

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Commission Review	:	Case No. 2013-0228
of the Capacity Charges of Ohio Power	:	Case No. 2012-2098
Company and Columbus Southern	:	
Power Company	:	On Appeal from the Public Utilities
	:	Commission of Ohio
	:	PUCO Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S RESPONSE  
TO OHIO POWER COMPANY'S MOTION TO DISMISS

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**INDUSTRIAL ENERGY USERS-OHIO'S RESPONSE  
TO OHIO POWER COMPANY'S MOTION TO DISMISS**

Pursuant to S.Ct.Prac.R. 4.01(B), Industrial Energy Users-Ohio ("IEU-Ohio") hereby files its Response to the Motion to Dismiss of Ohio Power Company ("AEP-Ohio") filed with the Court on July 12, 2013, and amended on July 16, 2013, in the above-captioned cases.<sup>1</sup> AEP-Ohio's Motion to Dismiss seeks to deprive appellants of their right to challenge, through an appeal to this Court, the unlawful and unreasonable actions of the Public Utilities Commission of Ohio ("Commission") in the proceeding below.

In the proceeding below, the Commission invented and applied a cost-based ratemaking methodology to uniquely increase AEP-Ohio's total compensation for the provision of generation capacity service used by competitive retail electric service ("CRES") providers. The total generation capacity service compensation uniquely authorized by the Commission for AEP-Ohio during the period from August 2012 through May 31, 2015 is \$188.88/megawatt-day ("MW-day").<sup>2</sup> The \$188.88/MW-day price is significantly higher than the market-based compensation level which the Commission directed AEP-Ohio to collect from CRES providers.<sup>3</sup>

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<sup>1</sup> IEU-Ohio's references to AEP-Ohio's Motion to Dismiss refer to the amended version of the motion filed with the Court on July 16, 2013.

<sup>2</sup> From 2007 when the RAA was adopted until 2012, AEP-Ohio's total capacity-related compensation was tied to market prices established by the Reliability Pricing Model ("RPM") capacity auction process ("RPM-Based Pricing"). From January 1, 2012 through May 31, 2015, at a time when market prices will provide customers the greatest opportunity to reduce electric bills, AEP-Ohio will collect total capacity-related compensation of \$188.88/MW-day, well in excess of market-based pricing, under the Commission orders that are the subject of this appeal. From June 1, 2015 forward, AEP-Ohio will again receive total capacity-related compensation tied to the RPM-Based Price. IEU-Ohio Merit Brief at 8, 12-18.

<sup>3</sup> Over the 2012 through 2015 timeframe, the annually-determined market-based price for generation capacity service has ranged from a low of \$20/MW-day to a high of \$153/MW-day. IEU-Ohio Merit Brief at 33; *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 10 (July 2, 2012) ("Capacity Order") (Appx. at 54).

Having found that it could invent a cost-based ratemaking methodology, the Commission then invented an unlawful and unreasonable method by which AEP-Ohio would collect the increase in compensation for generation capacity service. The Commission authorized AEP-Ohio to collect only a portion of the total compensation from CRES providers at the market-based rate because the use of the market-based rate would “promote retail electric competition,” “stimulate true competition among suppliers in AEP-Ohio’s service territory,” “incent shopping,” and because the same market-based pricing method has “been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field.”<sup>4</sup> The Commission authorized AEP-Ohio to collect the difference between the market-based rate and \$188.88/MW-day, in the future, through non-bypassable riders applicable to *retail* customers.<sup>5</sup> To justify both the increased compensation it authorized and the non-bypassable retail riders, the Commission held that its authority *stems from Ohio law*.<sup>6</sup>

Despite the fact that the Commission approved the collection of increased rates through retail riders it claims are supported by state law, AEP-Ohio’s Motion to Dismiss asserts that a decision by FERC, an agency of the federal government with jurisdiction limited to wholesale

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<sup>4</sup> Capacity Order at 23 (Appx. at 67). PJM Interconnection LLC (“PJM”) is a regional transmission organization (“RTO”) authorized by the Federal Energy Regulatory Commission (“FERC”) to oversee and operate the high voltage grid and wholesale electricity market in all or parts of 13 states (including Ohio) and the District of Columbia.

<sup>5</sup> *Id.* (authorizing the RPM-Based Price applicable to CRES providers and authorizing the deferral of above-market compensation); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 36 (Aug. 8, 2012) (“ESP II Order”) (authorizing a non-bypassable *retail* rider, the Retail Stability Rider or “RSR”, which collects a portion of the deferred above-market compensation and authorizing an additional non-bypassable *retail* rider to collect any remaining deferred above-market compensation) available at: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=0f94c2c9-481e-45f8-841f-8156530defbc>.

<sup>6</sup> Capacity Order at 12 (Appx. at 56).

sales of electricity and the transmission of electricity in interstate commerce, precludes IEU-Ohio from pursuing some unidentified assignments of error.<sup>7</sup> Unlike the above-market retail rate increases caused by the Commission's actions below, the FERC decision on which AEP-Ohio's Motion to Dismiss relies, only continued AEP-Ohio's compensation for generation capacity service at the "just and reasonable" market-based price established by an annual capacity auction process approved by FERC.<sup>8</sup> Thus, AEP-Ohio has materially misstated the reach, significance, and role of FERC's May 23, 2013 Order, which is attached hereto (Attachment A).

As demonstrated below, the appeal of the Commission's decision to invent and apply a cost-based ratemaking methodology to uniquely increase AEP-Ohio's compensation is properly before this Court and has not been preempted by FERC's May 23, 2013 Order. Specifically, AEP-Ohio's argument that Section 313(b) of the Federal Power Act ("FPA") provides the only process available to review AEP-Ohio's compensation for generation capacity service, now that FERC has issued an Order addressing the topic, is without merit because Section 313(b) of the FPA only applies to parties who have been aggrieved or injured by a FERC order. AEP-Ohio

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<sup>7</sup> AEP-Ohio Motion to Dismiss at 2 ("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.").

<sup>8</sup> FERC's May 23, 2013 Order allows AEP-Ohio to continue to obtain market-based compensation for generation capacity service from CRES providers; nothing more. FERC did not authorize or endorse the above-market compensation and significant rate increase authorized by the Commission. FERC did not address whether the Commission has any authority under State law to invent and apply a cost-based ratemaking methodology to significantly increase AEP-Ohio's compensation for generation capacity service. And because FERC's May 23, 2013 Order continued the market-based compensation previously authorized by the Commission and FERC did not address the issues before the Court, IEU-Ohio was not injured and had no basis or reason to further contest FERC's May 23, 2013 Order. Simply stated, IEU-Ohio's assignments of error do not interfere with FERC's May 23, 2013 Order. Indeed, if the Commission had, in the proceedings below, not deviated from the previously approved market-based compensation method by inventing and applying a cost-based method and thereby significantly increasing AEP-Ohio's compensation, IEU-Ohio would not have brought its appeal.

further argues that IEU-Ohio's failure to follow the exclusive jurisdictional review provision in Section 313(b) of the FPA preempts this Court's review. IEU-Ohio, however, was not aggrieved or injured by FERC's May 23, 2013 Order and therefore Section 313(b) of the FPA is inapplicable.

Furthermore, if AEP-Ohio's preemption theory is correct, then the total compensation AEP-Ohio may collect for generation capacity service is limited to the RPM-Based Price since that is the only compensation approved by FERC. Based on AEP-Ohio's theory, it is the Commission's decision authorizing compensation in excess of the RPM-Based Price that would be preempted by FERC's May 23, 2013 Order, and AEP-Ohio's failure to follow the exclusive jurisdictional review process in Section 313(b) of the FPA would preempt the Commission from authorizing any compensation for generation capacity service besides the RPM-Based Price; a result consistent with IEU-Ohio's appeal. In any event, IEU-Ohio's appeal is properly before this Court.

Because AEP-Ohio's Motion to Dismiss is not reasonably well-grounded in fact or warranted by existing law, IEU-Ohio urges the Court to reject the Motion to Dismiss.

### **FACTUAL BACKGROUND**

**1. AEP-Ohio has previously represented to this Court and to FERC that the Commission's actions in the case below are subject to review and future modification**

On August 31, 2012, IEU-Ohio filed a Complaint for Writs of Prohibition and Mandamus with the Court claiming that the Commission had patently and unambiguously exceeded its jurisdiction by inventing and applying a cost-based ratemaking methodology that significantly increased AEP-Ohio's compensation for generation capacity service, thereby depriving

customers of the ability to reduce their electric bills.<sup>9</sup> In response, AEP-Ohio and the Commission filed motions to dismiss IEU-Ohio's Complaint.

AEP-Ohio's motion to dismiss IEU-Ohio's Complaint argued, among other things, that IEU-Ohio's arguments could be heard through the normal appeals process.<sup>10</sup> AEP-Ohio argued that IEU-Ohio "seeks to use prohibition to bypass the appellate process" and argued that IEU-Ohio was "not entitled to a writ of prohibition because it has adequate legal remedies."<sup>11</sup> Specifically, AEP-Ohio asserted that IEU-Ohio's arguments "can be raised on direct appeal and should only be heard by the Court in that context" and that following IEU-Ohio's appeal the Court "may reverse, vacate, modify, or affirm the Commission's orders."<sup>12</sup> AEP-Ohio's latest Motion to Dismiss now endeavors to foreclose the very appellate process that it previously said would remain open to review the Commission's unlawful and unreasonable actions below.

AEP-Ohio has also represented to FERC, as noted in FERC's May 23, 2013 Order, that the compensation approved by the Commission in the case below is subject to review in Ohio and subject to modification by future Commission orders.<sup>13</sup> According to FERC, "[o]n September 17, 2012, AEP Ohio notified [FERC] that, in compliance with the Ohio Commission's orders and subject to any future rulings by the Ohio Commission or [FERC],

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<sup>9</sup> *State ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Case No. 2012-1494, Complaint for Writs of Prohibition and Mandamus (Aug. 31, 2012).

<sup>10</sup> *State ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Case No. 2012-1494, Motion to Intervene as Respondent of Ohio Power Company and Motion to Dismiss at 11 (Sept. 25, 2012).

<sup>11</sup> *Id.* at 11, 26.

<sup>12</sup> *Id.* at 26-27.

<sup>13</sup> Attachment A at ¶ 5.

AEP Ohio's FRR capacity would be available to Ohio LSEs in accordance with the state compensation mechanism adopted by the Ohio Commission, effective August 8, 2012."<sup>14</sup>

2. **FERC's May 23, 2013 Order continues to set AEP-Ohio's compensation for generation capacity service at the market-based price previously approved by FERC and the Commission under the FPA's "just and reasonable" standard and does not authorize or address any compensation that AEP-Ohio may collect from retail customers**

AEP-Ohio's newly asserted federal preemption theory arises from its unsuccessful effort to secure a decision from FERC approving the Commission's determination that its total compensation for the provision of generation capacity service should be \$188.88/MW-day. The effort began on March 25, 2013 when American Electric Power Service Corporation ("AEPSC"), on behalf of AEP-Ohio, filed a proposed appendix to the Reliability Assurance Agreement ("RAA").<sup>15</sup> The RAA is a FERC-approved agreement that has a pro-competitive purpose.<sup>16</sup> Among other things, the RAA sets the capacity obligation of each load serving entity ("LSE") as it relates to the multi-state reliability mission of PJM. The RAA also sets the primary means by which suppliers of capacity resources shall be compensated. More specifically, the RAA requires that the auction-based RPM be used to establish the primary and default means of establishing such compensation. This pricing method is often referred to as RPM-Based Pricing or market-based pricing.

AEPSC's proposed appendix to the RAA "request[ed] that [FERC] confirm that the Ohio state compensation mechanism is consistent with Schedule 8.1.D-FRR Capacity Plans (Schedule

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<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> Attachment A at ¶ 1. As with most governing documents, the RAA is available at PJM's website at <http://www.pjm.com/documents/agreements.aspx> (last checked July 22, 2013). The RAA is also included in IEU-Ohio's supplement to its Merit Brief filed in this proceeding on July 15, 2013. Citations to IEU-Ohio's Supplement to its Merit Brief are denoted herein as "Supp. at \_\_\_."

<sup>16</sup> Supp. at 22.

8.1) of the PJM RAA and accept the Appendix to the RAA.”<sup>17</sup> The application requested FERC to “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 RAA.”<sup>18</sup> The RAA appendix initially proposed by AEPSC, which as discussed below was not accepted by FERC, read:

The [Ohio Commission] in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a cost-based state compensation mechanism for load of alternative retail LSEs (a/k/a Competitive Retail Electric Service (CRES) providers) in Ohio Power Company’s FRR Service Area, of \$188.88/MW-day for FRR capacity made available by Ohio Power Company under the RAA, effective as of August 8, 2012. For purposes of administering the state compensation mechanism, the Final Zonal Capacity Price will be the price applicable to the unconstrained region of PJM adjusted for the RPM Scaling factor, the Forecast Pool Requirement and Losses. Ohio Power has indicated that it expressly reserves its right to propose a revised capacity rate to include charges or assessments necessary to enable Ohio Power to fully recover the cost of the FRR capacity (as determined by the [Ohio Commission] in its July 2, 2012 order).<sup>19</sup>

Protests to AEPSC’s filing were filed by IEU-Ohio, along with FirstEnergy Service Co.

(“FirstEnergy”), Exelon Corp. (“Exelon”), the Retail Energy Supply Association (“RESA”), the Office of Ohio Consumers’ Counsel (“OCC”), and Duke Energy Ohio, Inc. and Duke Energy Corp. (collectively, “Duke”).<sup>20</sup>

IEU-Ohio’s Protest asserted, among other things, that FERC only had jurisdiction over wholesale rates and could only approve the wholesale portion of the state compensation mechanism approved by the Commission, *i.e.*, FERC’s wholesale authority confined any approvals it might provide to the Commission’s actions below to the RPM-Based Pricing that the

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<sup>17</sup> Attachment A at ¶ 1.

<sup>18</sup> *American Electric Power Service Corp.*, FERC Docket No. ER13-1164, AEPSC Tariff Filing at 2 (Mar. 25, 2013) available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13213535>.

<sup>19</sup> Attachment A at ¶ 6.

<sup>20</sup> *Id.* at ¶ 10.

Commission directed AEP-Ohio to use to bill CRES providers for generation capacity service.<sup>21</sup> IEU-Ohio asserted that FERC could not address the above-market compensation for generation capacity service that the Commission authorized AEP-Ohio to collect from retail customers.<sup>22</sup> Asserting a position similar to that of IEU-Ohio, FirstEnergy requested FERC, if it found an appendix to the RAA to be appropriate, to direct AEP-Ohio to modify the RAA appendix to state that the wholesale rate shall be equal to the RPM-Based Price, consistent with the Commission's order.<sup>23</sup> FirstEnergy also proposed a revised RAA appendix that removed any reference to the Commission's \$188.88/MW-day price and confirmed that the wholesale compensation for generation capacity service would continue to be set pursuant to the RPM-Based Pricing method. More specifically, FirstEnergy proposed the following revisions to AEPSC's proposed appendix:

The Public Utilities Commission of Ohio (PUCO) in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a cost-based state compensation mechanism for load of alternative retail LSEs (a/k/a Competitive Retail Electric Service (CRES) providers) in Ohio Power Company's FRR Service Area, of ~~\$188.88/MW-day, for FRR capacity made available by Ohio Power Company under the RAA, effective as of August 8, 2012.~~ For purposes of administering the state compensation mechanism, the *wholesale rate shall be equal to the adjusted final zonal PJM RPM rate in effect for the rest of the RTO region for the current PJM delivery year, and with the rate changing annually on June 1, 2013, and June 1, 2014, to match the then current adjusted final zonal PJM RPM rate in the rest of the RTO region.* The Final Zonal Capacity Price will be the price applicable to the unconstrained region of PJM adjusted for the RPM Scaling Factor, the Forecast Pool Requirement and Losses. ~~Ohio Power has indicated that it expressly reserves its right to propose a revised capacity rate to include charges or assessments necessary to enable Ohio Power to fully recover the cost of the FRR capacity (as determined by the PUCO in its July 2, 2012 order).~~<sup>24</sup>

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<sup>21</sup> *Id.* at ¶ 13.

<sup>22</sup> *Id.* at ¶ 14.

<sup>23</sup> *American Electric Power Service Corp.*, FERC Docket No. ER13-1164, FirstEnergy's Motion to Intervene, Protest, and Requests for Rejection, Maximum Suspension, and Evidentiary Hearings at 2 (Apr. 16, 2013), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13234511>.

<sup>24</sup> *Id.* at 7 (formatted to remove a break in the block quote contained in FERC's Order).

In response to FirstEnergy's Protest, AEP-Ohio agreed to "FirstEnergy's proposed modifications and offer[ed] to submit a compliance filing to reflect these edits," except that AEP-Ohio disagreed with FirstEnergy's proposed modification to the effective date.<sup>25</sup> FERC approved the RAA appendix, subject to the modifications suggested by FirstEnergy and agreed to by AEP-Ohio.<sup>26</sup>

As modified, the FERC-approved appendix to the RAA confirms that the RPM-Based Pricing method alone continues to dictate the compensation that AEP-Ohio is authorized to receive from CRES providers. In approving the as-modified RAA appendix, FERC did not endorse the Commission's invented and applied cost-based ratemaking methodology, did not sign off on the Commission's total generation capacity service compensation of \$188.88/MW-day, and did not address any portion of the generation capacity service compensation that the Commission authorized AEP-Ohio to collect from retail customers. In other words, FERC's approval of the as-modified RAA appendix does not impinge on this Court's ability or responsibility to reach the State law questions raised by IEU-Ohio's appeal. Rather, FERC's approval of the as-modified RAA appendix and the continuing use of RPM-Based Pricing is completely consistent with the position advanced by IEU-Ohio in this appeal. Because FERC's approval of the as-modified RAA appendix continued the use of RPM-Based Pricing and did not reach the compensation available to AEP-Ohio from retail customers, there was no reason for IEU-Ohio to contest FERC's approval of the as-modified RAA appendix.

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<sup>25</sup> Attachment A at ¶ 20.

<sup>26</sup> *Id.* at ¶ 24.

## STANDARD OF REVIEW ON A MOTION TO DISMISS

R.C. 4903.12 vests this Court with exclusive jurisdiction to “review, suspend, or delay any order made by the public utilities commission” and R.C. 4903.13 provides that “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” However, before an order of the Commission is appealable to this Court, R.C. 4903.10 requires that a party first seek rehearing before the Commission. R.C. 4903.11 requires that parties file an appeal with this court within sixty days from the Commission’s order on rehearing. S.Ct.Prac.R. 10.02 also provides that an appeal from the Commission is perfected if: (1) the notice of appeal is filed with the Supreme Court and with the Commission within the sixty-day timeframe; and (2) the notice of appeal includes a copy of the decision being appealed, complies with the service requirements of S.Ct.Prac.R. 3.11(A)(2), and contains a certificate of filing pursuant to S.Ct.Prac.R. 3.11(C)(2).

As the record filed with this Court demonstrates, IEU-Ohio filed timely applications for rehearing, filed a timely notice of appeal, and timely filed its brief addressing the propositions of law contained in its notice of appeal. As a jurisdictional matter, its appeal is properly before the Court.

Nonetheless, AEP-Ohio’s Motion to Dismiss alleges that certain facts exist that render an unidentified portion of IEU-Ohio’s appeal preempted and moot. However, AEP-Ohio failed to comply with the requirement in S.Ct.Prac.R. 4.01(A)(1) that requires AEP-Ohio to specify with particularity the grounds for its motion. As a matter of law, therefore, the Court should dismiss AEP-Ohio’s Motion to Dismiss.

Further, AEP-Ohio's motion fails to demonstrate that the FERC Order had any preemptive effect under any of the legal theories it advances. Because IEU-Ohio's appeal is properly before the Court, AEP-Ohio must be held to a high standard before the Court issues an order that will deny review of any of the novel state legal issues presented by this appeal. Under analogous circumstances regarding motions to dismiss under the Civil Rules, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery' before a motion to dismiss can be granted."<sup>27</sup> "All material factual allegations of the complaint must be taken as true."<sup>28</sup> As it is clear that FERC's Order did not preempt the actions of the Commission, IEU-Ohio's appeal has not been preempted or rendered moot. Therefore, the Court should deny AEP-Ohio's Motion to Dismiss.

#### ARGUMENT

- 1. AEP-Ohio's Motion to Dismiss should be denied because AEP-Ohio has failed to set forth the particular relief it seeks in its Motion to Dismiss; AEP-Ohio claims some of IEU-Ohio's propositions of law have been preempted and are moot but does not identify which propositions of law it seeks to have dismissed**

S.Ct.Prac.R. 4.01(A) provides that "an application for an order or other relief shall be made by filing a motion for the order or relief," and requires the motion to "state with particularity the grounds on which it is based." Throughout AEP-Ohio's Motion to Dismiss, AEP-Ohio insinuates that certain Propositions of Law set forth in IEU-Ohio's Notice of Appeal are preempted by FERC's May 23, 2013 Order and are now moot. At page 12 of the Motion to Dismiss, AEP-Ohio claims "[t]hose portions of Appellants' appeals should be dismissed." At page 13, AEP-Ohio claims "[m]any of Appellants' assignments of error cannot . . . be pursued in

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<sup>27</sup> *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 524 (1996) (quoting *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975)).

<sup>28</sup> *Id.*

this Court.” At pages 17-18, AEP-Ohio claims “[b]ecause FERC has [acted], Appellants’ assignments of error based on federal law . . . should be dismissed.” However, nowhere in AEP-Ohio’s Motion to Dismiss does AEP-Ohio actually identify the propositions of law raised by IEU-Ohio in its Notice of Appeal that AEP-Ohio seeks to have dismissed. Because AEP-Ohio has failed to state, with particularity, the grounds for relief it seeks, the Court should deny AEP-Ohio’s Motion to Dismiss.

**2. The jurisdictional review process set forth in Section 313(b) of the FPA is inapplicable because IEU-Ohio was not aggrieved by FERC’s May 23, 2013 Order and because IEU-Ohio’s appeal is not “inescapably intertwined” with that Order**

If a party has been aggrieved by a FERC order, the process for a review of the FERC order begins by filing an application for rehearing with FERC, and if the party is still aggrieved following a decision by FERC on rehearing, the aggrieved party may appeal to a federal Court of Appeals. Section 313(b) of the FPA provides:

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such 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, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.<sup>29</sup>

In *Tacoma v. City of Tacoma*, 537 U.S. 320 (1958) the United States Supreme Court held that “[s]o acting, Congress in § 313 (b) prescribed the specific, complete and exclusive mode for judicial review of the Commission’s orders.”<sup>30</sup> “It there provided that any party aggrieved by the [FERC’s] order may have judicial review, upon all issues raised before [FERC] in the motion for

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<sup>29</sup> 16 U.S.C. § 8251(b).

<sup>30</sup> *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (citing *Safe Harbor Water Power Corp. v. Federal Power Comm’n*, 124 F.2d 800, 804 (3d Cir. 1941), cert. denied, 316 U. S. 663).

rehearing, by the Court of Appeals . . . .<sup>31</sup> “It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.”<sup>32</sup>

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 211-212 (1994), the United States Supreme Court also held that exclusive jurisdiction provisions do not preclude other courts from considering claims that are “wholly ‘collateral’ to a statute’s review provisions and outside the agency’s expertise, particularly where a finding of preclusion could foreclose all meaningful review.”<sup>33</sup>

Applying *Tacoma*, the Federal Courts of Appeals have held that exclusive jurisdictional appeal provisions prevent other courts from hearing issues that are “inescapably intertwined” with review of administrative agency orders.<sup>34</sup> A claim is “inescapably intertwined” with the administrative agency’s order if “it alleges that the plaintiff was injured by such order and that

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

<sup>32</sup> *Id.*

<sup>33</sup> The *Thunder Basin* Court gave several examples of what was meant by claims wholly collateral to the exclusive jurisdictional review process. *Thunder Basin Coal Co.*, 510 U.S. at 213 (1994). That Court cited its opinion in *Traynor v. Turnage*, 485 U.S. 535, 544-545 (1988), holding that a claim was not subject to the exclusive jurisdiction review process where the claim alleged a violation of the Constitution; contrasted against a claim alleging a violation of the application of the statute subject to the exclusive jurisdictional review process. The *Thunder Basin* Court also cited its prior opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976), holding that an exclusive jurisdictional review process was not applicable where the party was raising a due process challenge to the denial of Social Security benefits rather than raising a substantive challenge to the denial of benefits.

<sup>34</sup> *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001); *Ligon v. LaHood*, 614 F.3d 150, 157 (5th Cir. 2010); *Green v. Brantley*, 981 F.2d 514, 521 (11th Cir. 1993). The Ninth Circuit Court of Appeals uses language different than “inescapably intertwined” but has reached the same result holding that a claim could be maintained in a district court where the claim was extrinsic to the administrative agency’s order and the complained-of conduct exceeded what the administrative agency had authorized in its order. *Skokomish Indian Tribe v. U.S.*, 332 F.3d 551, 561 (9th Cir. 2003) (citing *United States v. Pend Oreille Public Utility Distr. No. 1*, 28 F.3d 1544, 1547-48 (9th Cir.1994)).

the court of appeals has authority to hear the claim on direct review of the agency order.”<sup>35</sup>

“This means that the mere overlap of evidence and testimony adduced in the two proceedings, or the mere overlap of findings made by an ALJ and by a district court are insufficient to preclude the district court from hearing a given claim.”<sup>36</sup> “Such overlap is relevant only if the claim attacks the matters decided by the administrative order.”<sup>37</sup>

IEU-Ohio was not aggrieved by FERC’s May 23, 2013 Order, as required by Section 313(b) of the FPA and, thus, did not and could not seek rehearing and ultimately appeal FERC’s Order to a federal Court of Appeals. As discussed above, FERC’s May 23, 2013 Order did not address the total Commission-approved compensation for generation capacity service or the amount of such compensation that AEP-Ohio might collect from retail customers. Because FERC did not rule on or approve either the total amount of such Commission-approved compensation or the portion of the Commission-approved total that AEP-Ohio might collect from retail customers, IEU-Ohio was not injured or aggrieved by FERC’s May 23, 2013 Order. Moreover, IEU-Ohio’s appeal here does not attack any matter decided by FERC; and therefore is not inescapably intertwined with FERC’s Order.

Accordingly, AEP-Ohio’s argument in Sections II.A and II.B of its Motion to Dismiss, (arguing that IEU-Ohio should have sought rehearing of FERC’s Order and appealed to a federal Court of Appeals) is not reasonably well-grounded in fact or warranted by existing law.

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<sup>35</sup> *Merritt*, 245 F.3d at 187.

<sup>36</sup> *Id.* at 189.

<sup>37</sup> *Id.* (emphasis added).

**3. The Court is not preempted from reviewing IEU-Ohio's appeal. Ohio retains jurisdiction over retail sales, and the filed-rate doctrine, of which the trapped costs doctrine is a subpart, is wholly inapplicable**

“The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law.” *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69 (1986).

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, e.g., where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.<sup>38</sup>

Preemption by an administrative agency can occur only “if it is acting within the scope of its congressionally delegated authority” because “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”<sup>39</sup>

The FPA does not preempt states from regulating all aspects of an electricity transaction; under the FPA states retain the ability to regulate retail sales.<sup>40</sup> “It is true that FERC’s jurisdiction over the *sale* of power has been specifically confined to the wholesale market.” *New York v. F.E.R.C.*, 535 U.S. 1, 20, (2002) (emphasis in original).

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<sup>38</sup> *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 368-69 (internal citations omitted).

<sup>39</sup> *Id.* at 374.

<sup>40</sup> 16 U.S.C. §§ 824(a) and (b)(1); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 384-85 (1988). “In direct response to decisions of this Court concluding that, under the Commerce Clause, States can regulate interstate sales of energy at retail but not at wholesale, Congress enacted the Federal Power Act, which filled the regulatory gap and incorporated the wholesale/retail line by providing FERC with regulatory jurisdiction over wholesale interstate sales of electricity and leaving retail sales to state regulation.” *Id.*

The Ohio Supreme Court has also recognized that Ohio has the authority to review the entirety of an electricity transaction to determine if the transaction complies with State law, so long as Ohio is not regulating the wholesale component of the transaction. *Cleveland Electric Illuminating Co. v. Public Utilities Commission of Ohio*, 76 Ohio St.3d 521, 525, 1996-Ohio-298.

In *Cleveland Electric*, FirstEnergy filed a complaint against AEP-Ohio alleging AEP-Ohio violated Ohio's Certified Territory Act by setting up a sham transaction with the city of Cleveland's municipal electric utility which in turn resold the power to a retail customer within the limits of Cleveland. The Commission granted AEP-Ohio's motion to dismiss FirstEnergy's complaint on grounds that the transaction between Cleveland and AEP-Ohio was wholesale and, thus, subject to the exclusive jurisdiction of FERC and that the Commission's review was preempted. This Court reversed the Commission's decision dismissing the complaint:

The import of this decision does not require the commission to improperly regulate an area where the federal government has preempted the field with regard to the FERC's regulation of wholesale power transactions. The commission's review will be of the entire alleged transaction from [AEP-Ohio] to [the medical center] by way of [Cleveland], not an analysis of the [AEP-Ohio/Cleveland] contract. Thus, the commission would not be encroaching into FERC's jurisdiction over the [AEP-Ohio/Cleveland] contract.

Further, in *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964), the United States Supreme Court found:

“ \* \* \* Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction \* \* \*. This was done in the [Federal] Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce *except those which Congress has made explicitly subject to regulation by the States.* ” (Emphasis added.)

Section 824k(h), Title 16, U.S.Code (prohibition on mandatory retail wheeling and sham transactions) states: “Nothing in this subsection shall affect any authority of any State or local government under state law concerning the transmission of electric energy directly to an ultimate consumer.” In examining the alleged sham transaction (the alleged deal between [AEP-Ohio] and [the

medical center] by way of [Cleveland]), the commission will be scrutinizing whether [AEP-Ohio] has made a retail deal with [the medical center]. As stated above, retail deals are explicitly excluded from FERC's exclusive jurisdiction.<sup>41</sup>

The United States Supreme Court, Ohio Supreme Court and FERC all clearly recognize that Ohio retains jurisdiction to review retail electricity transactions.

The unlawful and unreasonable actions challenged in this appellate proceeding resulted in significant increases in the electric bills paid by all retail customers of AEP-Ohio. The unlawful and unreasonable increases in retail electric bills occurred because the Commission arbitrarily discontinued the previously approved RPM-Based Pricing method of establishing AEP-Ohio's compensation for generation capacity service and then invented and applied a so-called cost-based method of establishing such compensation. The Commission then significantly increased retail electric bills to levels well above market. These unlawful and unreasonable actions, unique to AEP-Ohio, also reduced or eliminated the bill-reduction benefits otherwise available in the retail electricity market because the Commission authorized the significantly higher compensation to be collected through charges that are unavoidable by retail customers that do not receive generation supply from AEP-Ohio ("shopping customers"). The Commission held that its authority to increase AEP-Ohio's total compensation for generation capacity service stems from Ohio law.<sup>42</sup> But for the Commission's unlawful and unreasonable actions in the proceedings below, AEP-Ohio's retail customers would not have been subjected to these unlawful and unreasonable consequences. Thus, this Court can and should review the Commission's invention and application of a cost-based ratemaking methodology and the retail rate increase consequences to determine if they are authorized by Ohio law.

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<sup>41</sup> *Cleveland Electric* at 525.

<sup>42</sup> Capacity Order at 12 (Appx. at 56).

AEP-Ohio also alleges that this Court cannot review an unidentified portion of IEU-Ohio's appeal because "[a]ppellants may not ask this Court to second guess or undermine a federal tariff approved by FERC" and asserts that "the filed rate doctrine also precludes a state commission or court from interpreting a federal tariff differently from" FERC.<sup>43</sup> AEP-Ohio's argument is not reasonably well-grounded in fact or warranted by existing law.

The United States Supreme Court has held that where FERC has lawfully approved a rate, states may not bar regulated utilities from passing on that rate to retail customers.<sup>44</sup>

The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.... Such a 'trapping' of costs is prohibited.<sup>45</sup>

"The filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.'"<sup>46</sup>

"When the filed rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause."<sup>47</sup>

FERC has held that it applies the filed-rate doctrine as "narrowly as possible" to address any conflict between state-approved and FERC-approved tariffs:

. . . when there is a conflict between . . . [FERC]-jurisdictional and state-jurisdictional tariffs, the former must control. That does not mean [FERC] is

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<sup>43</sup> AEP-Ohio Motion to Dismiss at 19.

<sup>44</sup> *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988).

<sup>45</sup> *Id.*

<sup>46</sup> *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (citing *Nantahala*, 476 U.S., at 962).

<sup>47</sup> *Entergy*, 539 U.S. at 47 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-582, (1981)).

approving or disapproving any rate, term, or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.<sup>48</sup>

AEP-Ohio's Motion to Dismiss improperly claims that IEU-Ohio's appeal violates the filed-rate doctrine and that this Court's review of a portion of IEU-Ohio's appeal is therefore preempted.<sup>49</sup> AEP-Ohio's argument hinges on its incorrect claim that the FERC-approved appendix to the RAA approved by FERC in its May 23, 2013 Order authorizes compensation for generation capacity service at the rate of \$188.88/MW-day and also authorizes AEP-Ohio to collect the above-market portion of such total compensation from retail customers. As explained previously, however, FERC's Order and the as-modified RAA appendix approved in FERC's Order continue the use of the RPM-Based Pricing method for purposes of determining the generation capacity service compensation that AEP-Ohio is authorized to obtain from CRES providers and says nothing about what AEP-Ohio may obtain from retail customers. FERC's Order accepting that generation capacity service would be priced equal to the RPM-Based Price can be given full and binding effect even if the Commission's orders were to be reversed by this Court as requested by IEU-Ohio.

#### **4. The arguments raised by IEU-Ohio's appeal are not moot**

As demonstrated herein, AEP-Ohio's legal theory that certain unidentified portions of IEU-Ohio's appeal have been preempted and are therefore moot is without merit. In its May 23, 2013 Order, FERC did not endorse the Commission's invented and applied cost-based ratemaking methodology, did not endorse the Commission's total authorized generation capacity service compensation of \$188.88/MW-day, and did not address any portion of the generation capacity service compensation that the Commission authorized AEP-Ohio to collect from retail

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<sup>48</sup> *Nine Mile Point Nuclear Station, LLC*, 110 FERC ¶ 61033 (Jan. 21, 2005)

<sup>49</sup> AEP-Ohio Motion to Dismiss at 19.

customers. The Commission's actions that FERC did not endorse or address in its May 23, 2013 Order are the subject of IEU-Ohio's appeal. Thus, AEP-Ohio's theory that IEU-Ohio's appeal is moot is without merit and should be rejected.<sup>50</sup>

**5. If AEP-Ohio's legal theory is correct, then AEP-Ohio's compensation for generation capacity service would be limited to RPM-Based Pricing; an outcome consistent with IEU-Ohio's appeal**

If AEP-Ohio's preemption theory under the filed-rate doctrine is correct, then the total compensation it may collect for generation capacity service is limited to the RPM-Based Price since that is the only compensation approved by FERC in its May 23, 2013 Order. Based on AEP-Ohio's theory, it is the Commission's decision authorizing compensation in excess of the RPM-Based Price that would be preempted by FERC's May 23, 2013 Order, and AEP-Ohio's failure to follow the exclusive jurisdictional review process in Section 313(b) of the FPA would preempt this Court and the Commission from authorizing any compensation for generation capacity service besides the RPM-Based Price; a result consistent with IEU-Ohio's appeal. In any event, IEU-Ohio's appeal is properly before this Court.

### CONCLUSION

AEP-Ohio's Motion to Dismiss is not reasonably well-grounded in fact or warranted by existing law. For the reasons set forth herein, IEU-Ohio urges the Court to reject the Motion to Dismiss.

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<sup>50</sup> Furthermore, the mootness standard contained in AEP-Ohio's Motion to Dismiss is incomplete. While an appeal would typically be moot if the Court could not grant an appellant any relief, in cases where the harm is capable of repetition yet evading review, the Court has found that an appeal is not moot. *State ex rel. Dispatch Printing Co. v. Geer*, 114 Ohio St.3d 511, 513, 2007-Ohio-4643. The Commission's invention and application of a cost-based ratemaking methodology is also pending in Case No. 12-2400-EL-UNC, where Duke Energy Ohio, Inc. is seeking an increase in its capacity-related compensation based upon the significant rate increase AEP-Ohio received.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Response To Ohio Power Company's Motion to Dismiss* was served upon the parties of record this 26<sup>th</sup> day of July 2013 *via* electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



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143 FERC ¶ 61,164  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

PJM Interconnection, L.L.C.  
Ohio Power Company

Docket No. ER13-1164-000

ORDER ACCEPTING APPENDIX TO RELIABILITY ASSURANCE AGREEMENT  
SUBJECT TO A COMPLIANCE FILING

(Issued May 23, 2013)

1. On March 25, 2013, American Electric Power Service Corporation, on behalf of Ohio Power Company (AEP Ohio), filed a proposed appendix (Appendix)<sup>1</sup> to the PJM Interconnection, L.L.C. (PJM) Reliability Assurance Agreement (RAA).<sup>2</sup> AEP Ohio requests that the Commission confirm that the Ohio state compensation mechanism is consistent with Schedule 8.1.D-FRR Capacity Plans (Schedule 8.1) of the PJM RAA and accept the Appendix to the RAA. In this order, we accept the proposed Appendix, to become effective August 8, 2012, subject to a compliance filing requiring AEP Ohio to implement certain revisions to which it has agreed.

**I. Background**

2. PJM has a capacity market designed to ensure the availability of necessary resources to provide reliable service to load within the PJM region. The PJM capacity market includes the reliability pricing model (RPM), in which PJM conducts forward auctions to secure capacity for future delivery years. The RAA contains an alternative method for meeting the PJM capacity obligation, the Fixed Resource Requirement (FRR) Alternative, for entities that choose not to participate in the RPM auctions (FRR Entities).

3. Schedule 8.1 of the RAA includes the provisions of the FRR Alternative. Section D.8 of Schedule 8.1 provides:

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<sup>1</sup> PJM, Intra-PJM Tariffs, RAA, SCHEDULE 8.1 Appendix-Ohio Power FRR Capacity Ra (Appendix) (0.0.0).

<sup>2</sup> PJM, Intra-PJM Tariffs, RAA, SCHEDULE 8.1.D-FRR Capacity Plans (Schedule 8.1) (4.0.0).

In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs [that is, load serving entities]. In the case of load reflected in the FRR Capacity Plan that switches to an alternative LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail.

Section D.8 further provides:

In the absence of a state compensation mechanism, the applicable alternative retail LSE 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 [FPA] proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.

4. On November 24, 2010, AEP Ohio submitted a formula rate filing, in Docket No. ER11-2183-000, to change the rate of compensation for the capacity it provides on behalf of alternative LSEs under the FRR Alternative to a cost-based formula.<sup>3</sup> On January 20, 2011, the Commission rejected the formula rate proposal by AEP Ohio to collect the costs of meeting the capacity obligation under the FRR Alternative on the grounds that Public Utilities Commission of Ohio (Ohio Commission) had established a state compensation mechanism.<sup>4</sup> AEP Ohio has filed a request for rehearing of that order. On April 4, 2011, AEP Ohio also filed a complaint asserting that the January 2011 Order's interpretation of the RAA was inconsistent with the FPA and the original intent of the FRR Alternative provisions.

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<sup>3</sup> Alternative retail suppliers, or alternative LSEs, are known under Ohio state law as competitive retail electric service (CRES) providers.

<sup>4</sup> *American Electric Power Serv. Corp.*, 134 FERC ¶ 61,039 (2011) (January 2011 Order), *rehearing pending*.

5. On July 2, 2012, the Ohio Commission issued a ruling establishing charges for a state compensation mechanism.<sup>5</sup> On September 17, 2012, AEP Ohio notified the Commission that, in compliance with the Ohio Commission's orders and subject to any future rulings by the Ohio Commission or this Commission, AEP Ohio's FRR capacity would be available to Ohio LSEs in accordance with the state compensation mechanism adopted by the Ohio Commission, effective August 8, 2012.<sup>6</sup>

## II. Filing

6. AEP Ohio asks that the Commission accept an Appendix to the RAA that sets forth the rate of compensation for the capacity it provides on behalf of alternative LSEs pursuant to the Ohio Commission's adoption of a state compensation mechanism, which AEP Ohio states is permitted under the RAA. Specifically, AEP Ohio's proposed Appendix provides:

The [Ohio Commission] in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a cost-based state compensation mechanism for load of alternative retail LSEs (a/k/a Competitive Retail Electric Service (CRES) providers) in Ohio Power Company's FRR Service Area, of \$188.88/MW-day for FRR capacity made available by Ohio Power Company under the RAA, effective as of August 8, 2012. For purposes of administering the state compensation mechanism, the Final Zonal Capacity Price will be the price applicable to the unconstrained region of PJM adjusted for the RPM Scaling factor, the Forecast Pool Requirement and Losses. Ohio Power has indicated that it expressly reserves its right to propose a revised capacity rate to include charges or assessments necessary to enable Ohio Power to fully recover the cost of the FRR capacity (as determined by the [Ohio Commission] in its July 2, 2012 order).

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<sup>5</sup> AEP Ohio Transmittal at 5, (citing Ohio Commission Case No. 10-2929-EL-UNC). AEP Ohio states that the Ohio Commission found that the record established in the state proceeding supported a cost-based charge of \$188.88/MW day. AEP Ohio further states that, on August 8, 2012, the Ohio Commission implemented a cost deferral recovery mechanism that is intended to enable AEP Ohio to recover a portion of its FRR capacity costs from retail customers. *Id.* at 5-6 (citing Ohio Commission Case No. 11-346-EL-SSO).

<sup>6</sup> See September 17, 2012 Update on Status of Proceeding at 2 (Docket Nos. ER11-2183-001 and EL11-32-000).

AEP Ohio requests an effective date of August 8, 2012, the date that the Ohio state compensation mechanism became effective.

7. AEP Ohio states that once this filing is approved by the Commission and becomes final and non-appealable, it will withdraw both its request for rehearing of the January 2011 Order and its complaint in Docket No. EL11-32-000.

### **III. Notice of Filing, Comments, Protests and Responsive Pleadings**

8. Notice of the AEP Ohio's filing was published in the *Federal Register*, 78 Fed. Reg. 19,700 (2013), with interventions and protests due on or before April 15, 2013.

9. The Ohio Commission filed a notice of intervention. Timely motions to intervene were filed by American Municipal Power, Inc; DPL Energy Resources, Inc.; Duke Energy Ohio, Inc. and Duke Energy Corporation (collectively, Duke); Exelon Corporation (Exelon); Industrial Energy Users-Ohio (IEU-Ohio);<sup>7</sup> and the Retail Energy Supply Association (RESA).<sup>8</sup> FirstEnergy Service Company (FirstEnergy);<sup>9</sup> Office of Ohio Consumer Counsel (OCC); and PJM filed motions to intervene out of time.

10. The Ohio Commission filed comments. Exelon, IEU-Ohio, RESA, FirstEnergy and OCC filed protests, and Duke filed a limited protest. PJM, AEP Ohio,<sup>10</sup> and IEU-Ohio filed answers.

#### **A. Comments and Protests**

11. The Ohio Commission urges the Commission to accept AEP Ohio's filing as proposed. The Ohio Commission affirms that it has adopted a state compensation

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<sup>7</sup> Energy Users-Ohio is an association of large Ohio-based energy consumers.

<sup>8</sup> Retail Energy Supply Association's members include: Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd.; and TriEagle Energy, L.P.

<sup>9</sup> On behalf of FirstEnergy Solutions Corp.

<sup>10</sup> AEP Ohio filed answers on April 30, 2013 and May 16, 2013.

mechanism and that accepting AEP Ohio's proposed filing would avoid a jurisdictional dispute between the Ohio Commission and the Commission.<sup>11</sup>

12. Protesters do not support AEP Ohio's proposed tariff language and argue that the Commission should reject the filing. Exelon states that AEP Ohio's proposed Appendix is not required, and the Commission should not approve it. Exelon notes that, in an order issued on July 2, 2012, the Ohio Commission adopted the state compensation mechanism to apply to AEP Ohio's capacity under the RAA.<sup>12</sup> Exelon states that this order is currently effective and alternative LSEs have been compensating AEP Ohio at the rate required by this order. Therefore, Exelon asserts that the Commission need not accept a capacity mechanism that has already been established by a state commission and which the RAA states takes precedence over any other proposal AEP Ohio may file.<sup>13</sup> RESA and First Energy state that the Commission's January 2011 Order found that AEP Ohio did not have the right to make its filing given the existence of a state compensation mechanism in Ohio.<sup>14</sup> RESA states that this finding also applies to AEP Ohio's filing in this proceeding given the continued existence of a state compensation mechanism in Ohio.<sup>15</sup> RESA, FirstEnergy, and OCC contend that AEP Ohio has not met its burden to show that the rates are just and reasonable. RESA states that AEP Ohio's filing is unclear, and should be rejected for failing to provide any cost support.<sup>16</sup>

13. FirstEnergy and IEU-Ohio state that AEP Ohio's filing should be rejected because AEP Ohio does not have the authority to amend the RAA.<sup>17</sup> IEU-Ohio argues that even if AEP Ohio's filing is authorized, the Commission cannot grant AEP Ohio's requested relief because it exceeds the Commission's jurisdiction. IEU-Ohio contends that the Commission only has the authority and responsibility to approve only the wholesale rate

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<sup>11</sup> Ohio Commission Comments at 2-5.

<sup>12</sup> Exelon Comments at 2 (citing Ohio Commission's *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing, October 17, 2012).

<sup>13</sup> Exelon Comments at 2-3.

<sup>14</sup> RESA Protest at 8 (citing January 2011 Order, 134 FERC ¶ 61,039 at PP 8, 10).

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> FirstEnergy Protest at 4-5; IEU-Ohio Protest at 12-15.

for capacity that is provided to alternative LSEs, which in this instance, is the PJM RPM clearing price.<sup>18</sup>

14. Protestors also raise issues that they assert the Commission should consider if the Commission does not reject AEP Ohio's filing in this proceeding. Exelon states that the proposed Appendix should be revised to remove the ambiguities as to the capacity rate established. First Energy proposes the following modifications to the proposed Appendix, which FirstEnergy asserts accurately reflect the Ohio Commission's finding:<sup>19</sup>

The Public Utilities Commission of Ohio (PUCO) in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a ~~cost-based~~ state compensation mechanism for load of alternative retail LSEs (a/k/a Competitive Retail Electric Service (CRES) providers) in Ohio Power Company's FRR Service Area, ~~of \$188.88/MW-day, for FRR capacity made available by Ohio Power Company under the RAA, effective as of August 8, 2012.~~ For purposes of administering the state compensation mechanism, the wholesale rate shall be equal to the adjusted final zonal PJM RPM rate in effect for the rest of the RTO region for the current PJM delivery year, and with the rate changing annually on June 1, 2013, and June 1, 2014, to match the then current adjusted final zonal PJM RPM rate in the rest of the RTO region. The Final Zonal Capacity Price will be the price applicable to the unconstrained region of PJM adjusted for the RPM Scaling Factor, the Forecast Pool Requirement and Losses. ~~Ohio Power has indicated that it expressly reserves its right to propose a revised capacity rate to include charges or assessments necessary to enable Ohio Power to fully~~

~~recover the cost of the FRR capacity (as determined by the PUCO in its July 2, 2012 order).~~

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<sup>18</sup> IEU-Ohio at 16-17. IEU-Ohio states that a portion of what AEP Ohio characterizes as the state compensation mechanism (specifically, the difference between the PJM RPM clearing price that applies to alternative LSEs and \$188.88/MW-day) is exclusively a retail rate.

<sup>19</sup> FirstEnergy Protest at 6-7. In its protest, FirstEnergy provides its proposed revisions to AEP Ohio's proposed Appendix in redlined strike out, as reflected in the body of this order.

15. Further, FirstEnergy and RESA state that AEP Ohio's request for a retroactive effective date of August 8, 2012, for AEP Ohio's proposed rates must be denied as inconsistent with the filed rate doctrine.

**B. Answers**

16. PJM states the PJM Board of Directors (Board) authorized the filing of a revision to the RAA to incorporate an appendix to Schedule 8.1 in order to incorporate a capacity compensation rate for AEP Ohio.<sup>20</sup>

17. In its April 30, 2013 answer, AEP Ohio asserts that the Commission should disregard commenters' requests to reject AEP Ohio's filing on the basis that AEP Ohio is either not authorized to make the filing or that the filing is not needed. AEP Ohio notes that PJM's comments clarify that PJM received the proper authorization to make this amendment to the RAA on AEP Ohio's behalf.

18. AEP Ohio asserts that this filing is not contrary to the Commission's January 2011 Order because AEP Ohio's filing is not proposing to establish its capacity compensation charge, rather its filing is seeking the Commission's acceptance of the wholesale FRR charges as reflected in the Ohio Commission-approved state compensation mechanism. Therefore, AEP Ohio states that the Commission's acceptance of this filing would ensure that the state compensation mechanism would prevail, as in accordance with section D.8 of Schedule 8.1 of the RAA. Finally, AEP Ohio disputes arguments that this filing is not needed, noting the Ohio Commission's comments urging the Commission to accept the filing.<sup>21</sup>

19. AEP Ohio clarifies that it is not requesting that the Commission approve the Ohio Commission's determination as to AEP Ohio's FRR capacity costs. AEP Ohio states that it, and the Ohio Commission, are requesting one limited ruling that the Ohio Commission's decision to adopt a two-part state compensation mechanism is fully consistent with the RAA, which was adopted pursuant to federal law.<sup>22</sup>

20. AEP Ohio also agrees with FirstEnergy's proposed modifications and offers to submit a compliance filing to reflect these edits. AEP Ohio states that the only proposed modification that it objects to relates to removing the effective date (August 8, 2012),

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<sup>20</sup> PJM Answer at 2-3.

<sup>21</sup> AEP Ohio Answer at 7-8.

<sup>22</sup> AEP Ohio Answer at 5.

because, according to AEP Ohio, that is in fact the date that the Ohio Commission adopted the state compensation mechanism.<sup>23</sup>

21. IEU-Ohio asserts that AEP Ohio's answer does not adequately address the issues IEU-Ohio raises in its protest. In its May 16, 2013 answer, AEP Ohio asserts that IEU-Ohio's answer raises the same arguments that IEU-Ohio raised in its protest.

#### IV. Commission Determination

##### A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely unopposed motions to intervene serve to make the entities filing them parties to the proceeding. Given the lack of undue prejudice or delay, the parties' interest, and the early stage of the proceeding, we find good cause to grant the unopposed, untimely motions to intervene of FirstEnergy, OCC, and PJM.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept PJM's, AEP Ohio's, and IEU-Ohio's answers because they have provided information that assisted us in our decision-making process.

##### B. Proposed Appendix

24. As discussed below, we will accept AEP Ohio's proposed Appendix, to become effective August 8, 2012, subject to a compliance filing to modify the proposed Appendix as AEP Ohio has agreed to. We also accept AEP Ohio's commitment to withdraw its request for rehearing of the January 2011 Order, and the complaint filed in Docket No. EL11-32-000 once this filing is approved by the Commission and becomes final and non-appealable.

25. Under Schedule 8.1, a state is permitted to establish the compensation mechanism in a state regulatory jurisdiction that has implemented retail choice. The Ohio Commission states in its comments that the proposed Appendix conforms to the state compensation mechanism it approved, and that it supports the filing, effective on August 8, 2012.

26. Several protestors contend that the proposed Appendix is unnecessary as the RAA governs. Protestors argue that the Commission need not approve a capacity mechanism that has already been established by the Ohio Commission pursuant to the RAA. While

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<sup>23</sup> *Id.* at 6-7.

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AEP Ohio was not obligated by the RAA to file the proposed Appendix, we find no basis for rejecting the filing since it is consistent with the RAA.

27. Several parties maintain that the filing is unauthorized because the RAA permits only PJM to make filings to amend the RAA. Parties assert that AEP Ohio has not demonstrated that it received approval from the PJM Board to make this filing, as required for any filing to amend the RAA. We reject these arguments. We find that the filing is permissible because, as PJM answers, the PJM Board has authorized AEP Ohio to make this type of filing, which only adds an appendix, but which does not amend the body of the RAA itself.

28. First Energy argues that the effective date should not be August 8, 2012 and should be removed from the RAA provision. However, the Ohio Commission adopted the state compensation mechanism effective August 8, 2012, which no party disputes, and we therefore find that date to be in accordance with the RAA.

29. Several parties raise a concern that the proposed Appendix is ambiguous and unclear, and is unjust and unreasonable. But the protests were filed prior to AEP Ohio's answer in which AEP Ohio agreed to certain revisions to the Appendix that address these parties' concerns.

30. Having established that the proposed Appendix accords with the RAA and the state compensation mechanism, as detailed above, we therefore, reject the protests.

The Commission orders:

AEP Ohio's Appendix to the RAA is hereby accepted for filing, to become effective August 8, 2012, subject to a compliance filing, within 30 days of the issuance of this order, to implement the revisions to the Appendix to which AEP Ohio has agreed.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.