

**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	)	Case No. 12-2400-EL-UNC
4909.18.	)	

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

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

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**POST HEARING BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION**

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**On behalf of the Ohio Manufacturers' Association**

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**I. INTRODUCTION**

The purpose of this case is to determine whether the Public Utilities Commission of Ohio ("Commission") should approve an application submitted by Duke Energy Ohio, Inc., ("Duke") to modify the terms of its current Electric Security Plan ("ESP"). The Ohio Manufacturers' Association ("OMA") was a signatory to a previously filed Joint Motion to Dismiss Duke's application<sup>1</sup> on the basis that the application attempts to abrogate the terms of a Stipulation regarding Duke's ESP currently in effect. Specifically, Duke seeks to modify the capacity state compensation mechanism adopted in the Stipulation. As will be further articulated throughout this brief, the OMA remains in support of its Joint Motion to Dismiss on the basis that Duke's application violates both this

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<sup>1</sup> A Joint Motion to Dismiss was filed on October 4, 2012 by the Ohio Consumers' Counsel, the Ohio Energy Group, the City of Cincinnati, the Ohio Partners for Affordable Energy, Greater Cincinnati Health Council, Ohio Manufacturers' Association, The Kroger Company, Industrial Energy Users-Ohio, Cincinnati Bell, Inc. and Wal-Mart Stores East LP and Sam's East Inc.

Commission's precedent of enforcing Stipulations and the judicial doctrines of res judicata and collateral estoppel. Moreover, even if the Commission determines otherwise, Duke's application should be denied because it is clearly distinguishable from the AEP-Ohio proceeding and does not comport with Ohio policy objectives of ensuring the availability of reasonably priced retail electric service<sup>2</sup> or transitioning to a competitive market.<sup>3</sup>

## **II. ARGUMENT**

### **A. Duke's Application Should be Denied Because it is Directly Related to Duke's ESP Stipulation and Attempts to Repeal the State Compensation Mechanism Adopted by Duke and Other Parties in that Stipulation.**

Duke claims that its current application is unrelated to the proceedings that resolved Duke's ESP plan case.<sup>4</sup> The veracity of this claim, however, is highly questionable in light of the fact that Duke's current application would eliminate the state compensation mechanism approved in the Stipulation regarding Duke's ESP plan. As articulated in the OMA's initial Joint Reply to Duke Energy's Memorandum Contra,<sup>5</sup> the state compensation mechanism was directly at issue in the Duke ESP proceeding. Numerous sections of the Stipulation, namely Sections II.B and IV.A, address how competitive retail electric service ("CRES") providers and wholesale supply auction winners will be charged PJM Reliability Pricing Model ("RPM") – based prices for capacity. Specifically, in Section II.B., Duke agreed to supply capacity to PJM which would in turn charge such capacity to wholesale supply auction winners, based on the

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<sup>2</sup> Ohio Revised Code Section ("R.C.") 4928.02(A).

<sup>3</sup> R.C. 4928.02

<sup>4</sup> Reply of Duke Energy Ohio, Inc., to Joint Memorandum Contra Motion to Vacate by Signatory Parties and Memorandum Contra Motion to Vacate by Industrial Energy Users-Ohio, 2 (October 22, 2012)

<sup>5</sup> Joint Reply to Duke Energy's Memorandum Contra by Signatory Parties (October 26, 2012)

final zonal capacity price (“FZCP”) in the unconstrained regional transit authority (“RTO”) region. Section II.B reads as follows:

Acknowledging Duke Energy Ohio’s status as an FRR entity in PJM, the Parties agree that Duke Energy Ohio shall supply capacity to PJM, which, in turn, will charge for capacity to all wholesale supply auction winners for the applicable time periods of Duke Energy Ohio’s ESP with the charge for said capacity determined by the PJM RTO, which is the FZCP in the unconstrained RTO region.<sup>6</sup>

Duke’s commitment to this agreement is echoed again in Section IV.A of the Stipulation:

Consistent with Section II.B,...the Parties agree that Duke Energy Ohio shall supply capacity resources to PJM, which in turn, will charge for capacity resources to all CRES providers in its service territory for the term of the ESP...The Parties further agree that during the term of the ESP, Duke Energy Ohio shall charge CRES providers for capacity as determined by the PJM RTO, which is the FZCP in the unconstrained RTO region, for the applicable time periods of its ESP.<sup>7</sup>

Consequently, this new proceeding is simply an attempt to modify the capacity state compensation mechanism to which Duke agreed in its Stipulation and this attempted method modification contravenes the appeals process.

Under R.C. 4903.10, after any order has been issued by the Commission, any party “may apply for rehearing in respect to any matter determined in the proceeding.” The application for rehearing, however, must be filed within 30 days after the Commission’s Order has been entered on the journal of the Commission.<sup>8</sup>

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<sup>6</sup> Stipulation at Section II.B (October 24, 2011).

<sup>7</sup> *Id.* at Section IV.A.

<sup>8</sup> R.C. 4903.10.

In the Duke ESP proceeding, the Opinion and Order adopting the Stipulation was issued on November 22, 2011. Subsequently, on January 18, 2012, an Entry on Rehearing was issued affirming that Opinion and Order. Duke, however, failed to file an application for rehearing to reconsider the adopted Stipulation which also specified the state compensation mechanism by which Duke would be compensated for the capacity it provides to customers in its territory. Duke cannot now undermine the appeals process by attempting to file a new proceeding which will essentially reconsider an issue already adjudicated in its ESP proceeding.

Duke's application not only attempts to contravene the Commission's appeals process, but also, as stated in the Joint Motion to Dismiss, disregards the judicial policies of "res judicata" and "collateral estoppel."

1. **Duke is precluded under the doctrines of res judicata and collateral estoppel from re-litigating the state compensation mechanism approved in its ESP plan.**

As asserted in the Joint Motion to Dismiss, it is both routine and appropriate for the Commission, as well as courts throughout Ohio (and the United States); to dismiss cases when parties attempt to re-litigate what has already been litigated to a final judgment. Res judicata essentially precludes re-litigation of issues raised and decided in a prior action. This doctrine also applies in instances in which a party is prepared to present new evidence or a new cause of action not presented in the initial action, or seek remedies or relief not sought in the first action. The Supreme Court of Ohio has stated that:

A party cannot re-litigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies, in reference to the same subject matter. And if one of the parties failed to introduce

matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so.<sup>9</sup>

The doctrine of collateral estoppel compliments the doctrine of res judicata in that collateral estoppel precludes a party from re-litigating issues already adjudicated. The Supreme Court of Ohio has characterized collateral estoppel as precluding the re-litigation of an issue that has been “actually and necessarily litigated and determined in a prior action.”<sup>10</sup> In other words, “when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”<sup>11</sup> Both res judicata and collateral estoppel are designed to provide parties with a sense of finality.<sup>12</sup> In other words, a party only gets one bite at the apple. Both of these doctrines also apply to Commission proceedings<sup>13</sup> and to administrative cases concluded by settlement.<sup>14</sup>

In following both the Commission’s and Ohio courts’ precedent, Duke’s application should be denied on the basis of both res judicata and collateral estoppel. The Duke ESP proceeding was judicial in nature and provided Duke and all interested parties an opportunity to litigate the issues and introduce evidence. Moreover, the parties in the present proceeding are the same or in privity with the parties to Duke’s ESP proceeding. Additionally, the issue of Dukes’ compensation was in integral part of

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<sup>9</sup> *Covington and Cincinnati Bridge Co. v. Sargent*, 27 Ohio St. 233, 237-38 (1875)

<sup>10</sup> *New Winchester Gardens, Ltd. v. Franklin Cty. Brd. of Revision*, 80 Ohio St.3d 36, 41, 684 N.E.2d 312 (1997)

<sup>11</sup> Restatement of the Law, Second, Judgments, Section 27

<sup>12</sup> *Ameigh v. Baycliffs Corp.*, 81 Ohio St.3d 247, 258 (1997)

<sup>13</sup> *Superior’s Brand Meat, Inc. v. Linel*, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus; *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)

<sup>14</sup> *Scott. v. East Cleveland*, 16 Ohio App. 3d 429, 431 (Ct. Apps., 8th Dist., 1984) (1984)

the prior ESP proceeding, as evidenced by the testimony submitted by Duke's own President and other witnesses.<sup>15</sup> Duke failed to advocate for a cost-based compensation mechanism in its ESP Stipulation proceeding, thus in accordance with the doctrine of res judicata, Duke waived its right to do so.

a. **Duke's application should be denied on the basis of this Commission's precedent in applying the doctrines of res judicata and collateral estoppel.**

In applying the doctrines of res judicata and collateral estoppel, the Commission has primarily emphasized whether parties have been afforded one fair opportunity to litigate a claim or issue.<sup>16</sup> To this end, the Commission is guided by the following policy considerations:

- (1) fairness to the prevailing party requires that it not be subjected to the expense and potential harassment associated with re-litigating matters which were, or should have been, litigated in an earlier action, and
- (2) judicial economy requires that litigation arising from a particular controversy not be continued indefinitely.<sup>17</sup>

In line with the Commission's guiding policies, Duke was afforded one fair opportunity to litigate the compensation mechanism for its capacity in its ESP proceeding. Duke voluntarily chose to enter into a Stipulation with parties to its ESP proceeding that provided for a market-based compensation mechanism for its capacity. In line with the Commission's guiding policy considerations, both fairness to the

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<sup>15</sup> *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service, et al.*, Case No. 11-3549-EL-SSO, et al., Supplemental Testimony of William Don Wathen Jr. at 10 and Supplemental Testimony of Ms. Julie Janson at 4-6.

<sup>16</sup> *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, 1986 Ohio PUC LEXIS 853, \*4 (November 10, 1986).

<sup>17</sup> *Id.*



prevailing parties and judicial economy dictate that Duke should not be permitted to re-litigate the issue of its capacity compensation. Consequently, Duke's application should be denied.

**B. Duke's Application Should be Denied Because it is Distinguishable from the AEP-Ohio Proceeding.**

Even if the doctrines of *res judicata* and collateral estoppel do not prevail, Duke's application should also be denied because it is distinguishable from the AEP-Ohio ESP proceeding to which Duke cites in support of its current application. In the AEP-Ohio ESP proceeding, the Commission determined that "RPM-based capacity pricing would prove *insufficient* to yield reasonable compensation for the Company's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations."<sup>18</sup> In that proceeding, AEP-Ohio specifically stated that it would suffer financial harm if required to provide capacity at PJM's RPM-based price,<sup>19</sup> and consequently, the Commission approved a cost-based compensation mechanism for the Company. Conversely, Duke supported the compensation mechanism included in its ESP Stipulation on the basis that the Company would receive *just and reasonable* compensation through an RPM-based capacity pricing mechanism. In fact, at the evidentiary hearing concerning the Stipulation, "Duke presented four witnesses, supporting the Stipulation."<sup>20</sup> Witness Mr. Wathen explained that Rider Retail Capacity ("RC"), included in the Stipulation, was the

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<sup>18</sup> *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, et al.*, Case No. 11-346-EL-SSO, et al., 2012 Ohio PUC LEXIS 738 \*64 (August 8, 2012).

<sup>19</sup> *Id.*

<sup>20</sup> *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, et al.*, Case No. 11-3549-EL-SSO et al., 2011 Ohio PUC LEXIS 1248, \*8 (November 11, 2011).

mechanism established to compensate Duke for the capacity it provides. Additionally, Duke expressly chose to modify Rider RC in its original application which would have been a cost-based charge, changing it to a market-based charge in the Stipulation.<sup>21</sup> The testimony of Mr. Wathen explicitly confirms that Duke was in agreement with receiving RPM-based compensation for its capacity:

During the settlement discussions of this case, the Parties made it clear that a market price for the SSO service was preferred. This necessitates a change to the Company's proposed Rider RC. The change to Rider RC in the ESP means that customers will pay a market price for capacity at the FZCP for the FRR duration and will pay a market price for capacity established by competitive auction following that term. In either case, the price for capacity will be without reference to Duke Energy Ohio's cost of service. The Company is agreeing to implement a full [Competitive Bidding Process Auction] to determine the retail price for its SSO.<sup>22</sup>

The testimony of Ms. Janson, President of Duke Energy Ohio, only confirms that the company was amenable to receiving RPM-based pricing for its capacity:

In the Stipulation and Recommendation, the parties recognized Duke Energy Ohio's obligations as an FRR entity and, for the term of the ESP, Duke Energy Ohio will supply capacity resources to PJM, which, in turn, will charge wholesale suppliers for capacity. But the charge applicable to these wholesale suppliers will not reflect Duke Energy Ohio's costs of service...Rather, the charge will be predicated upon PJM's capacity market pricing structure. To clarify, Duke Energy Ohio bears the obligation to provide the capacity resources necessary to serve all customers in our footprint for the term of the ESP and the Company will be compensated for capacity resources based upon competitive PJM prices.<sup>23</sup>

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<sup>21</sup> See *supra* note 15, Supplemental Testimony of William Don Wathen Jr. at 10.

<sup>22</sup> *Id.* at 12-13.

<sup>23</sup> See *supra* note 15, Supplemental Testimony of Ms. Julie Janson at 4-5.

Duke would not have agreed to cost-based compensation if the Company would not receive *just and reasonable* compensation through such a mechanism. Duke had the same ability as AEP-Ohio to advocate for a cost-based capacity compensation mechanism. Duke, however, supported the Stipulation and the compensation mechanism contained therein, indicating that the Company would receive *just and reasonable* compensation for its FRR services with RPM-based pricing. On the basis of Duke's testimony and the testimony of other stakeholders, the Commission acknowledged that the Stipulation as a whole provid[ed] "benefits to all stakeholder."<sup>24</sup>

It is disingenuous for Duke to return to the Commission less than a year after entering into a Stipulation regarding its capacity compensation and insinuate that it is not being reasonably compensated. As indicated in the Joint Motion to Dismiss, Duke's present application is simply an attempt to "piggy back" on the AEP-Ohio decision to secure a better deal. Were the Commission to allow utilities to flout Stipulation agreements, there would be no incentive for parties to engage in settlement negotiations. Consequently, the Commission should deny Duke's application.

**1. Duke's Application should be denied because if approved, it would undermine the integrity of settlements.**

Duke's ESP application should be denied because it attempts to undermine the integrity of settlements which have historically been enforced by the Commission.<sup>25</sup> Stipulations, a type of settlement, are encouraged in Commission proceedings<sup>26</sup>

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<sup>24</sup> See *supra* note 20, \*73-74.

<sup>25</sup> See, e.g., *In the Matter of the Application of Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT et al., 1995 Ohio PUC LEXIS 131, \*3-4 (February 8, 1995).

<sup>26</sup> See, e.g., *In the Matter of the Application of Ohio Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges to Increase the Rates and Charges for Electric Services and Related Matters, et al.*, Case No. 94-996-EL-AIR et al., 1995 Ohio PUC LEXIS 236, \*126 (May 23, 1995).

because they save parties the expense of litigation, as acknowledged by Duke in a previous Commission proceeding,<sup>27</sup> and are “advantageous to judicial administration, and...to government as a whole.”<sup>28</sup> Because settlements render such benefit, Ohio’s public policy strongly encourages upholding negotiated settlements.<sup>29</sup> In fact, the Supreme Court of Ohio has gone as far as to say that “a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the court.”<sup>30</sup> The Court has held that, “to permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceeding a nullity.”<sup>31</sup> Furthermore, the Supreme Court has held that it is essential for the Commission to respect its previous decisions:

Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.<sup>32</sup>

In furtherance of this policy, the Commission accords substantial weight to Stipulations<sup>33</sup> and has acknowledged that parties must keep their commitments made in Stipulations.<sup>34</sup> In fact, when reviewing a Stipulation, the Commission has adopted criteria by which to measure the Stipulation’s reasonableness:

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<sup>27</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates, et al.*, Case No. 12-1682-EL-AIR, 2013 Ohio PUC LEXIS 95, \*20 (May 1, 2013) (Duke’s witness William Don Wathen Jr. testified that a stipulation avoids the cost of litigation).

<sup>28</sup> *Spercel v. Sterling Industries, Inc.*, 31 Ohio St. 2d 36, 38 (July 5, 1927).

<sup>29</sup> *Id.* at 39.

<sup>30</sup> *Id.* at 40.

<sup>31</sup> *Id.*

<sup>32</sup> *Ohio Consumers’ Counsel v. Public Util. Comm.*, 10 Ohio St.3d 49, 51 (1984)

<sup>33</sup> See *supra* note 27, \*17.

<sup>34</sup> See, e.g., *In the Matter of the 1995 Electric Long Term Forecast Report of the Cincinnati Gas & Electric Company*, Case No. 95-203-EL-FOR et al, 1996 Ohio PUC LEXIS 846, \*49 (December 19, 1996).

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

Accordingly, each Stipulation must be vetted by the Commission and the utility must demonstrate to the Commission that the proposed Stipulation satisfies these aforementioned criteria.

As previously stated, Duke presented several witnesses who testified in support of the Stipulation.<sup>35</sup> Specifically, Ms. Janson testified that the Stipulation satisfied the Commission's criteria for reasonableness.<sup>36</sup> The Commission also commented that parties had expended a great deal of time and effort to resolve the issues in that proceeding.<sup>37</sup> If Duke is permitted to repudiate the Stipulation into which it voluntarily entered, this would undermine both the Commission's policy and the Supreme Court of Ohio's precedent of enforcing settlements. Moreover, it would nullify the incentive for parties to participate in settlement negotiations. Consequently, the Commission should deny Duke's attempt to undermine the stipulated capacity pricing mechanism to which it agreed less than a year ago.

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<sup>35</sup> See *supra* note 20.

<sup>36</sup> See *supra* note 20, \*70-76.

<sup>37</sup> See *supra* note 20, \*72.

C. **Even if the Commission Determines that Duke's Previous Stipulation is Irrelevant to the Current Proceeding, Duke's Request Should be Denied Because it Does Not Comport with Ohio's Policy Objective of Ensuring the Availability of Reasonably Priced Retail Electric Service.**

As stated in R.C. 4928.02(A), it is the state's policy to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." Yet, if Duke's application is approved, based upon the OMA's evaluation, a large industrial customer will experience a monthly increase in its electric utility bill of over \$5000. This represents an annualized difference of more than \$63,000 over what this type of customer is currently paying under the Stipulation. This kind of exorbitant price increase can hardly be considered reasonable. Consequently, because Duke's application would not provide for reasonably priced electricity, in contravention of R.C. 4928.02(A), the Commission should not approve Duke's request.

D. **Even if the Commission Determines that Duke's Previous Stipulation is Irrelevant to the Current Proceeding, Duke's Application Should be Denied because it Does not Comport with Ohio's Policy Objective of Transitioning to a Competitive Market.**

Duke's application should also be denied because it violates the state's important policy objective of moving to a competitive market. R.C. 4928.02 specifies that it is the state's policy objective to "ensure the availability of *unbundled* and comparable retail electric service" as well as to "encourage innovation and *market* access for cost-effective supply- and demand-side retail electric service..." Duke's present application attempts to circumvent the policy objective of moving to a competitive market by allowing the utility to continue to rely on traditional cost-based compensation, instead of the competitive market (i.e. PJM's RPM). As long as utilities are permitted to rely on a traditional cost-based pricing mechanism, Ohio's policy objective of creating a

competitive and unbundled electric utility market, as codified in R.C. 4928.02, is impeded.

Thus, because Duke's Application will not further Ohio's transition to a competitive market, in contravention of R.C. 4928.02, Duke's application should be denied.

### **III. CONCLUSION**

For the foregoing reasons, the OMA respectfully requests that the Commission adopt the positions of the OMA as set forth in the Joint Motion to Dismiss and Post Hearing Brief.

Respectfully submitted on behalf of  
THE OHIO MANUFACTURERS' ASSOCIATION



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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Post Hearing Brief of the Ohio Manufacturers' Association was served upon the following parties of record via electronic mail this 28<sup>th</sup> day of June 2013.



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Summary: Text Post Hearing Brief of The Ohio Manufacturers' Association electronically filed by Teresa Orahod on behalf of J. Thomas Siwo