ORIGINAL

IN THE SUPREME COURT OF OHIO

INDUSTRIAL ENERGY USERS - OHIO	:	**Consolidated Case Nos. 2012-2098**
	:	**2013-228**
Appellant	:	
	:	**Appeals from the Public Utilities Commission of Ohio**
v.	:	
THE PUBLIC UTILITIES COMMISSION OF OHIO,	:	**Public Utilities Commission of Ohio Case No. 10-2929-EL-UNC**
Appellee.	:	

MOTION TO DISMISS OF OHIO POWER COMPANY

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MOTION TO DISMISS OF OHIO POWER COMPANY

Pursuant to Rule 4.01 of the Court's Rules of Practice, Ohio Power Company (d/b/a AEP Ohio), Appellee/Cross-Appellant, respectfully requests that the Court dismiss certain challenges raised in these appeals from the Public Utilities Commission of Ohio. For the reasons explained in the attached Memorandum in Support, AEP Ohio seeks dismissal of the assignments of error advanced in these consolidated appeals that improperly challenge matters already authoritatively addressed by the Federal Energy Regulatory Commission pursuant to Federal law.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This appeal arises out of an Order issued by the Public Utilities Commission of Ohio (the "Ohio Commission")[1] reforming how "capacity"—a component of electrical service—is priced. *See* Ohio P.U.C. Order in Case No. 10-2929-EL-UNC (July 2, 2012). Appellants, the Industrial Energy Users-Ohio and FirstEnergy Solutions, Corp., seek to overturn that decision, urging (among other things) that the Ohio Commission exceeded its jurisdiction by regulating wholesale energy markets that only the Federal Government can regulate and that the Ohio Commission's rulings are inconsistent with a tariff approved by the federal regulator, the FERC, in a decision that is now final and no longer subject to appeal. On May 23, 2013, however, federal regulators confirmed the compensation mechanism for capacity adopted by the Ohio Commission, ruling that it is consistent with the relevant federal tariff (Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement for PJM Interconnection, LLC). *See* 143 FERC ¶ 61,164 (May 23, 2013).

That FERC ruling forecloses this Court from exercising jurisdiction over Appellants' contention that the Ohio Commission's decision violates the federal tariff or invades exclusive federal jurisdiction. Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) requires that any challenge on those issues must be made by seeking review of FERC's order in specified federal courts of appeals; such challenges must be brought consistent with that provision or not at all.. Moreover, the filed-rate doctrine precludes this Court from entertaining Appellants' challenge based on their interpretation of the federal tariff. Finally, Appellants' argument that

[1] While the Public Utilities Commission of Ohio is commonly referred to as the "Commission" before this Court, this Memorandum in Support will refer to the Public Utilities Commission of Ohio as the "Ohio Commission" in order to avoid any confusion with the Federal Energy Regulatory Commission, which will be referred to as "FERC."

the Ohio Commission lacked jurisdiction—because FERC has exclusive jurisdiction—is now moot. Because FERC exercised its jurisdiction to confirm the Ohio Commission's mechanism under Federal law, any claim that the issue should be addressed by federal rather than state regulators is no longer live.

Because this Court lacks jurisdiction over those assignments of error—that the state compensation mechanism adopted by the Ohio Commission violates the relevant federal tariff, or otherwise invades a domain of exclusive federal authority—AEP Ohio respectfully requests their dismissal.

BACKGROUND

This case concerns the regulation of capacity markets and the prices paid for capacity. "'Capacity' is not electricity itself but the ability to produce it when necessary." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009); 134 FERC ¶ 61,039, at P4 (2011). When a utility buys capacity on the market, in essence it is purchasing "the option of buying a specified quantity of power" when it is needed; the utility can thereby ensure it can provide sufficient electricity to its customers during peak periods of electricity demand. *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 466 (D.C. Cir. 2008), *rev'd in part sub nom., NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010). Wholesale capacity markets are regulated by the FERC and, as discussed below, are subject to pricing based on a state compensation mechanism by a State commission such as the Ohio Commission.

I. *The PJM Reliability Assurance Agreement Established under Federal law*

PJM Interconnection, L.L.C. ("PJM") is a Regional Transmission Organization ("RTO") that covers thirteen States (including Ohio) and the District of Columbia. RTOs are federally regulated entities responsible for overseeing the delivery of electricity over large interstate areas

to support competitive bulk energy markets. 89 FERC ¶ 61,285, at 61,151-52 (1999). RTOs allow for different segments of the grid owned by its individual member utilities to be operated as a regional transmission grid. The RTO then manages that grid, offering non-discriminatory access to energy suppliers across the region. Doing so allows for greater competition among electricity generators and marketers, permitting lower-cost power to be "wheeled" across the region to meet the electricity needs of utilities that may be further away. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004).

In addition to overseeing the regional transmission grid, PJM also runs a capacity market that spans its 13-state region. This market facilitates the PJM Reliability Assurance Agreement requirement that all load-serving entities within PJM, including AEP Ohio, have or contract for sufficient capacity to provide reliable service to their end-use customers. *See* July 2, 2012 Capacity Charge Order at 10 (describing the Reliability Assurance Agreement's purpose). Load-serving entities can meet that requirement by securing capacity through an annual auction of capacity from the PJM region. The auction clearing prices are established using rules set out in PJM's FERC-approved tariff, referred to as the Reliability Pricing Model ("RPM"). 137 FERC ¶ 61,108, at P6 (2011) ("Under PJM's Reliability Pricing Model (RPM) protocols, PJM conducts forward auctions to secure capacity for a future delivery year. . . ."). The PJM Reliability Assurance Agreement includes an alternative program, the "Fixed Resource Requirement" ("FRR"), that enables utilities that own and/or control sufficient generating resources to opt out of the annual RPM auctions as the mechanism for securing sufficient capacity and instead rely upon their own capacity.

As a load-serving entity in PJM, 122 FERC ¶ 61,083, at P134 (2008), the AEP-East utilities (including AEP Ohio) "secures energy and transmission service (and related

interconnected operations services)"—including capacity—"to serve . . . its end-use customers," 139 FERC ¶ 61,054, at P2 (2012). As one of the AEP utilities, AEP Ohio fulfills its obligations under the PJM Reliability Assurance Agreement as an "FRR Entity" under the FRR alternative. 134 FERC ¶ 61,039, at P2-4. In addition to requiring that AEP Ohio meet the capacity needs of its own end-use customers, the Reliability Assurance Agreement also obligates AEP Ohio to make capacity available—to guarantee the availability of electricity on demand—to Competitive Retail Electric Service providers ("CRES providers") that sell to end-use consumers but elect not to operate facilities for the generation of capacity themselves. *See id* at P4. The FRR alternative was created for AEP because it largely operated in traditional cost-based regulation jurisdictions at that time.

Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement ("Section D.8") sets forth the rates at which AEP Ohio, as an FRR entity, is compensated for providing capacity to such CRES providers. 134 FERC ¶ 61,039, at PP2-3. Absent "a state-created compensation mechanism," the Reliability Assurance Agreement establishes a default capacity rate that tracks the capacity prices established each year through PJM's RPM capacity auctions. Section D.8 further provides, however, that an FRR entity like AEP Ohio always has the right to petition FERC, under Section 205 of the Federal Power Act, to propose an alternative compensation mechanism so long as it is just and reasonable. The tariff thus provides:

> In the absence of a state compensation mechanism, the applicable [CRES provider] shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity's costs or such other basis shown to be just and reasonable . . . .

134 FERC ¶ 61,039, at PP2-3 (quoting Section D.8). Consequently, under the PJM Reliability Assurance Agreement, absent a "state compensation mechanism," CRES providers that choose not to supply their own capacity would pay AEP Ohio for capacity based on RPM pricing, unless AEP Ohio petitions FERC for cost-based or another type of just and reasonable pricing.

II. *Proceedings To Establish the State Compensation Mechanism for AEP Ohio*

A. Initial Proceedings Before FERC

"Since the start of the PJM RPM capacity market," AEP Ohio received "capacity compensation" from CRES providers "based on the RPM clearing prices." 134 FERC ¶ 61,039, at P4. But the prices resulting from the auction dropped far below AEP Ohio's actual costs of providing capacity at a time when shopping in AEP Ohio's service territory (*i.e.*, use of CRES providers) was significantly increasing; hundreds of millions of dollars in losses were projected as a result. Accordingly, in November of 2010, AEP Ohio petitioned FERC under Section 205 of the Federal Power Act "to change the basis of [its] capacity compensation from the PJM RPM clearing price to annually adjusting formulas that track actual capacity costs." *Id.* AEP invoked its right, under the federal tariff, to "make a filing with FERC under Section 205" in the "absence of a state compensation mechanism." *Id.* at PP2-3.

B. After AEP Ohio submitted its Section 205 filing, however, the PUCO advised FERC that, by an Entry issued "on December 8, 2010," it had "expressly adopted the use of the RPM auction price as its state compensation mechanism." *Id.* at P6. AEP Ohio argued in response that under the jurisdictional bright line established under the Federal Power Act, the Ohio Commission did not have the legal authority to adopt a state compensation mechanism that established *wholesale* charges. AEP Ohio argued that the only reasonable interpretation of Section D.8 is that state commissions such as the Ohio Commission could adopt state compensation mechanisms that established *retail* charges assessed to retail customers. Relying on the Ohio Commission's representation, however, FERC rejected AEP Ohio's

filing in early 2011, citing "the existence of a state compensation mechanism." *Id.* at P13. Proceedings Before the Ohio Commission

The Ohio Commission's December 2010 Entry also sought comments from interested parties on using the RPM auction price as the state compensation mechanism, finding that "a review is necessary in order to determine the impact of the proposed change to AEP Ohio's capacity charges." Ohio P.U.C. Order in Case No. 10-2929-EL-UNC ¶ 4 (Dec. 8, 2010). After the submission of extensive briefing, evidence, and testimony, the Ohio Commission issued an Opinion and Order establishing a state compensation mechanism for capacity on July 2, 2012. *See* Ohio P.U.C. Order in Case No. 10-2929-EL-UNC (July 2, 2012) ("Capacity Charge Order"). That July 2, 2012 Capacity Charge Order is the subject of two consolidated appeals before this Court docketed as Case Nos. 2012-2098 and 2013-0228.

1. ***The Order Under Review—The Capacity Charge Order.*** In the Capacity Charge Order, the Ohio Commission "f[ound] that it has jurisdiction to establish a state compensation mechanism in this case pursuant to its general supervisory authority found in Sections 4905.04, 4905.05, and 4905.06, Revised Code." July 2, 2012 Capacity Charge Order at 22; *see also id.* at 12. At the same time, the Ohio Commission acknowledged that "capacity is a wholesale rather than a retail service." *Id.* at 22. And it stated that "compensation for AEP Ohio's FRR capacity obligations from CRES providers is wholesale in nature." *Id.* at 33. It further "recognize[d] that, pursuant to the [Federal Power Act], electric sales for resale and other ***wholesale transactions are generally subject to the exclusive jurisdiction of FERC***." *Id.* at 13. But the Ohio Commission ruled that its "exercise of jurisdiction, for the sole purpose of establishing an appropriate state compensation mechanism, is ***consistent with*** the governing section of the [Reliability Assurance Agreement], which, as a part of PJM's tariffs, has been approved by FERC." *Id.* (emphasis added). That is so, the Ohio Commission contended, because "Section

D.8 of Schedule 8.1 of the [Reliability Assurance Agreement] acknowledges the authority of a state regulatory jurisdiction . . . to establish a state compensation mechanism." *Id.*

After concluding that it had jurisdiction, the Ohio Commission adopted a state compensation mechanism. "[T]he record," the Ohio Commission explained, "reveals that RPM-based capacity pricing would be insufficient to yield reasonable compensation for AEP Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations." July 2, 2012 Capacity Charge Order at 23. The Ohio Commission thus found that "it is necessary and appropriate to establish a cost-based state compensation mechanism for AEP Ohio." *Id.* at 22.

At the same time, the Ohio Commission determined that charging CRES providers for capacity based on RPM (auction) prices would better promote competition in the market. July 2, 2012 Capacity Charge Order at 23. Accordingly, the Ohio Commission adopted a two-part mechanism that preserves the RPM clearing price for capacity charges assessed to CRES providers, while also accounting for AEP Ohio's cost of providing that capacity. *Id.* In particular, it directed AEP Ohio to collect the auction rate from CRES providers and to "defer incurred capacity costs not recovered from CRES provider billings." *Id.* The deferred capacity costs, it ruled, would be recovered from retail customers through a mechanism to be more fully developed in a separate proceeding. That approach, the Ohio Commission stated, would "appropriately balance [the] objectives of enabling AEP Ohio to recover its costs for capacity incurred in fulfilling its FRR capacity obligations, while promoting the further development of retail competition." *Id.* at 24. Although the Ohio Commission did not address the mechanics of the deferred recovery mechanism in its Order, it did set the cost level that AEP Ohio could recover under the two-part mechanism at $188.88/MW-day. *Id.* at 33.

2. ***The Companion Order—the Electric Security Plan Order.*** On August 8, 2012, the Ohio Commission issued its Opinion and Order in the separate Electric Security Plan (ESP) proceeding referenced in the July 2, 2012 Capacity Charge Order. *See* the Ohio P.U.C. Opinion and Order in Case No. 11-3646-EL-SSO (Aug. 8, 2012). In that Order, the Commission (among other things) addressed the mechanics of the deferred recovery mechanism that allows AEP Ohio to recover a portion of its costs from providing capacity. *Id.* at 35-36. That ESP Order is the subject of another appeal before this Court, docketed as Case No. 2013-0521.

C. Further Proceedings Before FERC

After the Ohio Commission issued its orders adopting the state compensation mechanism as discussed above, AEP Ohio filed with FERC "a proposed appendix" to the PJM Reliability Assurance Agreement, "specif[ying] the wholesale charges to be assessed" to CRES providers for the capacity AEP Ohio "is required to make available under Schedule 8.1 of Section D.8 to the [Reliability Assurance Agreement]." Dkt. No. 1, FERC No. ER13-1164, at 1 (Mar. 25, 2013). AEP Ohio noted that it "consistently has taken the position" that, "under the Federal Power Act and decades of [FERC] and judicial precedent, [FERC] has the ***exclusive authority*** to establish ***wholesale*** FRR capacity charges." *Id.* at 15 (emphasis added). AEP Ohio explained that the PJM Reliability Assurance Agreement's statement in Section D.8 that "a state compensation mechanism 'will prevail' cannot override the Federal Power Act." *Id.* But AEP Ohio—like the Ohio Commission in its July 2, 2012 Capacity Charge Order—also explained that the state compensation mechanism adopted by the Ohio Commission is "[c]onsistent with" the federal tariff—in particular, Section D.8 of the Reliability Assurance Agreement—and therefore permissible under federal law. Dkt. No. 1, FERC No. ER13-1164, at 1 (Mar. 25, 2013).

AEP Ohio's filing thus made two interrelated requests. First, "pursuant to its authority to interpret the [Reliability Assurance Agreement] as a tariff on file with [FERC]," AEP Ohio

requested that FERC "confirm that the Ohio Commission's adoption of a state compensation mechanism with wholesale and retail components is fully consistent with Section D.8" of the Reliability Assurance Agreement. Dkt. No. 1, FERC No. ER13-1164, at 2 (Mar. 25, 2013). Second, AEP Ohio requested that FERC "accept for filing the wholesale component of the Ohio state compensation mechanism set forth in the attached [Reliability Assurance Agreement] appendix." *Id.* AEP Ohio explained that "[t]hese rulings will (i) permit the parties to the various regulatory proceedings to move past jurisdictional questions about state commission authority to establish wholesale charges, (ii) bring additional certainty to longstanding proceedings at both the state and federal levels, and (iii) ultimately dispose of these and other contentious issues pending before the Commission in related proceedings." *Id.* The rulings would likewise fulfill FERC's "independent obligation under Federal Power Act Section 205 to review and accept or approve [wholesale] charges." *Id.* at 5.

Appellants First Energy and Industrial Energy Users-Ohio, along with others, intervened before FERC, filing protests. 143 FERC ¶ 61,164, at P9. Both Industrial Energy Users-Ohio and FirstEnergy urged, for example, that only "RPM-Based Pricing" could meet the Federal Power Act's requirement that all rates be "just and reasonable." IEU Protest at 18 (Apr. 15, 2013); FirstEnergy Protest at 5-10 (Apr. 16, 2013). The Office of the Ohio Consumers' Counsel intervened as well, urging that the Ohio Commission's plan violated the federal tariff. PJM's Reliability Assurance Agreement, OCC urged, "does not permit the PUCO to adopt a state compensation mechanism that imposes charges on non-shopping retail consumers," OCC Protest at 12 (Apr. 16, 2013); the resulting rates, OCC further argued, are "unduly preferential, unduly discriminatory, unjust and unreasonable contrary to the requirements of FPA Section 205," id. at 13. The Ohio Commission, by contrast, encouraged FERC to accept AEP Ohio's submission for

filing because that would "avoid the need for the Supreme Court of Ohio to opine on the meaning of the [Reliability Assurance Agreement] and further will avoid arguments claiming that there is some sort of jurisdictional dispute" between it and FERC. Ohio PUC Comments at 4 (Apr. 16, 2013).

On May 23, 2013, FERC rejected the protests filed by IEU-Ohio, FES and others, finding instead that AEP Ohio's proposed Appendix (as amended by AEP Ohio) "accords with the RAA" and "is consistent with the RAA" *See* 143 FERC ¶ 61,164, at PP26, 30 (May 23, 2013) at PP.26, 30. It accepted AEP Ohio's Appendix to the Reliability Assurance Agreement, which incorporated the Ohio Commission's mechanism for assessing wholesale charges to CRES providers, for filing as consistent with federal law. *Id.* at P24. Although Appellants both participated in the FERC proceedings. 143 FERC ¶ 61,164, at P9, neither sought rehearing of the FERC Order. And neither filed a petition for review before any federal court of appeals. Accordingly, under Section 313(b) of the Federal Power Act, 18 U.S.C. § 825l(b), the FERC Order is now final and non-appealable.

D. Proceedings Before This Court

On February 6 and 11, 2013, before FERC issued its Order, Appellants filed notices of appeal from the Capacity Charge Order. *See* Notice of Appeal of IEU-Ohio, Case No. 13-0228 (Feb. 6, 2013); FES's Notice of Cross-Appeal, Case No. 13-0228 (Feb. 11, 2013). In those notices, they generally challenge the state capacity charge compensation mechanism the Ohio Commission established in the Capacity Charge Order. But they include, among their assignments of error, challenges to the Ohio Commission's jurisdiction to approve a state compensation mechanism that includes wholesale charges (on the theory it invades exclusive federal jurisdiction). See Notice of Appeal of Industrial Energy Users-Ohio, Case No. 13-0228, ¶ 2 (Feb. 6, 2013) (Ohio Commission jurisdiction "does not include wholesale transactions

between AEP Ohio and competitive retail electric service ('CRES') providers."); id. ¶ 3 ("The Commission is without jurisdiction to determine what, if any, rights AEP Ohio may have under an agreement and this is particularly true in this case since the [Reliability Assurance Agreement] is subject to the exclusive jurisdiction of FERC."). They challenge the Ohio Commission's authority under the Reliability Assurance Agreement to adopt a cost-based (rather than an auction-based) compensation mechanism. See id. ¶ 5 (Reliability Assurance Agreement does not allow "cost-based rates").And they challenge the Ohio Commission's interpretation and authority to interpret the Reliability Assurance Agreement. See FirstEnergy Solutions Corp.'s Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013) ("The Commission acted unlawfully and unreasonably in setting a rate for capacity based on the utility's fully embedded costs, which is contrary to and inconsistent with PJM Interconnection, LLC's Reliability Assurance Agreement, as approved by the Federal Energy Regulatory Commission.").

Those issues, all of which concern the meaning and effect of the federal tariff and federal regulatory authority over wholesale markets, have now been addressed by FERC. Accordingly, for the reasons given below, this Court lacks jurisdiction over them, and the challenges should be dismissed.[2]

ARGUMENT

The Court lacks jurisdiction over Appellants' contention that the Ohio Commission exceeded its jurisdiction by regulating markets that are FERC's exclusive domain, or that the Commission's Orders are inconsistent with a federal tariff. Those claims would require this Court to second guess or undermine FERC's May 23, 2013 Order. But the Federal Power Act

[2] To the extent that the Appellants raise any challenges to the Ohio Commission's jurisdiction to adopt the State Compensation Mechanism that are based purely on Ohio law and are not based – directly or indirectly – on Federal law, those challenges are beyond the scope of this Motion to Dismiss and will be addressed in the merit briefing stage of these appeals.

requires that any challenges to a FERC order, explicit or implicit, be made in the relevant federal court of appeals or not at all. The filed-rate doctrine, moreover, precludes this Court from reviewing Appellants' effort to press an interpretation of a FERC tariff that departs from the one adopted by FERC or entities charged with its implementation; if they disagree with the implementation of a FERC tariff, their remedy lies with FERC. And Appellants' arguments that the Ohio Commission lacked jurisdiction because FERC has exclusive jurisdiction are now moot, FERC having exercised its jurisdiction to approve the determinations under review here. Those portions of Appellants' appeals should be dismissed.

I. *Challenges to FERC's May 23, 2013 Order Brought in Court*

A. The Federal Power Act Requires All Challenges To Be Brought in the Appropriate Federal Court Following Rehearing at FERC

The Federal Power Act sets forth the exclusive method to challenge, directly or indirectly, the lawfulness of FERC Orders. Section 313(b) of the Act provides that a party "aggrieved" by a FERC Order may obtain review of that Order "in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." 16 U.S.C. § 825*l*(b). "Congress in 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). "It thereby necessarily precluded . . . all other modes of judicial review." *Id.*; *see also, e.g.*, *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009); *W. Area Power Admin. v. FERC*, 525 F.3d 40, 51 (D.C. Cir. 2008); *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187-88 (2d Cir. 2001). "Even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute." *Investment Co. Institute*

v. Bd. of Governors of the Fed. Reserve Sys., 551 F.2d 1270, 1279 (D.C. Cir. 1977); *see also, e.g.*, *Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 791 (9th Cir. 2001). Consequently, any "objections" to FERC Orders "must be made in the Court of Appeals or not at all." *City of Tacoma*, 357 U.S. at 336.

Many of Appellants' assignments of error cannot, consistent with those rules, be pursued in this Court. Each would require this Court to second guess or undermine FERC's May 23, 2013 Order. IEU-Ohio, for example, contends that the Ohio Commission's jurisdiction "does not include wholesale transactions between AEP Ohio and competitive retail electric service ('CRES') providers." Notice of Appeal of IEU-Ohio, Case No. 13-0228, ¶ 2 (Feb. 6, 2013). That determination, IEU-Ohio urges, "is subject to the exclusive jurisdiction of FERC." *Id.* ¶ 3. IEU-Ohio also seeks to overturn the Ohio Commission's determination of appropriate compensation for capacity by urging that the governing federal requirement, the Reliability Assurance Agreement, does not permit "cost-based rates." *Id.* ¶ 5. FirstEnergy Solutions similarly challenges the Ohio Commission's Order as impermissibly modifying the "Reliability Assurance Agreement, as approved by the Federal Energy Regulatory Commission." FES's Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013).

But those same Federal law issues were before FERC, which has issued an Order to address them. That Order "accept[ed] AEP Ohio's proposed Appendix" and concluded that "the proposed Appendix accords with the [Reliability Assurance Agreement] and the state compensation mechanism." *See* 143 FERC ¶ 61,164, at PP26, 30. Accordingly, to address the federal-law assignments of error, this Court would need to decide whether FERC's May 23, 2013 Order properly confirmed Ohio's state compensation mechanism when it accepted AEP Ohio's proposed Appendix to the Reliability Assurance Agreement. But FERC has now addressed

whether the Ohio Commission's rulings were permissible under the Reliability Assurance Agreement and federal law. Appellants may not now challenge or otherwise seek to collaterally attack those determinations in this Court. *City of Tacoma*, 357 U.S. at 341, 344. Rather, pursuant to Section 313(b) of the Federal Power Act, such a challenge "must be made in the Court of Appeals or not at all." *Id.* at 336.

The Supreme Court's decision in *City of Tacoma* is on point. In that case, a city in Washington State applied for a FERC license to build a power project, including two dams. 357 U.S. at 324. Over objection of the attorney general for the State of Washington, FERC granted the license. *Id.* at 326. The State of Washington appealed to the U.S. Court of Appeals for the Ninth Circuit, arguing that "the City had not complied with applicable state laws nor obtained state permits and approvals required by state statutes." *Id.* at 328. The U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* The City also brought suit in state court seeking a declaratory judgment that the bonds issued to finance the project were valid. *Id.* at 329. The State of Washington then filed a cross-claim in state court, "reasserting substantially the same objections that . . . the State had made before the Commission, and that had been made in, and rejected by, the Court of Appeals on their petition for review." *Id.* The trial court enjoined the city from proceeding with the projects nonetheless, and the state supreme court eventually affirmed. *Id.* at 331-32.

The United States Supreme Court reversed, unequivocally rejecting the possibility of a state court decision overturning the effect of a FERC Order—even indirectly. Once FERC had approved construction of the power project, the State's attempt to enjoin the project in effect challenged that FERC decision. But Section 313 of the Federal Power Act permitted such challenges to be brought only in a federal court of appeals, and "necessarily precluded *de novo*

litigation between the parties of all issues inhering in the controversy," as well as "all other modes of judicial review." *City of Tacoma*, 357 U.S. at 336. Section 313(b) likewise "preclude[d] a district court from hearing a particular claim [when] the claim 'could and should have been' presented to and decided by a court of appeals." *Merritt*, 245 F.3d at 188 (quoting *City of Tacoma*, 357 U.S. at 338); *see also Skokomish Indian Tribe v. United States*, 332 F.3d 551, 558 (9th Cir. 2003) ("***Any*** collateral attacks" are "governed by § 825*l*(b)." (emphasis added)).

City of Tacoma precludes Appellants' collateral attacks to FERC's Order unless those challenges are properly presented in a federal court of appeals. In this Court, Appellants assert many of the same issuesthat were raised before FERC. IEU-Ohio, for example, contends that the Reliability Assurance Agreement does not allow "cost-based rates." Notice of Appeal of IEU-Ohio, Case No. 13-0228, ¶ 5 (Feb. 6, 2013). It likewise argued before FERC that the Ohio Commission impermissibly "invented and applied a cost-based ratemaking methodology." Protest of IEU-Ohio in No. ER13-1164-000, at 17 (Apr. 15, 2013); *id.* at 18 ("RPM-Based Pricing is the only price for wholesale capacity that can be viewed as just and reasonable and not unduly discriminatory."); FES's Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013). But FERC approved AEP Ohio's Appendix to the Reliability Assurance Agreement, incorporating the Ohio Commission's cost-based pricing mechanism, nonetheless. *See* 143 FERC ¶ 61,164, at PP26, 30 (May 23, 2013) at PP.26, 30. Appellants' efforts to assert those same arguments in this Court are squarely foreclosed by Section 313(b) of the Federal Power Act. If Appellants disagree with FERC's decision to accept the Ohio Commission's pricing as consistent with federal requirements, they must pursue a challenge against FERC in federal court.

It makes no difference, moreover, that Appellants' assignments of error are framed as challenges to the Ohio Commission's Capacity Charge Order, rather than as direct challenges to FERC's decision. Time and again courts apply the Federal Power Act's exclusivity provision even where, as here, a particular FERC Order is not explicitly raised. *See, e.g., Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) (barring efforts "to avoid the strict jurisdictional limits imposed by Congress" in Section 313(b) by declining to challenge FERC determinations directly); *Skokomish Indian Tribe*, 332 F.3d at 560 (holding that "the Tribe's claims are impermissible collateral attacks on FERC's licensing order" even though "the Tribe does not explicitly seek to modify, rescind, or set aside FERC's licensing order"). The only relevant inquiry is whether the ***effect*** of a decision by this Court would second guess or undermine a FERC Order. That is plainly the case here.

The policies underlying Section 313(b) reinforce that conclusion. Jurisdictional exclusivity avoids "the possibility of parallel litigation." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2135 (2012). When Congress adopts exclusivity provisions, it avoids "wide variations in the kinds of decisions . . . issued on the same or similar matters and a double layer of judicial review that [is] wasteful and irrational." *Id.*; *see also Cal. Save Our Streams Council*, 887 F.2d at 912 ("The point of creating a special review procedure in the first place is to avoid duplication and inconsistency"). Allowing this suit to proceed in this Court, notwithstanding FERC's ruling, would create precisely the risk of duplicative litigation—or an end-run on federal review—that Section 313(b) is designed to avoid.[3] State courts applying the Natural Gas Act's substantively

[3] Moreover, when it comes to resolving the scope of federal jurisdiction and the meaning of FERC tariffs, it makes sense for FERC to resolve those issues in the first instance. Even federal courts, which are authorized by Section 313(b) to review such FERC decisions, must defer to FERC's reasonable resolution of those matters. *See, e.g. Wisconsin Pub. Power, Inc. v. FERC*, 439 F.3d 239, 256 (D.C. Cir.2007).

identical exclusivity provision[4] have reached the same conclusion.[5] Like those courts, this Court too should rule that it lacks jurisdiction to entertain a collateral attack on FERC's rulings.

Congress has power to limit review of an agency's decision to a particular process, and that review process is exclusive where Congress' intent to make it so is "fairly discernable" from the statutory language. *Elgin*, 132 S. Ct. at 2132 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)); *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) ("[W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive."). Because FERC has done so here, Appellants' assignments of error based on federal law—which relate to the Ohio Commission's authority under the federal Reliability Reassurance Agreement, the impact of FERC's exclusive jurisdiction, or the permissibility of the Ohio Commission's decision under federal law should be dismissed.

B. Appellants' Failure To Petition FERC for a Rehearing Underscores the Impropriety of Review in this Court

The Federal Power Act provides that a challenge to a FERC Order shall not be considered "unless such objection shall have been urged before the Commission in [an]

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[4] The exclusivity provision of the Natural Gas Act states: "Any party to a proceeding under this chapter aggrieved by an order issued by the [FERC] in such proceeding may obtain review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has it principal place of business." 15 U.S.C. § 717r(b).

[5] The exclusivity provision of the Natural Gas Act states: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has it principal place of business." 15 U.S.C. § 717r(b).In *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400 (Ariz. Ct. App. 2006), for example, FERC had issued an order establishing that certain capacity limitations imposed by a pipeline company were no-fault occurrences that could not be blamed on the company. *Id.* at 401-02. Plaintiffs brought suit in state court against that company, setting forth state antitrust and unfair competition claims. *Id.* at 402. Plaintiffs alleged that the capacity limitations demonstrated the company's abuse of monopoly power to inflate the price of natural gas. But the court deemed the action an impermissible collateral attack on a FERC decision and dismissed the matter for want of jurisdiction. *Id.* at 402-04. Similarly in *Texas Eastern Transmission Corp. v. Bowie Lumber Co.*, 176 So. 2d 735 (La. Ct. App. 1965), the Louisiana Court of Appeals confronted a challenge to a party's right of expropriation. *Id.* at 737-38. After reviewing the matter, the court explained that the right was based on a certificate of public convenience and necessity granted by FERC, and that "any attack on an order of a federal agency must be brought in a federal court." *Id.* at 738.

application for rehearing unless there is reasonable ground for failure so to do." 16 U.S.C. § 825*l*(b). It likewise states that "[n]o proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon." *Id.* § 825*l*(a).

"Courts strictly construe the jurisdictional rehearing requirement." *Town of Norwood, Mass. v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990). The rehearing requirement "is an 'express statutory limitation[] on the jurisdiction of the court.'" *Cal. Dep't of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002). In *Missouri Coalition for the Environment v. FERC*, 544 F.3d 955 (8th Cir. 2008), for example, Appellants challenged a FERC Order approving a request to reconstruct a reservoir associated with a hydroelectric generating plant. *Id.* at 957. The Missouri Parks Association was an intervenor in the FERC proceedings, but it had not requested a rehearing before FERC. *Id.* The court ruled that Missouri Parks Association could not seek judicial review of FERC's order. *Id.* The "petition-for-rehearing requirement is mandatory," and "[n]either the court nor the Commission retains 'any form of jurisdictional discretion' to ignore it." *Granholm ex rel. Mich. Dep't of Natural Resources v. FERC*, 180 F.3d 278, 280-82 (D.C. Cir. 1999).

It is uncontested that Appellants have not sought rehearing of the May 23, 2013 FERC Order. And the 30-day deadline for seeking rehearing, *see* 16 U.S.C. § 825*l*(a), expired on June 24, 2013. Because Appellants never sought rehearing at FERC, the courts lack jurisdiction to overturn FERC's decision. For that reason too, insofar as Appellants' assignments of error urge that the Ohio Commission invaded FERC's jurisdiction, took action contrary to the federal the Reliability Assurance Agreement, or otherwise clain a violation of federal law, those assignments of error should be dismissed.

C. Appellants' Challenges Violate the Filed-Rate Doctrine

The filed-rate doctrine confirms that Appellants may not ask this Court to second guess or undermine a federal tariff approved by FERC. Under that doctrine, the "right to a reasonable rate is the right to the rate which [FERC] files or fixes." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986). Once a rate is filed with FERC, neither state regulators nor courts may collaterally attack it. "[E]xcept for review of [FERC's] orders" under the Federal Power Act, a "court can assume no right to a different [rate] on the ground that, in its opinion, it is the only or the more reasonable one." *Id.* And the filed rate doctrine also precludes a state commission or court from interpreting a federal tariff differently from the FERC-regulated entity responsible for implementing that tariff. *See AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 585-86 (5th Cir. 2006). "FERC, not the state, is the appropriate arbiter of any disputes involving a tariff's interpretation." *Id.* at 585. That is true even where, as in *AEP Texas*, the state believes it is enforcing the federal tariff and correcting a violation. *Id.* In that context too, the dispute must be presented to FERC and to the federal courts. *Id.*

Appellants' challenge to the Ohio Commission ruling runs afoul of that requirement. As explained above, Appellants' notices of appeal in large part challenge the Ohio Commission's interpretation of the Reliability Assurance Agreement. *See, e.g.*, FirstEnergy Solutions Corp.'s Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013) (urging that a rate "based on the utility's fully embedded costs" violates the "Reliability Assurance Agreement" approved by FERC). Consistent with the filed-rate doctrine, any dispute over AEP Ohio's or the Ohio Commission's compliance with that federal tariff must be addressed to FERC, not the state courts. *AEP Texas*, 473 F.3d at 585.

II. *Appellants' Collateral Attacks on FERC's Order Are Moot*

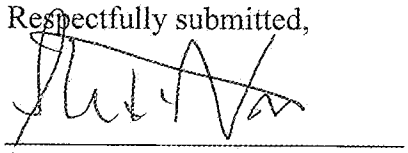
"Ohio courts have long exercised judicial restraint in cases which are not actual controversies." *Tschantz v. Ferguson*, 566 N.E.2d 655, 657 (Ohio 1991). And "[n]o actual controversy exists where a case has been rendered moot by an outside event." *Id.* This Court has explained that "[i]t is not the duty of the court to answer moot questions, and when, pending proceedings in error in this court, an event occurs without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition in error." *Id.*; *see also State ex rel. Gaylor, Inc. v. Goodenow*, 928 N.E.2d 728, 731 (Ohio 2010). For over a century, this Court has thus observed that a case is moot where the Court cannot grant an appellant "any effectual relief whatever" even if it were to decide in the appellant's favor. *State ex rel. Eliza Jennings, Inc. v. Noble*, 551 N.E.2d 128, 131 (Ohio 1990) (quoting *Miner v. Witt*, 92 N.E. 21, 22 (Ohio 1910)).

Appellants insist that the Ohio Commission below addressed issues outside of its jurisdiction that are within the exclusive purview of FERC. *See* p. 19 *supra.* But FERC addressed those very issues in its May 23, 2013 Order. Federal authority has not been invaded; it has now been exercised by FERC itself. Because FERC has exercised its federal authority and confirmed the Ohio Commission's determinations, those assignments of error are now moot.

Conclusion

The Court should dismiss, for lack of jurisdiction or on grounds of mootness, all sections of Appellants' appeal arguing that the Ohio Commission exceeded its jurisdiction by regulating wholesale energy markets that are the exclusive domain of FERC, or that its rulings are inconsistent with the Reliability Reassurance Agreement or any other tariff approved by FERC.

Respectfully submitted,



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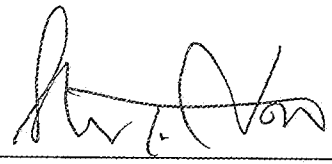
PROOF OF SERVICE

I certify that the *Motion to Dismiss of Appellee/Cross-Appellant Ohio Power Company* was served by electronic mail upon counsel for parties to this proceeding, identified below, this 12th day of July, 2013.



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