 2012)("[w]hen this Commission chooses to establish a state compensation method for a noncompetitive retail electric service, the adopted rate must be just and reasonable based upon traditional cost-of-service principles").
[149] See, generally, R.C. 4905.22 (charges for any service rendered shall be just and reasonable).
[150] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Entry on Rehearing, at pg. 49 (Jan. 30, 2013).

market-based rates for capacity are currently inadequate to ensure its receipt of just and reasonable compensation. In fact, for the term of its FRR plan, as detailed in the Application, the Company will be operating at a significant loss, with an estimated average annualized return on equity of negative 8.90 percent. And this negative ROE is undeniably insufficient to enable the Commission to achieve its goal – also a function of state policy – of ensuring the financial integrity of its jurisdictional utilities. Finally, it is noteworthy that the Commission has repeatedly found that the competitive market will not be unfairly harmed by a utility's receipt of above-market capacity revenues, even where such revenues are transferred to another entity.[151]

FES and IEU-Ohio correctly observe that Duke Energy Ohio must transfer its generating assets no later than December 31, 2014. And they further suggest rejection of the Company's Application because it fails to address this impending corporate separation.[152] But legal ownership of the generating assets included in Duke Energy Ohio's FRR plan is not determinative of whether the Company is entitled to a cost-based charge. Duke Energy Ohio is obligated under PJM tariffs to function as an FRR entity through May 31, 2015. Consistent with that obligation, Duke Energy Ohio has dedicated capacity from its legacy generating assets to its Ohio load zone. Thus, even after the transfer, Duke Energy Ohio will continue to rely upon the capacity from these assets to meet its legal obligations under applicable PJM tariffs. Moreover, without the certainty of this revenue, there is no assurance that the transferee will have the financial support necessary to enable the provision of capacity service in respect of Duke Energy Ohio's obligations. And as the Commission has approved such a transfer of revenues in a

[151] *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. 60 (Aug. 8, 2012).
[152] IEU-Ohio Initial Comments, at pp. 45, 47 (Jan. 2, 2013); and FES Initial Comments, at pp. 14-15 (Jan. 2, 2013).

factually similar circumstance,[153] the Application in these proceedings should not be rejected, subject only to re-filing. The act of corporate separation does not diminish Duke Energy Ohio's need for fair and just compensation.

B. Allegations of monopolies and price fixing are exaggerated.

In its comments, IEU-Ohio suggests that Duke Energy Ohio's proposed transfer of revenues reflective the cost-based capacity charge to its affiliate after the transfer of assets upon which that charge is predicated should be rejected because it would serve to create a monopoly and result in improper price fixing. In short, IEU-Ohio is arguing that this proposal violates the antitrust laws.[154] IEU-Ohio is patently incorrect.

As the United States Supreme Court has found, a parent company and its wholly owned subsidiary cannot conspire for purposes of the antitrust laws.[155] In so ruling, the Court established the principle that affiliated entities serving a single economic interest of the parent corporation are like a single entity and cannot unlawfully conspire or combine together. And as Ohio's Valentine Act was patterned after the federal Sherman Act, it must be interpreted in light of the construction afforded the federal act.[156] Here, Duke Energy Ohio and the intended transferee of its generating assets are affiliated entities. Consequently, they have a complete unity of interest and thus cannot violate the proscription of unlawful combinations or conspiracies in restraint of trade. IEU-Ohio's reliance upon the Valentine Act and its claims of impending illegal monopolies are wrong.

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[153] *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. 60 (Aug. 8, 2012).
[154] IEU-Ohio Initial Comments, at pp. 40-42 (Jan. 2, 2013).
[155] See, *e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984)
[156] *Re/Max International, Inc. v. Smythe, Cramer Comp*any, 265 F. Supp. 2d 882, 903 (N.D. Ohio 2003).

VIII. PROCEDURAL ISSUES

A. The Company's Application is not a late-filed application for rehearing in its ESP proceedings.

Staff, contending that the substance of the Application is contrary to the ESP Stipulation, equates it to an application for rehearing.[157] However, as discussed above, the Application addresses an issue that was not raised in the ESP Stipulation; it is not contrary, just not included. The ESP Stipulation clearly covers the amount that auction winners and CRES providers will be charged for capacity. It clearly does not address the cost to Duke Energy Ohio for providing noncompetitive wholesale capacity consistent with its FRR obligations or the recovery of such costs. The Application thus cannot be treated as if it were an Application for Rehearing, belated or not.

B. Appellate proceedings in other matters do not warrant holding these proceedings in abeyance.

FES maintains that Duke Energy Ohio should not have entered into a settlement of its ESP while the AEP Ohio capacity case was proceeding. And it further argues that these proceedings should now be stayed until such time as the appellate process in the AEP Ohio capacity case runs its course.[158] Neither of these comments is persuasive.

Duke Energy Ohio timely resolved its ESP consistent with the provisions of Chapter 4928, of the Revised Code. As a result, the competitive market was undeniably promoted, to the benefit of Duke Energy Ohio's customers. Indeed, Duke Energy Ohio **immediately** went to full market, procuring all of the supply needed to serve its SSO customers through competitive procurements. Furthermore, Duke Energy Ohio's percentage of income payment plan customers were afforded discounted service, upon the January 2, 2012, effective date of the ESP, through

[157] Staff Initial Comments, at pp. 13-14 (Jan. 2, 2013).
[158] FES Initial Comments, at pp. 2-3, 6-7 (Jan. 2, 2013).

FES. And in this regard, FES financially benefitted as both a wholesale supplier and a retail supplier from the timely resolution of the Company's SSO.[159] And as that SSO did not concern the services at issue here, there was no compelling reason (and FES points to none) for Duke Energy Ohio to delay the Commission's desired progress toward fully functioning competitive markets.

FES comments that Duke Energy Ohio's reliance upon the Commission's decisions AEP Ohio's capacity case is premature. It thus recommends that the Commission hold these proceedings in abeyance pending the conclusion of the appellate review process in respect of AEP Ohio's capacity case.[160] But those decisions are now in effect, as "every order made by the public utilities commission shall become effective immediately upon entry thereof... ."[161] Consequently, these decisions reflect the framework that must be acknowledged to ensure predictability and certainty in the regulatory arena. As the Commission has affirmed its obligation, using traditional ratemaking principles, to ensure that utilities are justly and reasonably compensated for the services they provide, there is no justification for FES's sought-after delay.

C. Comments that function only as intentional distractions should be disregarded.

Duke Energy Ohio would be remiss if it did not also address IEU-Ohio's attempt at persuasion with reference to comments that are **not** attributable to the Company. Throughout its comments, IEU-Ohio repeatedly references the filings of Duke Energy Commercial Asset Management, Inc., (DECAM) and Duke Energy Retail Sales, LLC, (DER) made in the AEP

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[159] *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio., Inc.*, Case No. 11-6000-EL-UNC, Report of Commission Staff (Jan. 5, 2012). See also, ESP Stipulation, at pp. 17-18.
[160] FES Initial Comments, at pg. 2-3 (Jan. 2, 2013).
[161] R.C. 4903.15.

Ohio capacity case. To the extent that IEU-Ohio is intending to attribute the substance of those filings to Duke Energy Ohio, it has erred as Duke Energy Ohio is an entirely separate legal entity. And what one entity has stated in filings cannot be forced upon or attributed to another. Moreover, reliance upon DECAM's and DER's filings here is no more effective than reliance upon any other arguments in the AEP Ohio capacity case that the Commission rejected in its orders, including those previously advanced by IEU-Ohio.

The OCC and OEG also contend that any compensation necessary to ensure the reliability of Duke Energy Ohio's electric distribution system should be addressed in the Company's pending rate case.[162] Although the OCC and OEG are correct in that Duke Energy Ohio is seeking an increase in its base distribution rates, those proceedings are irrelevant here. Again, the proposals reflected in the Application do **not** concern a request for an increase in existing rates and, as such, any reference to reliable operation of the Company's distribution system is misplaced and should, therefore, be disregarded. The absurdity in the comments from the OCC and OEG are also reflected in the contention that Duke Energy Ohio should be viewed as part of a larger corporation. Such a contention violates firmly established regulatory and ratemaking principles as there no element of establishing an Ohio public utility's just and reasonable rates that reflects affiliated or parent organizations.

D. Comments merely adopting a previously filed motion to dismiss are non-substantive and should be stricken.

The City and OMA failed to offer any substantive comments on Duke Energy Ohio's Application. Rather, they merely incorporated by reference their prior arguments as set forth in a motion to dismiss. To the extent this adoption of prior arguments is intended to further persuade, it should be rejected. However, erring on the side of caution, Duke Energy Ohio incorporates by

[162] OCC and OEG Initial Comments, at pg. 19 (Jan. 2, 2013).

reference, in these reply comments, its memorandum in opposition to the previously filed motion to dismiss.

IX. CONCLUSION

For the reasons stated herein, Duke Energy Ohio, Inc., respectfully requests that the Commission reject the comments of the Commenting Parties and, instead, authorize the proposals as set forth in the Application to both perpetuate certainty and predictability in the regulatory arena and ensure that its jurisdictional utilities are justly and reasonably compensated for the services they render.

Respectfully submitted,

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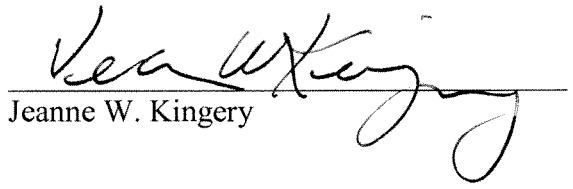
CERTIFICATE OF SERVICE

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 1st day of February, 2013, to the parties listed below.



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Summary: Comments Reply Comments of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Kingery, Jeanne W Ms.