

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

**REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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I. Duke’s application does not mirror AEP Ohio’s Capacity Case application

Duke Energy Ohio Inc. (“Duke”) continues to demand that it be treated like AEP Ohio for its capacity charges. As numerous parties have stated in initial briefs, the AEP Ohio Capacity decision has no bearing on Duke’s capacity rates. The Commission’s decision in AEP Ohio’s Capacity Case related only to AEP Ohio.¹ The Commission expressly stated that it initiated the AEP Ohio proceeding:

¹ OCC Ex. 3, In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, Case No. 10-2929-EL-UNC (“AEP Capacity Proceeding”) (Entry on Rehearing) (Dec. 8, 2010) at 32.

solely to review AEP-Ohio's capacity costs and determine an appropriate capacity charge for its FRR obligations. We have not considered the costs of any other capacity supplier subject to our jurisdiction nor do we find it appropriate to do so in this proceeding.²

The AEP Ohio Capacity decision does not apply on a statewide basis as Duke argues.

The Commission examines and considers applications individually and not by a “one-size-fits-all” mentality. Duke has even agreed with this important principle in the past:

Despite AEP Ohio’s misguided urging, the Commission should not, and does not, summarily regulate public utilities with a “one size fits all” mentality. Rather, as the Commission is accustomed to doing, its decision must be predicated upon a deliberate review of the relevant evidence in the individual case at bar. The Commission thoroughly reviewed the record and issued a detailed Opinion and Order in connection with the Duke Energy ESP Stipulation.³

Duke fully contemplated charging only market rates for capacity until the AEP decision.⁴ However, Duke is not “similarly situated” to AEP Ohio. There are substantial differences between the two companies. Most notably, AEP Ohio did not enter into a stipulation governing the pricing of its capacity as Duke did. The significant differences bolster the need to treat Duke and AEP on a separate and individual basis.

² OCC Ex. 3, *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC (“*AEP Capacity Proceeding*”) (Entry on Rehearing) (Dec. 8, 2010) at 32 (emphasis added).

³ *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.* (“*Duke ESP Proceeding*”) (Duke Energy Ohio, Inc.’s Memorandum in Opposition to the Application for Rehearing of Columbus Southern Power Company and Ohio Power Company at 4) (Dec. 23, 2011).

⁴ Tr. I at 229 (Trent Cross).

There are no changed circumstances that would justify altering the pricing that Duke agreed to in the ESP Stipulation. The capacity prices for the ESP period were known before Duke entered into the Stipulation.⁵ Duke intensely studied the ESP case, modeled the PJM capacity prices as part of the process of agreeing to the ESP Stipulation, and fully understood the financial ramifications of agreeing to market prices for capacity.⁶ Duke reported the ESP Stipulation to the investment community, which recognized that it would immediately and over time diminish Duke's earnings.⁷ Duke must be held to the terms of the ESP settlement – a package that included both market capacity rates and the \$330 million ESSC. Since January 2012 Duke has been charging CRES providers the FZCP market rate and retail customers Rider ESSC to compensate Duke for its generation assets to meet its FRR obligations. The Commission should not allow Duke to avoid its agreement on capacity pricing capacity and upset the benefit of the bargain that the other parties made with Duke. The Commission must reject Duke's current application.

⁵ Tr. I at 349-350.

⁶ *Id.* at 995, 998, & 1000 (Savoy Cross).

⁷ *Id.* at 746 (DeMay Cross).

II. Duke's application violates the doctrines of *res judicata* and collateral estoppel.

Duke argues that *res judicata* and collateral estoppel do not apply because the Application in this proceeding deals with issues which are different from the issues addressed in the ESP Case.⁸ Contrary to this claim, Duke's compensation for the provision of its capacity service as an FRR entity has already been settled through the ESP Stipulation. The issues are the same – capacity pricing. Duke was well aware of its alternatives for the provision of its capacity service and chose RPM-based pricing (plus the \$330 million ESCC) and explicitly included it in the ESP Stipulation. Duke cannot now re-litigate the issues that it resolved through settlement.

Duke further argues that *res judicata* does not apply to its Application in this proceeding because the ESP Case was a settlement and not a valid final judgment upon the merits.⁹ But the ESP Case was indeed a proceeding with a final judgment upon the merits where parties were provided the opportunity to litigate. The Commission provided notice, held an evidentiary hearing, and provided parties the opportunity to introduce evidence. Duke took full advantage of the opportunity and submitted evidence in support of its Application. Duke now claims that the ESP Case was not litigated because all issues were resolved through the ESP Stipulation. *Res judicata* applies to cases that were resolved through settlement.¹⁰ As such, the ESP Case was a final judgment upon the

⁸ Duke Brief at 41-42.

⁹ *Id.* at 41.

¹⁰ *Scott v. East Cleveland*, 16 Ohio App.3d 429,476 (Ct. App.) (1984).

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

III. The Commission has authority to establish a SCM under state law, but Duke previously settled on a capacity price.

Some of the parties in their initial briefs dispute whether the Commission can establish a state compensation mechanism (“SCM”) pursuant to its traditional regulatory authority under Chapters 4905 and 4909 of the Ohio Revised Code. The Commission has already decided it can and these same parties have appealed that decision to the Ohio Supreme Court.¹¹ But that is not the issue here. Duke may like the outcome of the AEP-Ohio litigation in Case No. 10-2929-EL-UNC better than the result it obtained through a negotiated settlement on the capacity issue, but that does not translate Duke’s preference to have what AEP-Ohio got into a legal right. The issue here is whether Duke had a deal and is bound to provide its capacity service to CRES providers and its load at the FZCP for the duration of Duke’s FRR entity status and ESP? The answer is clearly yes. In addition, Duke was compensated an additional \$110 million a year for three years for an ESSC charge to provide stability and certainty regarding Duke’s capacity service as an FRR entity.¹² The ESP Stipulation addresses Duke’s additional capacity compensation, as follow:

¹¹ *AEP Capacity Proceeding* (Opinion and Order) (July 2, 2012); (Entry on Rehearing (Oct. 17, 2012); (Entry on Rehearing) (Dec. 12, 2012); (Entry on Rehearing) (Jan. 30, 2013) (on appeal in the Ohio Supreme Court, Consolidated Case Nos. 2012-2098 and 3013-228).

¹² FES Ex. 22, *Duke ESP Proceeding* (Supplemental Testimony of Duke Witness Wathen at 18-19) (Oct. 28, 2011).

For the calendar years 2012, 2013, and 2014 of the ESP, Duke Energy Ohio shall recover annually, via a non-bypassable generation charge called the Electric Service Stability Charge Rider (Rider ESSC), an amount intended to provide stability and certainty regarding Duke Energy Ohio's provision of retail electric service as an FRR entity while continuing to operate under an ESP.¹³

Duke is asking the Commission to set aside the capacity pricing portion of the Stipulation in Case No. 11-3549-EL-SSO, *et al.*, in favor of a cost-based SCM capacity charge. This directly undermines the agreement Duke and the rest of the ESP parties bargained for. The Commission adopted that Stipulation on November 22, 2011 and issued an Entry on Rehearing on January 18, 2012 affirming its decision. Duke did not apply for rehearing until now, through this application. Duke's application defies regulatory and legal certainty because there exists already a valid final order by the Commission that addressed Duke's capacity issue and compensation. It's too late for Duke to get a different capacity price now and the Commission should deny its application for this reason.

IV. Conclusion

Duke's application ignores prior settlement agreements, defies state policies supporting settlements, and undermines the finality of Commission orders. The application, if approved, will unreasonably cost Ohio customers \$729 million dollars when parties had negotiated a lower amount be paid for the same capacity that is the subject of Duke's

¹³ IEU Ex. 5, *Duke ESP Proceeding* (Stipulation and Recommendation at 15-16) (Oct. 24, 2011) (as amended).

Application. The Commission should reject Duke's Application and preserve the integrity of the ESP Stipulation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by electronic mail upon the following parties of record, this 30th day of July, 2013.

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Summary: Reply Brief submitted by Assistant Attorney General Steven L. Beeler on behalf of the Staff of the Public Utilities Commission of Ohio. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio