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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

INITIAL POST-HEARING BRIEF OF THE KROGER CO.

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INITIAL POST-HEARING BRIEF OF THE KROGER CO.

The Kroger Co. ("Kroger") is one of the largest grocers in the United States with over 65 stores, manufacturing plants, and offices in Duke Energy Ohio, Inc.'s ("Duke") service territory, consuming over 225 million kWh per year. As a substantial consumer of electricity and related services in Duke's service territory, Kroger sought and was granted intervention in the above-captioned matters. In this proceeding, Kroger is keenly interested in the enforcement of two stipulations in which Duke is a signatory party to and that Kroger, along with 29 other parties, entered into in good faith to resolve all issues in the prior proceedings. Despite the agreements reached in those prior proceedings, Duke seeks to charge customers an additional $776 million for the same capacity service in the form of a deferral. Duke's request is unlawful and should be rejected.

I. Procedural History

On April 26, 2011, Duke submitted an application and Stipulation and Recommendation ("RTO Stipulation") to the Public Utilities Commission of Ohio ("Commission") in Case No. 11-2641-EL-RDR for approval of a transfer from the Midwest Independent System Operator, Inc. to PJM ("RTO Proceeding").[1] Pursuant to the RTO Stipulation, Duke agreed not to seek approval from the Federal Energy Regulatory Commission ("FERC"), pursuant to Section 8.1 of PJM's Reliability Assurance Agreement ("RAA"), of a wholesale capacity charge based upon its costs as a fixed resource requirement ("FRR") entity for the period between January 1, 2012 and May 31, 2016.[2] The Commission approved Duke's application and adopted the RTO Stipulation on May 25, 2011.[3]

On June 20, 2011, Duke submitted an application to the Commission in Case No. 11-3549-EL-SSO ("ESP Case") for, *inter alia*, approval of a non-bypassable charge for its embedded costs of supplying capacity.[4] Duke and 30 parties settled the ESP Case and submitted a Stipulation and Recommendation ("ESP Stipulation") to the Commission on October 24, 2011.[5] The ESP Stipulation provided for a comprehensive resolution of *all* issues, including the price of capacity furnished by Duke as an FRR entity and Duke's

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1 *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. (RTO Realignment)(Application).

2 Duke Ex. 15 at ¶20 (RTO Realignment)(RTO Stipulation).

3 RTO Realignment, Opinion and Order at 14-16 (May 25, 2011).

4 Kroger Ex. 5 at 10-11 (*In The Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., Application (June 20, 2011) (ESP Application)).

5 See Industrial Energy Users-Ohio (IEU) Ex. 5 (*In The Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., Stipulation and Recommendation (October 24, 2011) (ESP Stipulation)).

compensation for such services.[6] On November 22, 2011, the Commission approved the ESP Stipulation with slight modifications.[7]

Notwithstanding these two stipulations, Duke submitted its application in this proceeding to the Commission on August 29, 2012, seeking cost-based compensation for its capacity services and an additional $776 million in capacity revenues ("Application").[8] Subsequently, a procedural schedule was established for the above-captioned proceeding. On October 4, 2012, ten intervening parties filed a Joint Motion to Dismiss, requesting that Duke's Application be dismissed as unlawful and in direct violation of existing settlements.[9] The Joint Motion to Dismiss is still pending before the Commission. The hearing began on April 15, 2013. The major issues explored at the hearing were Duke's current commitments under prior settlement agreements, Duke's need for additional revenue for its capacity service, the level of such additional revenue, and Duke's ability to seek additional revenue pursuant to its filed Application.

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[6] Id. at 2.

[7] See Kroger Ex. 8 (*In The Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (November 22, 2011) (ESP Order)).

[8] Office of the Ohio Consumers' Counsel (OCC) and the Ohio Energy Group (OEG) Joint Ex. 1 at 1 (Comments); IEU Ex. 17 at 18 (Comments); Kroger Ex. 2 at 1 (Comments).

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

II. Argument

A. The Commission should grant the Joint Motion to Dismiss filed by various signatory parties on October 4, 2012, and summarily deny Duke's Application.

1. Duke's request for a cost-based compensation mechanism, if approved, would violate the ESP Stipulation and the RTO Stipulation to which Duke was a signatory party.

The Commission does not have authority to decide Duke's Application because *all* issues presented by Duke were settled by the ESP Stipulation and the RTO Stipulation.[10] Specifically, the ESP Stipulation, signed by Duke in 2011, established the rates for capacity furnished by Duke, as an FRR entity, that customers would pay over a three-year period ending May 2015.[11] Despite this fact, Duke is now requesting that the Commission allow Duke to charge customers an additional $776 million for its provision of capacity service under the guise of a "newly adopted state compensation mechanism" in the form of a deferral.[12] Specifically, Duke is requesting that the Commission: 1) establish a cost-based charge for capacity; 2) authorize a deferral for the difference between the revenues from the currently charged market-based rate and the proposed cost-based charge; and 3) approve a tariff that will allow future recovery of the deferral.[13] As stated in the Joint Motion to Dismiss, this is in direct violation of the ESP Stipulation approved (with minor modifications) by the Commission in the ESP Case.[14]

In the ESP Application, Duke proposed to collect embedded costs of providing capacity to all customers in its territory, plus a reasonable rate of return, on a non-

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[10] See IEU Ex. 5 (ESP Stipulation).

[11] See IEU Ex. 5 (ESP Stipulation).

[12] Duke Ex. 1 at 2, 9 (Application).

[13] Id. at 1.

[14] See Joint Motion to Dismiss (October 4, 2012).

bypassable basis for a term of nine years and five months.[15] Duke initially argued that a cost-based rate should be established as the Commission's state compensation mechanism pursuant to PJM's RAA,[16] but abandoned its original proposal in favor of reaching a settlement.[17] Under the ESP Stipulation, Duke agreed, among other things, to promptly transition to market pricing and charge the market-based Reliability Pricing Model ("RPM") rate for capacity provided to CRES providers to serve shopping load in exchange for, among other things, being allowed to collect $330 million from customers for its electric stability service charge ("Rider ESSC").

Duke negotiated for the establishment of Rider ESSC with the intent that it would provide compensation to Duke for its role as an FRR entity.[18] Under Rider ESSC, which was the result of good faith bargaining, shopping customers, including Kroger, "agreed to pay Duke [a] non-bypassable charge even though there are no direct services that shoppers receive from Duke in exchange."[19] The ESP Stipulation specifically states, and Duke witnesses agree, that Rider ESSC was intended to "provide stability and certainty regarding [Duke's] provision of retail electric service as an FRR entity while continuing to operate under an ESP."[20] This was negotiated in exchange for, among other things, a market-based capacity charge that would be determined by the PJM regional transmission organization ("RTO"), which is the Final Zonal Capacity Price ("FZCP"), for the term of

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[15] Kroger Ex. 5 at n. 9, 26 (ESP Application); Tr. Vol. II at 285 (April 16, 2013)("cost-based capacity was something that was included in the original ESP [Case]").

[16] Kroger Ex. 5 at 25-26 (ESP Application).

[17] IEU Ex. 5 at 6-8 (ESP Stipulation).

[18] Kroger Ex. 1 at 6 (Higgins Direct).

[19] Kroger Ex. 1 at 6 (Higgins Direct).

[20] IEU Ex. 5 at 16 (ESP Stipulation); Kroger Ex. 1 at 6 (Higgins Direct); OEG Ex. 1 at 15 (Kollen Direct); Tr. Vol. II at 253-54; Tr. Vol. VI at 1372-73 (April 22, 2013).

the ESP.[21] Nonetheless, in a "contrived and disingenuous argument,"[22] Duke requested in this proceeding that the Commission increase its benefits under the negotiated ESP and RTO agreements.

Duke incorrectly relies on the Commission's decision in Case No. 10-2929-EL-UNC ("AEP-Ohio Case") for authority that it is entitled to a cost-based capacity charge.[23] The Commission explicitly stated in its Opinion and Order specific to the AEP-Ohio Case that it was not creating precedent.[24] Additionally, the Order certainly did not say that it created authority for other utilities to unilaterally change the terms of agreements that they have signed. In fact, the Opinion and Order overtly states that the Commission was not creating a generic state compensation mechanism that was meant to apply to all Ohio utilities.[25] Nonetheless, Duke attempts to argue that the Commission must treat similarly situated utilities in a consistent fashion, and, therefore, Duke should receive the same compensation mechanism as was granted to AEP-Ohio.[26] Duke ignores, however, the fact that it has signed both the ESP Stipulation and the RTO Stipulation which have already resolved the issue of Duke's compensation for capacity service, and that the terms of those stipulations cannot be unilaterally changed.

There have been no fundamental changes since either the ESP Stipulation or the RTO Stipulation were approved by the Commission that would justify a change in the

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[21] See IEU Ex. 5 (ESP Stipulation).

[22] Kroger Ex. 1 at 5 (Higgins Direct).

[23] Tr. Vol. II at 325; Tr. Vol. VI at 1352.

[24] OCC-OEG Joint Ex. 1 at 3 (Comments); Ohio Power Company Ex. 1 at 2 (Comments); See Tr. Vol. VIII 1951-52.

[25] OCC Ex. 23 at 16 (Rose Direct); See OEG Ex. 1 at 5-6 (Kollen Direct); OCC Ex. 3 at 77 (*In the Matter of the Commission Review the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC (AEP-Ohio Case)(Entry on Rehearing)).

[26] Tr. Vol. I at 138-139; Duke Ex. 29 at 22 (Reply Comments).

state compensation mechanism already approved by the Commission in those proceedings.[27] Duke has failed to meet its burden to demonstrate otherwise, and, in fact, Duke admits that the circumstances that led it to enter into those agreements still exist: Duke is still an FRR entity and it is still providing service pursuant to its ESP.[28] Further, at the time Duke signed the ESP Stipulation, it knew of its "obligations as an FRR entity within PJM, the provisions of the PJM [RAA] regarding the state compensation mechanism for an FRR entity, the pending request by [AEP-Ohio] to modify its FRR compensation, the RPM capacity prices for three years forward, and the cost of its legacy generation."[29]

It was with this knowledge of issues surrounding wholesale capacity pricing and state compensation mechanisms that Duke negotiated for, and agreed, to provide capacity for its FRR obligation based on the PJM reliability pricing model.[30] The ESP Stipulation does not contain an option or condition which allows Duke to receive a cost-based rate. Nor is there a provision that authorizes Duke to modify the capacity pricing mechanism established by the ESP Stipulation during the term of the ESP. Rather, the capacity charge and associated compensation to Duke was balanced out by other provisions of the ESP Stipulation favorable to Duke, such as Rider ESSC.[31] Duke's attempt to undermine the ESP Stipulation, a result of good faith bargaining, should be rejected by the Commission.

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[27] OEG Ex. 1 at 5 (Kollen Direct).

[28] Tr. Vol. II at 334.

[29] OEG Ex. 1 at 5 (Kollen Direct); Tr. Vol. II at 326-28.

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

[31] IEU Ex. 5 at 16 (ESP Stipulation).

In addition, Duke's Application violates the RTO Stipulation, which was adopted by the Commission on May 25, 2011. In the RTO Stipulation, Duke agreed not to seek approval from FERC for a wholesale capacity charge based upon its costs as an FRR entity for the period between January 1, 2012 and May 31, 2016.[32] Duke's Application in this proceeding requests exactly what it has agreed not to request, a cost-based capacity charge.

Duke acknowledges that prior to the AEP-Ohio Case decision, Duke could not request a cost-based capacity charge from FERC because it had made a commitment not to do so under the RTO Stipulation.[33] Duke argues that the Commission's decision in the AEP-Ohio Case changed the landscape in Ohio and that Duke is now somehow able to get out from under the RTO Stipulation because it can ask the Commission, instead of FERC, for approval of a cost-based capacity charge.[34] Duke's rationale is flawed, and must be rejected.

As discussed above, the decision in the AEP-Ohio case should not have any effect on the stipulations that Duke entered into before the decision was issued. Duke is bound by its approved stipulations. The Commission also specifically stated in its Opinion and Order in the AEP-Ohio Case that the decision was not to have any precedential value[35] and, the Order was clear that the Commission was not setting a generic state-wide compensation mechanism.[36] Duke's reliance on the AEP-Ohio Case is, therefore,

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[32] Duke Ex. 15 at ¶ 20 (RTO Stipulation).

[33] Tr. Vol. VI at 1354.

[34] Tr. Vol. VI at 1354.

[35] OCC and OEG Joint Ex. 1 at 3 (Comments); Ohio Power Company Ex. 1 at 2 (Comments).

[36] OCC Ex. 23 at 16 (Rose Direct); See OEG Ex. 1 at 5-6 (Kollen Direct); OCC Ex. 3 at 77 (*In the Matter of the Commission Review the Capacity Charges of Ohio Power Company and Columbus Southern*

misplaced: the AEP-Ohio Order does not authorize Duke to unilaterally alter its settlement agreements, and it does not establish a state-wide compensation mechanism.

Duke's Application should be denied because Duke voluntarily entered into two stipulations where Duke agreed *not* to be compensated through a cost-based capacity charge. Duke specifically chose to abandon its pursuit of its claim for cost-based pricing for capacity as the state compensation mechanism in favor of regulatory certainty through settlement of its ESP and RTO cases and compensation through RPM pricing and $330 million through Rider ESSC. Any Commission decision to the contrary would undermine the integrity and regulatory certainty of the settlement process and of the Commission's decisions.[37]

2. The ESP Stipulation resolved *all* issues in the ESP Case, including pricing and compensation for capacity services.

In this proceeding, Duke attempts to circumvent the ESP Stipulation, which prohibits Duke from creating a cost-based capacity charge, by arguing that Duke only agreed to the pricing of its capacity service, not compensation.[38] Duke argues that the Application in this proceeding is requesting approval for cost-based compensation and that this specific issue was not resolved by the ESP Stipulation.[39] The evidence in the record reflects a different understanding. First, the ESP Stipulation, by its own terms, resolved *all* issues raised in the ESP Case.[40] Second, signatory parties to the ESP Stipulation believed pricing and compensation for Duke's provision of capacity service were affirmatively resolved by the ESP Stipulation: "As Duke's compensation for

Power Company, Case No. 10-2929-EL-UNC (AEP-Ohio Case)(Entry on Rehearing)); Ohio Power Company Ex. 1 at 3-4 (Comments); OCC and OEG Joint Ex. 1 at 2 (Comments).

[37] FES Ex. 3 at 10 (Noewer Direct); See Staff Ex. 2 at 10 (Comments); Tr. Vol. IX at 2302.

[38] Kroger Ex. 1 at 9 (Higgins Direct); Duke Ex. 2 at 5 (Trent Direct).

[39] See Duke Ex. 2 at 11 (Trent Direct); See Duke Ex. 29 at 5 (Reply Comments).

[40] IEU Ex. 5 at 2 (ESP Stipulation).

capacity was one of the key issues raised in [the ESP Case], it was not left unresolved."[41] When questioned specifically about this testimony and the distinction between pricing and compensation, Kroger Witness Higgins responded to Duke: "I believe when one looks at the stipulation as a whole and when one looks at the record that was produced in support of the stipulation, including Duke's own testimony, that it is incontrovertible the parties knew and understood what Duke's compensation was going to be as part of that agreement."[42]

Finally, Duke appears to agree that there were several issues raised and resolved by the ESP Stipulation.[43] Duke's own witness also conceded that the former President of Duke previously recognized that the ESP Stipulation encompassed both pieces: "[Duke] bears the obligation to provide the capacity resources necessary to serve all customers in our footprint for the term of the ESP and [Duke] will be compensated for capacity resources based upon competitive PJM prices."[44]

The RAA, which Duke entered into when it transferred to PJM and became an FRR entity, provides that a state compensation mechanism for capacity service may be market-based or cost-based.[45] The RAA does not set forth when a state must provide an FRR entity with a cost-based versus a market-based compensation mechanism.[46] Instead, it is within the discretion of the state to determine what the appropriate mechanism is

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[41] Kroger Ex. 1 at 9, 10 (Higgins Direct).

[42] Tr. Vol. IX at 2285-86.

[43] See Tr. Vol. IX at 2281-82, 2284-85 (several issues are discussed through cross-examination by Duke as being resolved by the ESP Stipulation).

[44] Tr. Vol. II at 303-305; IEU Ex. 6 at 4-5 (Janson Supp. Direct).

[45] See Tr. Vol. X at 2705 (May 20, 2013).

[46] Tr. Vol. X at 2705.

depending on the circumstances of each particular FRR entity.[47] It follows that, and Duke admits that, if an FRR entity wants to enter into an agreement with customers that it provides capacity service to for a market-based compensation mechanism, the RAA would not prevent the FRR entity from doing so.[48]

This is exactly what Duke has done. Since January 1, 2012, Duke has been compensated for its capacity service as an FRR entity through a market-based state compensation mechanism, i.e., the FZCP, as contemplated by the ESP Stipulation.[49] Duke receives compensation for its capacity services as an FRR entity based on market-based pricing in accordance with the ESP Stipulation, and had been for six months without question.[50] It was not until after the Opinion and Order was issued in the AEP-Ohio Case that Duke raised any concerns with the market-based compensation mechanism, now arguing that circumstances have somehow changed and that the Commission now has more or different authority then it once had when it approved Duke's ESP and RTO Stipulations. With the knowledge that AEP-Ohio was granted a cost-based compensation mechanism, Duke filed its Application in this proceeding, and only now attempts to make a distinction between pricing and compensation.

If there was such a distinction between pricing and compensation, Duke "had an obligation to disclose, in writing, that critical distinction to the Commission and to the other signatory parties to the ESP Stipulation as a matter of fair dealing, particularly in accepting the compensation provided by Rider ESSC as a bargained-for exchange."[51]

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[47] Tr. Vol. X at 2705; Duke Ex. 29 at 43 (Reply Comments).

[48] Tr. Vol. X at 2707.

[49] Tr. Vol. X at 2705.

[50] Tr. Vol. II at 311.

[51] Kroger Ex. 1 at 10 (Higgins Direct); Tr. Vol. IX at 2298-99.

Duke made no such disclosure. In fact, the ESP Stipulation, as originally signed by 31 parties, established the rate that was to be charged by Duke for capacity.[52] Section IV.A of the ESP Stipulation states:[53]

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

After the hearing considering the ESP Stipulation concluded, Duke filed a motion to amend this provision of the ESP Stipulation so that the bolded language above would read: "PJM shall charge CRES providers for capacity as determined by the PJM RTO..."[54] At the time of the filing of the motion to amend the ESP Stipulation, Duke stated that the change was necessary to correct "an inadvertent typographical error."[55] It appears that Duke is now attempting to attach a substantive meaning to this change, and ask the Commission to believe that the ESP Stipulation did not address the issue of Duke's compensation for capacity.[56] Duke's request, however, is unsubstantiated by the record. As Kroger Witness Higgins explained, the revision to the ESP Stipulation to

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[52] Tr. Vol. IX at 2288-89.

[53] IEU Ex. 5 at 12 (ESP Stipulation)(emphasis added).

[54] See Kroger Ex. 6 (ESP Case, Motion of Duke Energy Ohio, Inc. to Admit an Amendment to the Stipulation as Joint Exhibit 1.1 and Request for Expedited Treatment (November 16, 2011)).

[55] Kroger Ex. 6 at 4 (ESP Case, Motion of Duke Energy Ohio, Inc. to Admit an Amendment to the Stipulation as Joint Exhibit 1.1 and Request for Expedited Treatment).

[56] See Tr. Vol. II at 305, 328; Tr. Vol. VI at 1376; Duke Ex. 2 at 5 (Trent Direct).

correct the typographical error did not change the meaning of the ESP Stipulation or the understanding of the parties:[57]

> That was depicted as a typographical error but, nevertheless, it didn't change the substance of what parties' understanding was and is, and that is that Duke -- that there was an agreement as to how Duke was going to be compensated. PJM was the billing agent for collecting these charges, but it was well understood that Duke would be compensated by the billing agent for providing the capacity and, in fact, there are other parts of the stipulation that were not changed for a typographical error that make that clear. For example, if you look at the master supply agreement, which is Attachment F – .
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> * * *
>
> Okay, I'm just pointing out that there are other elements of the stipulation that make it clear that -- as to how Duke was going to be compensated.

Through Duke's continued questioning of Kroger Witness Higgins on the topic, the understanding of a signatory party intimately involved in the ESP settlement as to what they believed they agreed to and why in the ESP Stipulation is telling:[58]

> A. It was described as being a typographical error in Duke's memorandum to the Commission, and so it was depicted as simply housekeeping and there was no representation, that I can see, that this was a substantive change that would be later used to give Duke the opportunity to file and seek increased charges from customers, essentially replicating its original proposal in the ESP that had been negotiated away. No, I didn't believe that any party who agreed to this understood that that was what was implicated by this correction of a supposed typographical error.
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> Q. The implication being what, sir, that Duke Energy Ohio would make a filing for a cost-based charge for its capacity service after the Ohio Commission declared such service to be a noncompetitive wholesale service?
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> A. The implication that Duke Energy Ohio would file for a cost-based capacity service after entering into a stipulation in which it was resolved and in which Duke had agreed to the terms and conditions of

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[57] Tr. Vol. IX at 2286-87, 2289 ("it didn't change the substance of parties' understanding as to how Duke was going to be compensated.").

[58] Tr. Vol. IX at 2300.

> an agreement that effectively waived that provision. That was the implication.
>
> No one would have agreed to that implication, irrespective of whether the Commission later made a finding in a litigated case with another utility that found that a different state compensation mechanism was appropriate for that utility.

Duke's revisionist history must be rejected. The testimony of Duke Witness Janson, which was filed in support of the ESP Stipulation, clearly states that the ESP Stipulation covered both Duke's pricing and compensation for capacity. In her testimony, Duke Witness Janson stated that "[Duke] bears the obligation to provide the capacity resources necessary to serve all customers in [its] footprint for the term of the ESP and [Duke] will be *compensated* for capacity resources based upon competitive PJM prices."[59] Therefore, Duke's claim that the ESP Stipulation did not address compensation for capacity is in clear contradiction to Duke's own testimony that it submitted in the ESP Case for approval of the ESP Stipulation and to the evidence in the record.[60] This is, quite simply, another "disingenuous and contrived"[61] argument that Duke makes in an attempt to avoid the provisions of the ESP Stipulation.

Further, Duke claims that it is the position of the intervening parties that the ESP Stipulation says nothing about compensation and, therefore, it must be true that Duke agreed to provide its capacity service at no charge.[62] This characterization is false. Section 6.2(b) of Attachment F to the ESP Stipulation specifically states:[63]

> For capacity purchased from Duke Energy Ohio at the Final Zonal Capacity Price for the unconstrained portion of

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[59] IEU Ex. 6 at 4-5 (Janson Supp. Direct)(emphasis added); Tr. Vol. II at 309, 330-31.

[60] OEG Ex. 1 at 13 (Kollen Direct).

[61] Supra n. 20.

[62] Duke Ex. 29 at 6 (Reply Comments).

[63] IEU Ex. 5, Attachment F at 35; see also Tr. Vol. IX at 2304.

> the RTO region by an SSO supplier pursuant to Section 3.1(b), such SSO Supplier shall, unless Duke Energy Ohio directs otherwise, be invoiced and submit payment for such Capacity on behalf of Duke Energy Ohio directly to PJM in accordance with the billing practices set forth in the PJM Agreements.

This provision plainly provides that the payment for capacity was going to be made on behalf of Duke. Accordingly, as Kroger Witness Higgins recognized: "when you're making a payment on behalf of someone, that clearly speaks to compensation, it clearly speaks to the intention and the understanding of that concept of compensation."[64] Duke's compensation for its provision of capacity services was unmistakably contemplated by the ESP Stipulation and the signatory parties agreed that Duke would be compensated based upon RPM-based prices, a position supported by Duke's own witness in the ESP Case.[65] Duke's distortion of the historical record highlights Duke's ulterior motive to obtain an additional $776 million from ratepayers because it believes that AEP-Ohio received a better deal.

Duke's agreed-upon compensation for its provision of capacity service is further evidenced by Rider ESSC, which was developed through negotiations of the ESP Stipulation. As mentioned above, by Duke's own admission and by the terms of the ESP Stipulation, Rider ESSC is intended to provide stability and certainty in Duke's provision of capacity service.[66] Duke does not argue that Rider ESSC was not intended to provide compensation to Duke.[67] Instead, Duke argues that Rider ESSC was intended to provide compensation for retail electric service and not for the wholesale capacity service that

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[64] Tr. Vol. IX at 2304.

[65] IEU Ex. 6 at 4-5 (Janson Supp. Direct)(emphasis added); Tr. Vol. II at 309, 330-31; Tr. Vol. IX at 2293-94 ("PJM is collecting moneys on behalf of Duke and remitting them to Duke.").

[66] Tr. Vol. II at 253-54; Tr. Vol. VI at 1322-23; Duke Ex. 29 at 7 (Reply Comments).

[67] Id.

Duke claims is at issue in this proceeding.[68] However, as explained below, there is no distinction between retail and wholesale capacity service in the ESP Stipulation and any compensation set forth in the ESP Stipulation is for all of Duke's capacity service provided by Duke in its role as an FRR entity.[69]

3. The ESP Stipulation does not distinguish between wholesale and retail capacity service.

Duke also argues that the ESP Stipulation does not apply to Duke's Application in this proceeding because the ESP Stipulation addressed competitive retail electric services and this proceeding is addressing non-competitive wholesale capacity service.[70] Duke states that the Commission's decision in the AEP-Ohio Case "affirmed that the capacity services provided by an FRR entity are excluded from regulation under Chapter 4928 of the Revised Code" and, therefore, "the ESP addresses [Duke's] rates and charges in respect of the competitive services it is providing: services that are separate and distinct from those at issue in these proceedings."[71] Given that, "[g]eneration capacity services have been declared competitive,"[72] Duke's argument lacks merit. Duke admits that Section 4928.03 of the Revised Code classifies retail generation as a competitive retail service and capacity service was not excluded from this classification.

Duke also concedes that it cannot locate a place in the ESP Stipulation where there is a distinction between retail and wholesale services provided by Duke.[73] However, Duke claims that it now has "the benefit of the Commission's *subsequent*

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[68] Tr. Vol. II at 253; Duke Ex. 2 at 11 (Trent Direct); Duke Ex. 29 at 7 (Reply Comments).

[69] Tr. Vol. IX at 2280-81.

[70] See Tr. Vol. II at 306; Duke Ex. 29 at 8 (Reply Comments).

[71] Duke Ex. 2 at 5 (Trent Direct).

[72] IEU Ex. 17 at 7, 11-16 (Comments); Section 4928.03, Revised Code.

[73] Tr. Vol. III at 308.

ruling in the [AEP-Ohio Case],"[74] which somehow changes the type of services that were addressed in the ESP Stipulation.[75] Apparently Duke believes that the AEP-Ohio decision miraculously clarifies what Duke and thirty other parties agreed to in the ESP Stipulation, even though the Commission did not consider Duke's ESP Stipulation in making its decision in another utility's ESP Case. Further, the Commission's Opinion and Order in the AEP-Ohio Case relied upon by Duke[76] specifically stated that in making its decision, it was not necessary to determine whether capacity service was competitive or non-competitive.[77] Therefore, the Commission's decision does nothing to clarify whether Duke's capacity service is competitive, and it certainly does not clarify for Duke whether Duke's ESP Stipulation addressed competitive or non-competitive capacity service. As such, Duke's reliance on the AEP-Ohio Order is misplaced,[78] and its arguments are strained in an attempt to add some credibility to its historical revisionism. Unfortunately for Duke, thirty other parties exist to thwart Duke's attempt to modify the Stipulation that they negotiated for in good faith.[79] The Commission should summarily reject such a self-serving illusory argument.[80]

Further, regardless of what the Commission decided in the AEP-Ohio Case, Duke entered into the ESP Stipulation which resolved *all* issues in the ESP Case. The capacity

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[74] Tr. Vol. II at 306, lns 17-20 (emphasis added); Tr. Vol. II at 307, 308, 309-310 (repeated references to Duke now having the benefit of the Commission's decision in the AEP-Ohio Case).

[75] Tr. Vol. II at 306.

[76] Duke Ex. 2 at 10 (Trent Direct)(referencing page 13 of the Opinion and Order in the AEP-Ohio Case); Tr. Vol. I at 125-127 ("I do not see anything specifically on this page [of the AEP-Ohio Case, Opinion and Order] that references competitive versus noncompetitive.").

[77] Tr. Vol. II at 319; Tr. Vol. VIII at 1958; OCC Ex. 1 at 13 (AEP-Ohio Case, Opinion and Order).

[78] See Tr. Vol. VIII at 1951; FES Ex. 1 at 26 (Lesser Direct); OCC Ex. 25 at 5 (Effron Direct); See OEG Ex. 1 at 19-21 (Kollen Direct).

[79] FES Ex. 1 at 26 (Lesser Direct).

[80] FES Ex. 1 at 26 (Lesser Direct).

service provided by Duke as an FRR entity was a major issue in the ESP Case and Duke voluntarily agreed to a settlement which set a price and compensation for this service.[81] While Duke may have received cost-based compensation for its capacity service as an FRR entity if it had litigated the case to conclusion as AEP-Ohio did, Duke chose not to do so.[82] Instead, Duke determined that it was in its best interests to avoid the risks of litigation and enter into the ESP Stipulation and receive compensation through a market-based mechanism in exchange for Rider ESSC, among other things.[83] The fact that Duke now regrets its decision to settle in light of AEP-Ohio being granted cost-based compensation is not a reason to allow Duke to break the bargain established in the ESP proceeding and modify one provision of the ESP Stipulation without considering all components.[84] Accordingly, Duke's request for a cost-based compensation mechanism should be rejected and the Commission should deny Duke's Application.

4. If Duke was unsatisfied with, or needed clarification of the Commission's Order approving the ESP Stipulation, the proper remedy was to apply for rehearing.

As stated by several intervenors, Duke's Application in this proceeding is actually an improper application for rehearing of the Commission's decision adopting the ESP Stipulation.[85] Section 4903.10, Revised Code, provides that any party may file an application for rehearing within 30 days after the Order has been entered on the Commission's journal. Further, the statute states that "[n]o cause of action arising out of any order of the [C]ommission, other than in support of the order, shall accrue in any

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[81] See FES Ex. 10 at 4-5, 7, 9-10; Tr. Vol. I at 80-83, 85-92.

[82] Tr. Vol. II at 384-85; See Staff Ex. 2 at 9 (Comments).

[83] Tr. Vol. II at 384-85; See IEU Ex. 5; See Staff Ex. 2 at 9 (Comments).

[84] See Tr. Vol. II at 407; See Staff Ex. 2 at 9 (Comments).

[85] Staff Ex. 2 at 13-14 (Comments); OCC and OEG Joint Ex. 1 at 21 (Comments).

court to any person, firm, or corporation unless such person, firm, or corporation has made a *proper application* to the [C]ommission for rehearing."[86] An application for rehearing is only proper if it is filed within 30 days after the order is entered on the Commission's journal.[87]

Duke failed to make a proper application to challenge the ESP Stipulation or the Commission's Order approving the same. In the ESP Case, the Commission issued its Opinion and Order on November 22, 2011 and its Entry on Rehearing on January 18, 2012. Duke did not apply for rehearing or seek clarification with respect to these decisions within the 30 days prescribed by Section 4903.10, Revised Code. In fact, Duke had no reason to file an application for rehearing within the 30-day time period because Duke voluntarily entered into the agreement and understood its terms as approved by the Commission. It was not until six months after the ESP Stipulation was in effect (eight months after the Commission approved it) that Duke had 'buyer's remorse' and wished that it had reached a different deal.[88] This is evidenced by Duke's admission that the Application in this proceeding is based solely on the Commission's decision in the AEP-Ohio Case.[89]

Given that the time period for an application for rehearing on the ESP Stipulation had already passed by the time the decision in the AEP-Ohio Case was issued, Duke filed its Application in the instant proceeding under the guise of an application for new services in an attempt to have the Commission reconsider Duke's compensation mechanism for capacity service.

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[86] Section 4903.10, Revised Code (emphasis added).

[87] Staff Ex. 2 at 13 (Comments).

[88] See Tr. Vol. II at 407.

[89] Tr. Vol. VI at 1352.

Duke's Application requests that the Commission reconsider the pricing and compensation for capacity service that was agreed to in the ESP Stipulation. As set forth in Section II.A.1 above, the compensation mechanism for Duke's Provision of capacity service was clearly a term that was negotiated for in the ESP Stipulation and Duke cannot have the Commission's approval of one component of the ESP Stipulation reviewed by and modified merely calling an application for rehearing an application to "establish a new service."[90] Not only is Duke requesting review of something that was clearly included in the ESP Stipulation, but it is also apparent that Duke is not establishing a new service. Duke knew of its alternatives,[91] and chose RPM-based pricing. Duke cannot now revisit the resolved issue.

Duke's Application is seeking an increase in the compensation it receives for a service that it is already providing.[92] Further, Duke is requesting a deferral that is to be composed of the difference between Duke's current compensation and Duke's requested compensation. This is "an explicit admission by Duke that it is already receiving compensation for generation capacity service albeit at a level that is less than Duke now wants."[93] Moreover, Duke does not indicate that its current service is going to change in any way – Duke merely wants the compensation for the same service to increase.[94] This is clearly not a request to establish a new service.

Accordingly, this Application should be treated as an untimely application for rehearing and it should be rejected pursuant to Ohio law.

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[90] Duke Ex. 1 at 5 (Application).

[91] Tr. Vol. II at 326-28.

[92] Duke Ex. 1 at 4, 8 (Application); See IEU Ex. 17 at 18 (Comments).

[93] IEU Ex. 17 at 18 (Comments).

[94] See Tr. Vol. II at 355.

5. Duke's Application is unlawful because it seeks to increase its standard service offer compensation for service that is being provided under the ESP without demonstrating that the ESP is more favorable in the aggregate than a market rate offer.

When an electric distribution utility ("EDU") is seeking an increase in compensation for generation-related capacity services, the EDU must demonstrate that its proposed ESP is more favorable in the aggregate than any market rate offer ("MRO") available, "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals."[95] The Commission cannot approve an ESP application unless it finds that the proposed ESP, as a package, is more favorable than an MRO.[96] Duke argues that Section 4928.143, Revised Code, does not apply in this proceeding because Duke is not seeking approval of an ESP.[97] However, as set forth above, the Application in this proceeding is requesting the exact same thing that was requested by Duke in its application in the ESP Case. While Duke may not have filed the Application in this proceeding under the ESP statutes, it is clear that Duke is requesting approval of a unilateral modification to charges that have already been approved under its ESP.[98] Therefore, Section 4928,143, Revised Code, applies to Duke's pending Application.[99]

Duke has presented no evidence to establish that Duke's modified ESP, with its additional compensation for capacity service is more favorable than an MRO. In fact,

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[95] Section 4928.143(C)(1), Revised Code; IEU Ex. 17 at 23 (Comments).

[96] Section 4928.143(C)(1), Revised Code.

[97] Tr. Vol. VI at 1402; Duke Ex. 2 at 11 (Trent Direct); Duke Ex. 29 at 34 (Reply Comments).

[98] Tr. Vol. VIII at 1948.

[99] Tr. Vol. VIII at 1948.

Duke's testimony provided in the ESP Case establishes the opposite.[100] In the ESP Case, it was established that the ESP Stipulation, as approved, "was more favorable than a comparable MRO by only $62 million on a net present value basis over the entire term of the ESP."[101] Duke's request to increase its compensation under the ESP in this proceeding will cause the ESP to fail the ESP versus MRO test by adding an additional $776 million to the cost of an ESP versus the cost of an MRO.[102] Accordingly, Duke has not, and cannot, establish that the requested increase in compensation would meet the ESP versus MRO test as required under Section 4928.143, Revised Code.

6. The ESP Stipulation is a package that cannot be altered in a piecemeal fashion.

The ESP Stipulation is a compilation of agreed-upon issues between Duke and the other signatory parties and each separate bargained-for provision depends on the enforcement of the other bargained-for provisions. The ESP Stipulation states that it represents "an agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions within the Stipulation."[103] Even Duke states that the ESP Stipulation was "an overall package of terms" and "a comprehensive settlement of various and complex issues."[104]

Kroger Witness Higgins filed testimony in the ESP Case supporting the approval of the ESP Stipulation as a package: "Taken as a package, the Stipulation benefits

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[100] FES Ex. 22 at 30-31 (Wathen Supp. Direct); FES Ex. 1 at 4-5, 29-34 (Lesser Direct).

[101] FES Ex. 1 at 25 (Lesser Direct); Kroger Ex. 8 at 47 (ESP Order)(citing testimony of Duke Witness Wathen); FES Ex. 30 at 6 (Comments).

[102] Tr. Vol. VIII at 1948; FES Ex. 30 at 6 (Comments).

[103] IEU Ex. 5 at 2-3 (ESP Stipulation).

[104] Tr.Vol. VIII at 1929.

ratepayers and is in the public interest."[105] Kroger Witness Higgins participated in the negotiations and settlement of the ESP Case and recommended to his client, Kroger, that Kroger support the ESP Stipulation inasmuch as the ESP Stipulation reasonably addressed all of Kroger's concerns with Duke's ESP application, which included a cost-based capacity pricing provision.[106] In this proceeding, Kroger Witness Higgins specifically testified that "Kroger found Duke's proposed capacity pricing in its ESP application to be quite alarming and it was a major issue of concern for Kroger."[107] He further referenced page 48 of his ESP testimony and added that Kroger believed its "large concern over [Duke's] proposed treatment of capacity charges" had been resolved by the ESP Stipulation.[108] Kroger Witness Higgins continued:[109]

> By the time I filed my settlement testimony in support of the agreement, the agreement that was negotiated by the parties, by the time that occurred there was no longer a dispute because the issue that the company had raised in its direct filing, namely the treatment of capacity prices, did not find its way into the final settlement agreement and was resolved. Therefore, there was no need to leave a or to identify particular issues with which Kroger disagreed because by the time I filed this we had come to an agreement.

He explained that the capacity component of Duke's initial filing was withdrawn, and "[i]t became irrelevant and resolved."[110]

As a signatory party to the ESP Stipulation, Duke cannot isolate the capacity price provision from the rest of the ESP Stipulation after the ESP Case has been resolved in its

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[105] Duke Ex. 32 at 4 (Higgins Testimony in ESP Case).

[106] Duke Ex. 32 at 4 (Higgins Testimony in ESP Case); Tr. Vol. IX at 2273-74, 2276, 2305.

[107] Tr. Vol. IX at 2273.

[108] Tr. Vol. IX at 2273.

[109] Tr. Vol. IX at 2277.

[110] Tr. Vol. IX at 2282.

entirety and claim that one issue was outstanding and never resolved.[111] No issues were excepted from the settlement agreement and the ESP Stipulation was not filed as a partial stipulation with some issues litigated. If it was Duke's intent to except out a provision for litigation, it would have done so in the ESP Stipulation as it did in another recent case.[112] If Duke wishes to re-litigate the capacity pricing provision before the expiration of the ESP Stipulation, then Duke must also re-litigate all other issues that were addressed in the ESP Case, including Rider ESSC.[113] Accordingly, if Duke is allowed to modify the capacity pricing provision of the ESP Stipulation, the Commission must re-open the entire ESP Case so that the remaining signatory parties have the same opportunity to modify the other provisions, such as Rider ESSC.

7. Duke's Application violates res judicata and collateral estoppel.

Ohio law states that res judicata is a "valid, final judgment rendered upon the merits" and it "bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."[114] Similarly, collateral estoppel prevents the re-litigation of issues which have already been "actually and necessarily litigated and determined in a prior action."[115] These doctrines are applicable to proceedings before the Commission.[116] The Ohio Supreme Court stated, "where an administrative proceeding is of a judicial nature and where the parties have

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[111] See Tr. Vol. III at 775-778; See Staff Ex. 2 at 11 (Comments).

[112] *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685, et al., Stipulation and Recommendation (April 2, 2013).

[113] See Tr. Vol. III at 773-78.

[114] *Postal Telegraph-Cable Company v. Newport* (1917), 247 U.S. 464, 476, 62 L. Ed. 1215, 1221.

[115] *New Winchester Gardens, Ltd v. Franklin Cty. Brd. of Revision* (1997), 80 Ohio St.3d 36,41, 684 N.E.2d 312.

[116] *Office of Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9, 10, 475 N.E.2d 782.

had ample opportunity to litigate the issues involved in the proceeding" litigation may be barred in a second administrative proceeding.[117]

Duke argues that res judicata and collateral estoppel do not apply because the Application in this proceeding addresses issues which are different from the issues addressed in the ESP Case. However, as discussed above, Duke's compensation for the provision of its capacity service as an FRR entity has already been settled through the ESP Stipulation. Prior to entering into the ESP Stipulation, Duke was well aware of its alternatives for the provision of its capacity service and chose RPM-based pricing and explicitly included it in the ESP Stipulation. Duke cannot re-visit and re-litigate those very issues that it resolved through settlement.

Duke next argues that res judicata does not apply to its Application in this proceeding because the ESP Case was not judicial in nature.[118] However, the ESP Case was clearly judicial in nature. All parties were provided the opportunity to litigate. In the ESP Case, the Commission "provided notice, held an evidentiary hearing, and provided parties the opportunity to introduce evidence."[119] Duke took full advantage of the opportunity and submitted evidence in support of its Application. Nonetheless, Duke claims that the ESP Case was not litigated because all issues were resolved through the ESP Stipulation.[120] Courts have held, however, that res judicata also applies to cases that were resolved through settlement.[121] Accordingly, the ESP Case was judicial in nature

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[117] *Superior's Brand Meats, Inc. v. Lindley* (1980), 62 Ohio St.2d 133 (syllabus).

[118] Duke Ex. 29 at 12 (Reply Comments),

[119] Joint Reply to Duke Energy's Memorandum Contra by Signatory Parties at 18.

[120] Tr. Vol. II at 286-88; Duke Ex. 29 at 14 (Reply Comments).

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

and the doctrines of collateral estoppel and res judicata may be used to bar litigation of Duke's Application in this proceeding.

B. Duke's Application fails to demonstrate that an increase in compensation for the provision of capacity service in connection with its status as an FRR entity is just, reasonable, prudent, or lawful.

As explained herein, Kroger believes that Duke's Application should be summarily denied as contrary to Ohio law and in violation of two settlements: [122]

> I believe that it is a black and white matter of Duke Energy Ohio reneging on the settlement agreement and . . . I don't believe that, as a threshold matter, that it is necessary to conduct other layers of analysis because the fundamental question is . . . what was agreed to in the ESP stipulation, and it clearly indicated that all matters were being resolved, that the matter that Duke has brought in this filing is fundamentally the same matter that Duke had raised in the ESP filing, and was one of the issues that was resolved. So I did not conduct further analysis because I felt as a threshold matter they really weren't germane to the basic issue in this case.

Nonetheless, if the Commission considers the merits of Duke's request to establish a regulatory asset to recover additional embedded costs associated with its legacy generating assets, Duke's Application should also be denied as unjust, unreasonable, and imprudent. To this end, some parties, including Staff, filed testimony on the merits of the regulatory asset requested despite the fact that those parties fundamentally agree that Duke should not be permitted to receive a cost-based capacity charge.[123] Duke's request to create a regulatory asset amounts to a request for impermissible retroactive ratemaking, and Duke has failed to establish undue harm. Additionally, if the Commission entertains a cost-based capacity charge, the amount of the compensation

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[122] Tr. Vol. IX at 2305.

[123] Staff Ex. 1 at 3 (Luciani Direct)("Staff does not support the institution of a cost-based capacity rate for Duke Energy Ohio."); OCC Ex. 23 at 3-5 (Rose Direct); OEG Ex. 1 at 3-4 (Kollen Direct); OCC Ex. 25 at 4 (Effron Direct); FES Ex. 1 at 3, 5, 17 (Lesser Direct).

requested should be reduced by excluding revenues recognized through Rider ESSC because Duke failed to recognize its full revenue currently received for capacity service.[124]

1. Duke's Application requests approval of retroactive ratemaking in violation of Ohio law.

Under Ohio law, a utility may not establish retroactive rates.[125] Duke is asking the Commission to establish a cost-based compensation mechanism and to permit deferrals as of August 29, 2012, the date of the Application.[126] As recognized by OCC and OEG, "Duke is requesting that it be compensated for dollars lost during the pendency of this proceeding. This unlawful approach has been rejected by the Ohio Supreme Court at least twice – in *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), and most recently in *In re: Application of Columbus Southern Power Co. et al.*"[127]

Duke's attempt to argue that its request does not constitute retroactive ratemaking because it is requesting the deferral of incurred costs and that type of deferral is widely accepted by the Commission should be rejected. This is another "contrived and disingenuous argument"[128] by Duke as it is clear that Duke's request is actually for the deferral of revenue.[129] Duke is requesting that it be able to collect the additional revenue that it would be able to receive under a cost-based compensation mechanism and create a

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[124] Tr. Vol. VIII at 1928; OEG Ex. 1 at 28 (Kollen Direct); FES Ex. 1 at 3-4, 12-14 (Lesser Direct).

[125] *See In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-4276, ¶¶ 8-14.

[126] OCC and OEG Joint Ex. 1 at 17 (Comments); IEU Ex. 17 at 37 (Comments).

[127] OCC and OEG Joint Ex. 1 at 17 (Comments)(citing *In re Application of Columbus Southern Power Co et al.* (2011), 128 Ohio St.3d 512, 2011-Ohio-4276, ¶¶ 8-14); *Lucas Cty. Commrs v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 686 N.E.2d 501.

[128] Supra n.20.

[129] See OEG Ex. 1 at 8 (Kollen Direct); IEU Ex. 17 at 34 (Comments).

rider to charge those revenues back to customers.[130] Duke's requested increase in compensation may be based in theory on its embedded costs, but what Duke is asking for the Commission to defer is the additional revenue that Duke could receive under a cost-based compensation mechanism. The deferral of revenues dating back to August 29, 2011 is a clear violation of law as it constitutes retroactive ratemaking.

Further, Duke surprisingly fails to consider that the Commission recently rejected a similar argument in the AEP-Ohio Case. The Commission would not allow the pricing mechanism granted to AEP-Ohio take effect until the Commission issued its Order.[131] Therefore, even if the Commission were to grant Duke's deferral, it could not begin deferring until the order for this proceeding is issued. Apparently Duke only asks the Commission to follow its precedent when that precedent favors Duke. Accordingly, the Commission should deny Duke's request for deferral of its revenue.

2. Duke has failed to demonstrate that undue financial harm exists, warranting a change in rates prior to expiration of the ESP.

Duke claims that it will be operating at a significant loss if its compensation for capacity service as an FRR entity is not increased.[132] Although Duke does not state that it is requesting emergency rate relief under Section 4909.16, Revised Code, it is necessary to analyze that statute since Duke is requesting an increase in rates established

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[130] OEG Ex. 1 at 29-30 (Kollen Direct).

[131] Kroger Ex. 8 at 24 (ESP Order).

[132] Duke Ex. 1 at 8-9 (Application); Duke Ex. 2 at 11 (Trent Direct); Duke Ex. 7 at 5 (Savoy Direct); Duke Ex. 5 at 10(DeMay Direct).

pursuant to its ESP Stipulation prior to the expiration of Duke's ESP.[133] When considering emergency rate relief, the Commission must weigh a number of factors:[134]

> First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, applicant's evidence will be reviewed with the strictest scrutiny and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation. Next, emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.

As other intervenors recognized, "The Supreme Court of Ohio has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature."[135]

Duke has failed to demonstrate by clearly and convincing evidence that any additional compensation is necessary;[136] Duke has failed to demonstrate that circumstance have changed, let alone are extraordinary; and Duke has failed to establish that it has exhausted its remedies to cure the alleged financial harm. As explained by several intervenors, Duke has chosen to retain its legacy generation assets and incur any losses that result therefrom even though Duke was previously authorized to transfer these assets to its unregulated affiliate.[137] Duke also chose to enter into an ESP Stipulation to establish the level of compensation for its standard service offer ("SSO"), which included a provision to collect $330 million from ratepayers through the non-bypassable Rider

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[133] See Tr. Vol. VII at 1607; See OCC and OEG Joint Ex. 1 at 8 (Comments).

[134] *In re Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (Aug. 23, 1988).

[135] OCC and OEG Joint Ex. 1 at 8 (Comments)(citing *In re Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (Aug. 23, 1988).

[136] Tr. Vol. I at 117.

[137] OCC and OEG Joint Ex. 1 at 9-10 (Comments); FES Ex. 1 at 12-13 (Lesser Direct); Tr. Vol. I at 97-102.

ESSC.[138] The revenue received through Rider ESSC was "intended to protect [Duke's] financial integrity and ensure that the overall revenue under the ESP is adequate to [Duke] in its provision of an SSO."[139] If Duke believes its revenues are insufficient, Duke could seek additional revenues for its distribution and transmission businesses through traditional rate cases, or it could seek additional SSO revenues from a new or amended ESP.[140] Duke, nonetheless, has not sought any of these options. Instead, Duke has ignored the available remedies to cure its alleged financial harm, and expects the Commission to rescue it from its own actions and decisions by granting additional compensation that will be paid by Ohio consumers.[141]

3. Duke's Application fails to take into account the revenue received from Rider ESSC.

Assuming, arguendo, that the Commission determines that a cost-based compensation mechanism is appropriate for Duke, then the Commission must reduce the additional amount of revenue requested by the amount of revenues already authorized to be collected pursuant to Rider ESSC.[142] Duke alleges that a cost-based compensation mechanism is necessary because it is receiving an insufficient amount of compensation for its provision of capacity service. However, Duke's calculation of current revenues received from its capacity service is fatally flawed as it omits a substantial source of

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[138] FES Ex. 1 at 12 (Lesser Direct); OEG Ex. 1 at 14-15 (Kollen Direct).

[139] Tr. Vol. VIII at 1930, 1950; IEU Ex. 6 at 14 (ESP Case, Janson Supp. Direct); FES Ex. 1 at 12 (citing Duke Witness Wathen's testimony supporting the ESP Stipulation); IEU Ex. 17 at 9-11, 15-18 (Comments); FES Ex. 10 at 3-4, 7; Tr. Vol. I at 84-87, 88-89, 94-98, 100-101.

[140] FES Ex. 1 at 12-14 (Lesser Direct).

[141] OCC and OEG Joint Ex. 1 at 9 (Comments).

[142] Tr. Vol. VIII at 1927-28; OEG Ex. 1 at 28 (Kollen Direct); FES Ex. 1 at 3-4, 12-14 (Lesser Direct)("at an absolute minimum the PUCO should reduce [Duke's] request for creation of a $729 million regulatory asset by the full $330 million [Duke] will receive through the ESSC. This implies an absolute maximum regulatory asset value of $339,122,082, or $140,866,617 on an annualized basis.").

income, Rider ESSC.[143] As explained previously, Duke's own witness in the ESP Case explicitly stated that Rider ESSC was "intended to ... ensure that the overall revenue under the ESP is adequate to [Duke] in its provision of an SSO."[144] Despite Duke's declaration in the ESP Case, Duke did not account for Rider ESSC when it established its projected income statement in connection with the Application in this proceeding.[145] Duke admits that it is receiving this revenue and that such revenues are being allocated to Duke's Commercial Power business segment, which is associated with Duke's legacy generating assets,[146] and that the revenue is eventually rolled into the regulated electric revenue line item set forth on the income statement filed with Duke's 10-K.[147] Nonetheless, inexplicably, Duke does not recognize revenues received through Rider ESSC in its overall calculation of revenues generated from the provision of capacity service as an FRR entity.[148] There is no reason for this exclusion.[149] In fact, it is necessary to include Rider ESSC in the calculation of Duke's revenues received from its provision of capacity service consistent with its status as an FRR entity given that the ESSC revenues are designed to subsidize the legacy generating assets.[150]

Duke claims that it does not need to include Rider ESSC in its revenue calculations for purposes of this proceeding because Rider ESSC is intended to compensate Duke for retail electric services, not for the provision of capacity service

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[143] OEG Ex. 1 at 27 (Kollen Direct).

[144] IEU Ex. 6 at 14 (Janson Supp. Direct).

[145] Tr. Vol. IV at 934, 937 (April 18, 2013).

[146] FES Ex. 1 at 13 (Lesser Direct).

[147] Tr. Vol. IV at 934-35; Tr. Vol. VII at 1660-61.

[148] FES Ex. 1 at 3-4, 12-14 (Lesser Direct).

[149] See OEG Ex. 1 at 28 (Kollen Direct).

[150] Tr. Vol. VIII at 1927-28 ("it is appropriate to subtract out all of the revenues that you already asked for and will collect under the ESSC"); FES Ex. 1 at 13 (Lesser Direct).

consistent with its FRR obligations.[151] However, as set forth above, Rider ESSC was the result of negotiations between Duke and the other signatory parties to the ESP Stipulation and it was negotiated in the context of Duke's total compensation for the provision of SSO service under an ESP, which included the provision for a market-based compensation mechanism for Duke's capacity service. There can be no question that Rider ESSC was intended to act as compensation for Duke's provision of capacity service as an FRR entity as the ESP Stipulation specifically states that Rider ESSC was intended to "provide stability and certainty regarding [Duke's] provision of retail electric service *as an FRR entity* while continuing to operate under an ESP."[152] Kroger Witness Higgins explains that "the ESSC was justified in the settlement agreement in significant part because of Duke's responsibilities as an FRR entity."[153] He also notes that in its capacity as an FRR entity, Duke entered into the ESP stipulation with its eyes wide-open: "At the end of the day it's dollars to the company, and . . . the company ran the math on the dollars to the company and took that into account as part of the entire package."[154] "If [Duke] requires additional revenues for its regulated distribution and transmission business, it can file a traditional rate case to request such revenues."[155] At a minimum,[156] Rider ESSC must be included in the calculation of any capacity revenues, and the amount

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[151] Tr. Vol. II at 253; Duke Ex. 29 at 46 (Reply Comments).

[152] IEU Ex. 5 at 16 (ESP Stipulation)(emphasis added); See Tr. Vol. VIII at 1927-28; Kroger Ex. 1 at 6 (Higgins Direct); OEG Ex. 1 at 15 (Kollen Direct); Tr. Vol. II at 253-54; Tr. Vol. VI at 1372-73.

[153] Tr. Vol. IX at 2280.

[154] Id.

[155] FES Ex. 1 at 13 (Lesser Direct); IEU Ex. 17 at 17 (Comments). Duke also did not account for the ESSC revenues in its distribution rate case pending before the Commission, further evidence that Duke does not acknowledge such revenues as being distribution-related.

[156] As some intervenors argue, if the Commission allows Duke to collect above-market embedded capacity costs, additional adjustments are necessary to the amount Duke has requested. FES Ex. 1 at 11 (Lesser Direct); OCC Ex. 25 at 6-7 (Effron Direct); OEG Ex. 1 at 6-11 (Kollen Direct).

of revenues received from Rider ESSC must then be used to reduce the amount of above-market embedded capacity costs Duke is authorized to collect.[157]

III. Conclusion.

Based upon the foregoing arguments, the Commission should deny Duke's Application on its face as unlawful. Duke's Application to obtain a cost-based compensation mechanism is in direct violation of the ESP Stipulation and the RTO Stipulation, is a late-filed application for rehearing, and is barred by res judicata and collateral estoppel. As Kroger Witness Higgins concluded, when considering Duke's Application, "the Commission should reject this application squarely, and to the extent that the rejection of the application considers the interests of Duke Energy Ohio, it [should] consider the interests of Duke Energy Ohio in [the] broader context of regulatory policy and upholding the credibility and integrity of stipulations".[158]

Notwithstanding the above, if the Commission considers the merits of Duke's request to create a regulatory asset, a cost-based compensation mechanism still should not be granted as Duke has failed to sustain its burden for an increase in current ESP revenues in the magnitude of $776 million. Accordingly, the Commission should deny Duke's Application for the establishment of a cost-based compensation mechanism and the associated deferral as unjust, unreasonable, imprudent, and in violation of Ohio law.

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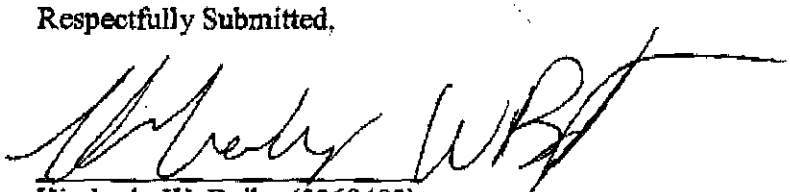
[157] FES Ex. 1 at 4 (Lesser Direct)("removing the ESSC revenues from [Duke's] claimed revenue requirement reduces the 'revenue to be collected' amount from the proposed $729,122,082 to $399,122,082").

[158] Tr. Vol. IX at 2302.

Respectfully Submitted,



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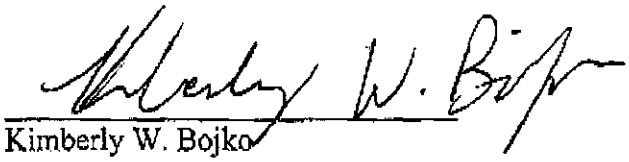
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 28th day of June, 2013 by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.



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