

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

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INDUSTRIAL ENERGY USERS-OHIO'S MEMO CONTRA  
 JOINT MOTION TO DISMISS OF OHIO POWER COMPANY AND  
 THE PUBLIC UTILITIES COMMISSION OF OHIO

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMO CONTRA  
JOINT MOTION TO DISMISS OF OHIO POWER COMPANY AND  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Pursuant to S.Ct.Prac.R. 4.01(B)(1), Industrial Energy Users-Ohio ("IEU-Ohio") files its response to the Joint Motion to Dismiss of Ohio Power Company ("AEP-Ohio") and the Public Utilities Commission of Ohio ("Commission"). The Joint Motion to Dismiss seeks to have the Court dismiss IEU-Ohio's Propositions of Law VI, VII, and VIII. Propositions of Law VI and VII challenge the unlawful and unreasonable two-tiered shopping tax approved by the Commission on March 7, 2012, and increased and extended on May 30, 2012. Proposition of Law VIII requests the Court to direct the Commission to make certain prospective accounting adjustments to prevent customers from significantly overcompensating AEP-Ohio for the provision of wholesale generation capacity service. The practical effect of the Joint Motion to Dismiss is to block customers from seeking and obtaining relief from unlawful and unreasonable charges for wholesale generation capacity service, an area that AEP-Ohio agrees the Commission lacks jurisdiction to regulate. As demonstrated below, the Joint Motion to Dismiss is without merit. These Propositions of Law present the Court with a live controversy, which is lawfully before the Court. Accordingly, the Joint Motion to Dismiss should be denied.

**I. BACKGROUND**

**A. The Unlawful and Unreasonable Two-Tiered Charges**

This proceeding is a result of AEP-Ohio's attempt to displace the market prices established by PJM Interconnection, L.L.C.'s ("PJM") Reliability Pricing Model ("RPM") ("RPM-Based Pricing") and secure a significant above-market increase in its compensation for generation capacity service. AEP-Ohio's attempt to secure above-market compensation began with an application submitted to the Federal Energy Regulatory Commission ("FERC"). In

response, the Commission opened the proceeding below and AEP-Ohio immediately objected, filing an application for rehearing that asserted that the Commission lacked authority under Ohio law and was also preempted under federal law from regulating its compensation for generation capacity service. When the Commission opened the proceeding below in late 2010, RPM-Based Pricing controlled for all shopping in AEP-Ohio's service area either as a term and condition of AEP-Ohio's initial electric security plan ("ESP"), as a result of the Commission's adoption of a state compensation mechanism, or as a result of PJM's Reliability Assurance Agreement ("RAA") which requires RPM-Based Pricing when there is no state compensation mechanism. RPM-Based Pricing was the *status quo* until AEP-Ohio sought to displace RPM-Based Pricing with significantly above-market compensation for generation capacity service.

The Commission first authorized AEP-Ohio to displace RPM-Based Pricing with the two-tiered shopping tax (thereby providing AEP-Ohio with a significant increase in compensation for generation capacity service) as a result of AEP-Ohio's attempt to settle the proceeding below ("Capacity Case"). In August 2011, AEP-Ohio submitted prefiled testimony in the proceeding below seeking Commission authority for a significant above-market increase in its compensation for generation capacity service. Specifically, AEP-Ohio sought to increase its compensation from RPM-Based Pricing to \$355.55/megawatt-day ("MW-day"), based on high level summaries of unaudited FERC Form 1 data for the year 2010. Over the time relevant to this case, RPM-Based Pricing has ranged from a low of \$20/MW-day, to a high of \$153/MW-day, a three-year average of \$70/MW-day.<sup>1</sup>

Subsequently, AEP-Ohio entered into a strongly contested stipulation and recommendation ("ESP Stipulation") in an attempt to satisfy its desire for above-market

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<sup>1</sup> Opinion and Order at 10 (July 2, 2012) (IEU-Ohio Appx. at 54) (hereinafter "Capacity Order"); IEU-Ohio Ex. 102A at 23 (IEU-Ohio Supp. at 193).

compensation for generation capacity service and resolve several other proceedings including its pending ESP proceeding. The ESP Stipulation recommended that the Commission approve a two-tiered generation capacity service pricing scheme applicable to competitive retail electric service (“CRES”) providers serving shopping customers in AEP-Ohio’s service area. The first tier was tied to RPM-Based Pricing and the second tier was set at an arbitrary above-market rate of \$255/MW-day. AEP-Ohio admitted that the above-market arbitrary \$255/MW-day price was designed to block retail customers from switching to CRES providers by significantly reducing the savings otherwise available from such providers.<sup>2</sup>

The Commission approved the ESP Stipulation on December 14, 2011, and authorized the two-tiered shopping tax to go into effect on January 1, 2012. By the time the applications for rehearing were submitted to the Commission, the consequences of the ESP Stipulation and impact on customers’ bills had become apparent. On February 23, 2012, the Commission withdrew its approval of the ESP Stipulation, finding that the ESP Stipulation as a package was not in the public interest. In accordance with its obligation in R.C. 4928.143(C)(2)(b) the Commission directed AEP-Ohio to end the two-tiered shopping tax and restore RPM-Based Pricing for all shopping in AEP-Ohio’s territory.<sup>3</sup>

AEP-Ohio refused to comply with the Commission’s order. Instead, it continued charging the two-tiered shopping tax and on February 27, 2012 AEP-Ohio filed a motion for relief asserting that the Commission’s directive was unclear. AEP-Ohio requested authority to continue its interpretation of the ESP Stipulation’s two-tiered shopping tax, claiming that allowing the ESP Stipulation’s two-tiered shopping tax to remain effective during the pendency of the Commission’s investigation was a “perfect compromise.”

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<sup>2</sup> FES Ex. 102 at Ex. TCB-4 (IEU-Ohio Supp. at 804).

<sup>3</sup> Entry on Rehearing at 12 (Feb. 23, 2012) (IEU-Ohio Appx. at 180).

Despite rejecting the ESP Stipulation as not in the public interest and the Commission's obligation under R.C. Section 4928.143(C)(2)(b) to restore RPM-Based Pricing, the Commission nonetheless allowed AEP-Ohio to continue collecting the two-tiered shopping tax. In doing so, the Commission found that the record from the consolidated proceedings to consider the ESP Stipulation could be relied upon in this proceeding to resolve contested issues.<sup>4</sup> This reliance is irreconcilable with the purpose of the consolidation, which was "for the purpose of considering the Stipulation."<sup>5</sup> As if lawless acts are less lawless when their tenure is limited, the Commission made temporary AEP-Ohio's continued collection of the two-tiered "shopping tax" holding that it would end on May 31, 2012 (with the restoration of RPM-Based Pricing effective June 1, 2012).<sup>6</sup>

In response to the Commission's unlawful and unreasonable flip-flop, various applications for rehearing were filed contesting the March 7, 2012 Entry on procedural and substantive grounds.<sup>7</sup> No application for rehearing was filed by AEP-Ohio (AEP-Ohio did not contest the Commission's determination that RPM-Based Pricing be restored effective June 1, 2012). On April 11, 2012, some 16 months after this proceeding was initiated, the Commission

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<sup>4</sup> Entry at 15 (Mar. 7, 2012) (IEU-Ohio Appx. at 29).

<sup>5</sup> *ESP II Case*, Entry at 4 (Sept. 16, 2011) (emphasis added), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11I16B14424C32193>.

<sup>6</sup> Entry at 17 (Mar. 7, 2012) (IEU-Ohio Appx. at 31).

<sup>7</sup> IEU-Ohio's application for rehearing asserted that: (1) the Commission lacked authority under Ohio law to authorize the two-tiered charges, (2) the resulting rates of the two-tiered shopping tax were unduly discriminatory and not comparable, (3) the two-tiered shopping tax permitted AEP-Ohio to recover transition costs in violation of state law, (4) there was no record to support the Commission's finding that "the state compensation mechanism could risk an unjust and unreasonable result," (5) the rate increase was not based on any economic justification as required by Commission precedent, (6) the Commission failed to comply with R.C. 4903.16, and (7) AEP-Ohio did not file an application for rehearing as provided by R.C. 4903.10, and the Commission abrogated its prior order without making the findings required by that Section. IEU-Ohio Application for Rehearing at 1-2 (Mar. 27, 2012) (IEU-Ohio Appx. at 438-439).

granted rehearing for the purpose of giving itself more time to consider the rehearing requests filed in response to the March 7, 2012 Entry.

The evidentiary hearing phase of this proceeding subsequently commenced on April 17, 2012 and concluded on May 15, 2012. On April 30, 2012, while the evidentiary hearings were in progress, and after AEP-Ohio had concluded its case-in-chief, AEP-Ohio filed a motion seeking to undo the “*perfect compromise*” it previously advanced. More specifically, AEP-Ohio asked the Commission to: (1) extend the Commission-specified life of its two-tiered pricing scheme; and, (2) increase the revenue collected by AEP-Ohio by significantly increasing the shopping tax’s first tier from \$20/MW-day to \$146/MW-day.<sup>8</sup> In other words, AEP-Ohio once again asked the Commission to engage in authorizing prices for wholesale generation capacity service, something AEP-Ohio has repeatedly asserted is beyond the Commission’s subject matter jurisdiction. Further, AEP-Ohio’s motion was essentially an untimely application for rehearing of the Commission’s March 7, 2012 Entry, which specifically held that the continued version of unlawful shopping-blocking two-tiered shopping tax would end on May 31, 2012 and that RPM-Based Pricing would be restored effective June 1, 2012.

On May 30, 2012, just as the Commission-ordered restoration of RPM-Based Pricing was about to occur, and without citing evidence from this proceeding (the evidentiary hearing concluded on May 15, 2012) or addressing the pending applications for rehearing that had previously been granted by the Commission, the Commission changed course again and allowed

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<sup>8</sup> RPM-Based Pricing is established for each PJM delivery year, which runs from June 1 to the following May 31. On June 1, 2012, RPM-Based Pricing became \$20/MW-day. *See generally*, Motion for Extension (Apr. 30, 2012), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12D30B60940B06932>.

AEP-Ohio to increase and extend its above-market compensation for wholesale generation capacity service.<sup>9</sup>

On June 19, 2012, IEU-Ohio and other parties filed applications for rehearing from the Commission's May 30, 2012 Entry, again raising issues the Commission continued to dodge: its jurisdictional authority, the unlawful collection of transition revenue, and a lack of comparability, among others. On July 11, 2012, the Commission granted the applications for rehearing for further consideration.

On July 2, 2012, the Commission issued the Capacity Order.<sup>10</sup> The Commission found that it could use its general supervisory authority to authorize AEP-Ohio to significantly increase its compensation for wholesale generation capacity service. The Commission then invented and applied a cost-based ratemaking methodology found nowhere in Ohio law and concluded AEP-Ohio's "cost" of providing generation capacity service, a competitive service, was \$188.88/MW-day. The Commission, however, also found that the *status quo* RPM-Based Pricing encouraged the competition mandated by R.C. Chapter 4928 and empowered retail customer choice in furtherance of the State policies in R.C. 4928.02. The Commission then limited the wholesale compensation for generation capacity service that AEP-Ohio could collect from CRES providers to the compensation provided by RPM-Based Pricing. Then, the Commission authorized AEP-Ohio to make certain accounting changes to defer the difference between RPM-Based Pricing and \$188.88/MW-day, plus interest, and said that it would address the collection of this difference in AEP-Ohio's pending ESP case. The evidentiary hearing, however, had already ended in the ESP case. Nonetheless, the Commission determined as part of its Opinion and Order approving AEP-Ohio's ESP that the difference between the

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<sup>9</sup> Entry at 7-8 (May 30, 2012) (IEU-Ohio Appx. at 39-40).

<sup>10</sup> Opinion and Order (July 2, 2012) (IEU-Ohio Appx. at 45).

RPM-Based Price and the \$188.88/MW-day price which was not collectable from CRES providers would be collected through non-bypassable or unavoidable charges imposed on shopping and non-shopping retail customers in AEP-Ohio's service area. IEU-Ohio and others filed applications for rehearing and have subsequently appealed this aspect of the Commission's Opinion and Order approving AEP-Ohio's ESP.

IEU-Ohio's applications for rehearing from the March 7, 2012 Entry and May 30, 2012 Entry, however, remained pending even after the Commission issued its Capacity Order. The Commission finally addressed the merits of these applications for rehearing challenging the two interim two-tiered shopping tax orders in its October 17, 2012 Entry on Rehearing. The Commission held that it had subject matter jurisdiction under R.C. 4905.04, 4905.05, and 4905.06 to authorize the temporary two-tiered shopping tax, and that its exercise of authority was consistent with its "broad investigative authority" under R.C. 4905.26.<sup>11</sup> The Commission concluded if it had authority to adopt RPM-Based Pricing as AEP-Ohio's compensation for generation capacity service in its initial Entry opening the Capacity Case, it had the authority to modify that compensation.<sup>12</sup>

Despite the limited purpose of consolidation, the Commission again claimed that it could rely on the closed record from the ESP Stipulation proceeding to take the action identified in the temporary two-tiered shopping tax Entries.<sup>13</sup> The Commission also rejected IEU-Ohio's arguments that the two-tiered shopping tax was discriminatory, finding that all customers "had an equal opportunity to take advantage of the allotted RPM-based pricing."<sup>14</sup> Finally, the

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<sup>11</sup> Entry on Rehearing at 13 (Oct. 17, 2012) (IEU-Ohio Appx. at 102).

<sup>12</sup> *Id.* at 14-15 (IEU-Ohio Appx. at 103-104).

<sup>13</sup> *Id.* at 16-17, 25-26 (IEU-Ohio Appx. at 105-106, 114-115).

<sup>14</sup> *Id.* at 19 (IEU-Ohio Appx. at 108).

Commission rejected IEU-Ohio's assertion that the above-market compensation for generation capacity service amounted to an award of transition revenue or its equivalent long after Ohio law precluded any such award. The Commission held that the above-market compensation was not transition revenue because it was not compensation for a retail service and "[b]ecause AEP-Ohio's capacity costs are not directly assignable or allocable to retail electric generation service."<sup>15</sup> Despite this holding in the *ESP II Case*,<sup>16</sup> the Commission nonetheless directed that AEP-Ohio collect the wholesale generation capacity service compensation difference between RPM-Based Pricing and the \$188.88/ MW-day from retail customers.<sup>17</sup>

As discussed above, IEU-Ohio properly contested the Commission's authorization of a significant increase in AEP-Ohio's compensation for generation capacity service when the Commission approved the ESP Stipulation, when the Commission granted AEP-Ohio's so-called "perfect compromise," and again when the Commission indulged AEP-Ohio's undoing of its "perfect compromise" by authorizing AEP-Ohio to extend and increase the two-tiered shopping tax. At each point, IEU-Ohio requested that the Commission make the unlawful and unreasonable two-tiered temporary shopping tax subject to refund, but the Commission refused despite its own precedent.<sup>18</sup>

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<sup>15</sup> *Id.* at 20 (IEU-Ohio Appx. at 109).

<sup>16</sup> As used herein, "*ESP II Case*" refers to *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*

<sup>17</sup> *ESP II Case*, Opinion and Order at 36 (Aug. 8, 2012) (hereinafter "*ESP II Order*"), available at: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=0f94c2c9-481e-45f8-841f-8156530defbc>.

<sup>18</sup> *See, e.g.*, Entry on Rehearing at 26-27 (Oct. 17, 2012) (IEU-Ohio Appx. at 115-116). When a party has sought interim relief, the Commission has historically applied its authority to provide emergency rate relief under R.C. 4909.16. The Commission has also held a hearing prior to granting the emergency relief and has made the interim rate increase subject to refund.

## B. IEU-Ohio's Complaint for Writs of Prohibition and Mandamus

On August 31, 2012, IEU-Ohio initiated an original action before this Court by filing a Complaint for Writs of Prohibition and Mandamus. The Complaint alleged that the Commission had patently and unambiguously exceeded its jurisdiction by relying on its general supervisory authority in R.C. Chapter 4905 to invent and apply a cost-based ratemaking methodology found nowhere in Ohio law providing AEP-Ohio a substantial increase in the compensation it receives for generation capacity service.<sup>19</sup> AEP-Ohio and the Commission separately moved to dismiss IEU-Ohio's Complaint arguing, among other things, that IEU-Ohio had a proper remedy through the normal appeal process.<sup>20</sup> The Court granted AEP-Ohio's and the Commission's motions to dismiss the Complaint on April 16, 2013.

Despite AEP-Ohio's representations in its motion to dismiss IEU-Ohio's Complaint that IEU-Ohio had an adequate legal remedy through the normal appeal process, AEP-Ohio nevertheless has twice moved to dismiss portions of IEU-Ohio's appeal in Case Nos. 2012-2098 and 2013-0228. In the first filed on July 12, 2013, AEP-Ohio argued that certain unidentified portions of IEU-Ohio's appeal were preempted by actions undertaken by FERC. As demonstrated in IEU-Ohio's July 26, 2013 Response, AEP-Ohio's arguments are without merit.

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"Consistent with the customary commission practice in emergency proceedings, we further require that if the temporary rates authorized herein exceed the rates ultimately determined to be reasonable in applicant's pending permanent rate application ... applicant shall refund, with interest ... any amounts charged and collected pursuant to the emergency rates which exceed the amounts which would have been charged and collected had the authorized permanent rates been in place during the period." *Re Dayton Power & Light Co.*, Case No. 80-826-EL-AEM, 41 P.U.R.4th 136, Opinion and Order at 146 (Nov. 26, 1980),

<sup>19</sup> *State of Ohio, ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Case No. 2012-1494, Complaint for Writs of Prohibition and Mandamus (Aug. 31, 2012) (hereinafter "*Writ Proceeding*").

<sup>20</sup> *Writ Proceeding*, Motion to Intervene as Respondent of Ohio Power Company and Motion to Dismiss at 26-28 (Sept. 25, 2012); *Writ Proceeding*, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, *et al.* at 12-14 (Sept. 25, 2012).

AEP-Ohio has now filed a second motion to dismiss that the Commission has joined. Despite AEP-Ohio's and the Commission's prior representations to the Court that IEU-Ohio had an adequate legal remedy through the normal appeal process, the August 14, 2013 Joint Motion to Dismiss again seeks to block this Court's review of the Commission's unlawful and unreasonable actions below. The Joint Motion to Dismiss asserts that IEU-Ohio's Propositions of Law VI, VII, and VIII are moot because this Court cannot provide IEU-Ohio a remedy, and also asserts that the Commission's actions below are not the type that would be capable of repetition yet evading review. As demonstrated below, AEP-Ohio and the Commission are wrong on both fronts.

**C. IEU-Ohio's Propositions of Law VI, VII, and VIII**

As discussed above, AEP-Ohio's two-tiered shopping tax was approved as part of the ESP Stipulation. Prior to the ESP Stipulation, AEP-Ohio received compensation solely based upon RPM-Based Pricing, a term of AEP-Ohio's initial ESP according to the Commission.<sup>21</sup> Upon rejecting the ESP Stipulation, the Commission was required, in accordance with R.C. 4928.143(C)(2)(b), to restore "the provisions, terms, and conditions of the utility's most recent standard service offer."

In fact the Commission initially directed AEP-Ohio to restore RPM-Based Pricing.<sup>22</sup> Then the Commission proceeded to ignore the command in R.C. 4928.143(C)(2)(b) and its own directive that RPM-Based Pricing be restored; it authorized AEP-Ohio's two-tiered shopping tax to temporarily remain in effect following the rejection of the ESP Stipulation. IEU-Ohio's

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<sup>21</sup> Entry at 1-2 (Dec. 8, 2010) (IEU-Ohio Appx. at 182-183). The Entry held that the Commission had approved AEP-Ohio's initial ESP rates "based upon the continuation of the current capacity charges established by the three-year capacity auction conducted by PJM, Inc." *Id.* The three-year capacity auction referenced by the Commission is PJM's RPM, and the prices established by it are the RPM-Based Pricing referenced herein.

<sup>22</sup> Entry on Rehearing at 12 (Feb. 23, 2012) (IEU-Ohio Appx. at 180).

Proposition of Law VI alleges that the Commission's failure to restore RPM-Based Pricing was unlawful and unreasonable.

The Commission gave three reasons for allowing the two-tiered shopping tax to continue following its rejection of the ESP Stipulation. First, the Commission cited evidence from the consolidated hearing on the ESP Stipulation and observed that such evidence indicated that AEP-Ohio's cost of providing generation capacity service could range from a low of \$57/MW-day to a high of \$355/MW-day.<sup>23</sup> The Commission also noted that AEP-Ohio was no longer collecting provider of last resort ("POLR") charges because the Commission found on remand, after a successful appeal by IEU-Ohio, that AEP-Ohio had failed to demonstrate that it had POLR costs. Finally, the Commission cited the fact that AEP-Ohio shared the proceeds from off-system sales ("OSS") with its affiliates, a term of a FERC-approved agreement.

IEU-Ohio's Proposition of Law VII alleges that the Commission's reliance on the record developed for the ESP Stipulation was unlawful and unreasonable because the Capacity Case was consolidated solely for the purposes of considering the ESP Stipulation and not for purposes of addressing contested issues in the proceeding below. Without this reference to the record of the ESP Stipulation hearing, the Commission had no basis to suggest, let alone hold, that RPM-Based Pricing was below AEP-Ohio's claimed cost of capacity.

IEU-Ohio's Proposition of Law VII also asserts that the Commission improperly relied on the fact that AEP-Ohio is no longer authorized to collect POLR charges. Previously, the Commission determined that AEP-Ohio was not entitled to POLR charges because it had failed to demonstrate that it had any POLR-related costs.<sup>24</sup> The Commission's suggestion that

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<sup>23</sup> Entry at 16 (Mar. 7, 2012) (IEU-Ohio Appx. at 30).

<sup>24</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or*

AEP-Ohio should be permitted to increase its capacity charges to make up for a cost the Commission previously found had not been proven defies reason.

Finally, Proposition of Law VII identifies that despite the Commission's reliance on AEP-Ohio's FERC-approved agreement to share its OSS revenue with its affiliates, there was no evidence to address the impact of the OSS sharing on AEP-Ohio, even if it were a relevant consideration.

The Commission eventually issued the Capacity Order and replaced the temporary two-tiered shopping tax with another form of unlawful and unreasonable above-market compensation. Specifically, the Commission invented and applied a cost-based ratemaking methodology and using its invented methodology it held that AEP-Ohio's cost of providing generation capacity service was \$188.88/MW-day. As discussed above, CRES providers are required to pay a portion of the \$188.88/MW-day charge equal to the RPM-Based Price; shopping and non-shopping customers in AEP-Ohio's service area are required to pay the above-market portion of the \$188.88/MW-day price, plus interest, through non-bypassable charges. A portion of this above-market compensation for generation capacity service will be collected by AEP-Ohio through May 2015 and a portion is being deferred (through the accounting authorized by the Commission) for future collection. IEU-Ohio's Proposition of Law VIII requests the Court direct the Commission to reduce the regulatory asset balance created for the portion of such above-market compensation the collection of which is deferred to the future by the unlawful and unreasonable above-market compensation received by AEP-Ohio since January, 1 2012.

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*Transfer of Certain Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 33 (Oct. 3, 2011), available at: <http://dis.puc.state.oh.us/TiffToPDF/A1001001A11J03B20528I67558.pdf>.

## **II. 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 60-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, IEU-Ohio’s appeal is properly before the Court.

Because IEU-Ohio’s appeal is properly before the Court, AEP-Ohio and the Commission 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>25</sup> “All material factual allegations of the complaint must be taken as true.”<sup>26</sup>

Demonstrated herein, IEU-Ohio’s Propositions of Law VI, VII, and VIII are not moot.

Therefore, the Court should deny the Joint Motion to Dismiss.

**III. ARGUMENT**

**A. IEU-Ohio’s Propositions of Law VI, VII, and VIII are not moot**

***i. IEU-Ohio’s appeal is the first opportunity IEU-Ohio has had to present these issues to the Court and have the Court address them on the merits***

IEU-Ohio’s Propositions of Law VI, VII, and VIII present IEU-Ohio’s first opportunity for this Court to reach the merits of the arguments raised in these three propositions of law. Moreover, the issues raised in these propositions of law are crucial in crafting an adequate remedy for IEU-Ohio, assuming the Court agrees that the Commission’s Capacity Order is unlawful and unreasonable.

IEU-Ohio could have not sought an earlier appeal of the two-tiered shopping tax Entries. “An interim order on appeal in a pending commission proceeding will not be considered by this Court.”<sup>27</sup> “Accordingly, th[e] court has consistently dismissed premature appeals.”<sup>28</sup> IEU-Ohio timely filed its applications for rehearing from the March 7, 2012 and May 30, 2012 Entries within the 30-day timeframe provided by R.C. 4903.10. The Commission granted both applications for rehearing for further consideration of the matters raised therein and did not address their merits until the October 17, 2012 Entry on Rehearing. However, there was not a final appealable order in the case below until the Commission issued the January 30, 2013 Entry

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<sup>25</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>26</sup> *Id.*

<sup>27</sup> *Cincinnati Gas & Elec. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, ¶ 9.

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

on Rehearing. In fact, IEU-Ohio appealed from a prior December 2012 Entry on Rehearing in and in response the Commission filed a motion to dismiss arguing that IEU-Ohio's appeal was premature. The Court granted the Commission's motion to dismiss on June 5, 2013.

Moreover, when IEU-Ohio filed its Complaint for Writs of Prohibition and Mandamus, both AEP-Ohio and the Commission moved to dismiss the appeal and argued that IEU-Ohio had a proper legal remedy and the Court could address the issues raised in IEU-Ohio's Complaint through the appeals process. Thus, IEU-Ohio's appeal, including Propositions of Law VI, VII, and VIII, is IEU-Ohio's first opportunity to present these issues to the Court and have the Court address them on the merits.

*ii. Propositions of Law VI and VII are crucial to IEU-Ohio achieving an adequate remedy if the Court finds the Capacity Order is unlawful and unreasonable*

If the Court grants IEU-Ohio's appeal and finds that the Commission acted unlawfully and unreasonably when it invented and applied a cost-based ratemaking methodology to significantly increase AEP-Ohio's compensation for generation capacity service, then the question remains about what rates to return to. As demonstrated in Propositions of Law VI and VII, the Commission's two Entries approving the two-tiered shopping tax were unlawful and unreasonable. Accordingly, if the Court grants IEU-Ohio's other Propositions of Law and finds the Capacity Order is unlawful and unreasonable, the Court should also reach the merits of Propositions of Law VI and VII to hold that on remand the Commission cannot re-implement the unlawful and unreasonable two-tiered shopping tax that was in effect prior to the Capacity Order.

Additionally, as discussed below the determination of whether the two interim orders approving the two-tiered shopping tax are unlawful and unreasonable directly impacts the accounting adjustment IEU-Ohio seeks through Proposition of Law VIII.

**iii. Proposition of Law VIII is not moot because IEU-Ohio has presented the Court an issue where the Court can grant IEU-Ohio an effective remedy**

The Joint Motion to Dismiss argues that IEU-Ohio's Proposition of Law VIII is moot because the remedy IEU-Ohio seeks is barred by the prohibition on retroactive ratemaking, citing *Keco Industries, Inc. v. Cincinnati Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957).<sup>29</sup> In general, *Keco* was focused on the applicability of the common law's treatment of unjust enrichment and holds that errors made by the Commission do not create an opportunity for civil restitution. It is IEU-Ohio's position that the *Keco* principle does not apply based on the facts, law and circumstances before the Court in this appeal. To the extent the Court judges that the *Keco* principle is implicated by IEU-Ohio's request for relief, IEU-Ohio urges the Court to make a case-specific exception to the principle because the Commission's actions below were so far out of bounds relative to its legal duties as established by the General Assembly that neither the Commission's actions nor the resulting rate increase can enjoy any presumption of reasonableness. In fact, throughout the proceeding below, AEP-Ohio agreed that the Commission's actions were outside the scope of its legal authority.

In *Keco*, the Commission authorized rates that were "established by the proper designated authority after a hearing and consideration in full compliance with the law...."<sup>30</sup> After a review of the balance struck by the Ohio General Assembly in the general statutory plan of regulation and collection of rates in the context of the *Keco* case, the Court determined that neither the Commission nor this Court, had authority to restitution of rates found to be unlawful and unreasonable. But, unlike in the *Keco* case, the rate increase authorized by the Commission

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<sup>29</sup> Joint Motion to Dismiss at 7 (Aug. 14, 2013).

<sup>30</sup> *Keco*, 166 Ohio St. at 258.

below came before the Commission made the slightest effort to satisfy the procedural or substantive requirements that the Commission must satisfy before it can authorize an increase in rates. Specifically, the Commission ignored the ratemaking statutes applicable to competitive services, such as generation capacity service, in R.C. Chapter 4928 and ignored the cost-based ratemaking statutes applicable to noncompetitive services located in R.C. Chapter 4909. In fact, as demonstrated in IEU-Ohio's Proposition of Law IV, in the proceeding below the Commission failed to follow nearly every procedural and substantive requirement in R.C. Chapter 4909, the ratemaking statutes followed in *Keco*. Thus, in this case, the Commission did not follow the general statutory plan by which it may set and regulate rates as it did in *Keco*.

Unlike in *Keco*, there was no attempt on the part of AEP-Ohio or the Commission to consider AEP-Ohio's request for a substantial rate increase in full compliance with the applicable law. Instead, the Commission authorized the two-tiered shopping tax without a record and further ignored the duties established by the General Assembly and invented a cost-based ratemaking methodology to increase rates. The balance struck by the General Assembly, which the Court respected when it established the *Keco* principle, was not a balance that the Commission acknowledged or respected in the proceeding below. Thus, the *Keco* principle must not be applied in this appeal to permit AEP-Ohio and the Commission to escape accountability for their illegal behavior. Applying the *Keco* principle in this circumstance does a disservice to the spirit of the rule of law laid down in *Keco* and allows AEP-Ohio and the Commission to use *Keco* as a shield that can only work to encourage illegal behavior.

Furthermore, IEU-Ohio's Proposition of Law VIII does not seek a retroactive adjustment to rates. This proposition of law requests that the Court order the Commission to credit against regulatory asset balances otherwise eligible for amortization the unlawful and unreasonable

above-market charges collected by AEP-Ohio since January 2012. Simply stated, IEU-Ohio requests the Court to direct the Commission to make an accounting adjustment; IEU-Ohio's Proposition of Law VIII does not seek to alter current rates.

As this Court has stated, and the Commission agrees, accounting adjustments do not constitute ratemaking.<sup>31</sup> "We have upheld the commission's accounting orders when the accounting procedure did not affect current rates and the ratemaking effect of the accounting order would be reviewed in a later rate proceeding."<sup>32</sup> Because IEU-Ohio seeks an accounting adjustment (a credit against regulatory asset balances) and not an adjustment to current rates, AEP-Ohio's and the Commission's argument regarding retroactive ratemaking is inapplicable, and their request to dismiss IEU-Ohio's Proposition of Law VIII is meritless.

**B. Even if Propositions of Law VI and VII do not present a live controversy, they are the type of harm that is capable of repetition but evading review**

Even if the Court determines IEU-Ohio's Propositions of Law VI and VII do not present the Court with a live controversy, the Court should nonetheless reach the merits of IEU-Ohio's arguments because the harm addressed in these two propositions of law are capable of repetition yet evading review. "A claim is not moot if it is capable of repetition, yet evading review."<sup>33</sup> "This exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its

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<sup>31</sup> *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 18-19; *In the Matter of the Application of Duke Energy Ohio for Authority to Change Accounting Methods*, Case Nos. 08-709-EL-Air, *et al.*, Finding and Order at 3 (Jan. 14, 2009) ("deferrals do not constitute ratemaking").

<sup>32</sup> *Elyria Foundry*, 2007-Ohio-4164, ¶ 19.

<sup>33</sup> *State ex rel. Dispatch Printing Co. v. Geer*, 114 Ohio St.3d 511, 513, 2007-Ohio-4643.

cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.”<sup>34</sup> This exception applies here.

Propositions of Law VI and VII are the type of claim that is always too short in duration to be fully litigated before its cessation or expiration. The Commission acquiesced to AEP-Ohio by unlawfully increasing rates without a hearing and record. Following the hearing, the Commission terminated the two-tiered shopping tax and replaced it with another unlawful and unreasonable pricing scheme. The temporary nature of the two-tiered shopping tax, approved without a hearing and only for the pendency of the Commission’s review, prevented parties from taking an appeal until the Commission had terminated the two Entries approving the two-tiered shopping tax.<sup>35</sup> Thus, the first element is satisfied.

IEU-Ohio also faces a reasonable expectation that the harm complained of in Propositions of Law VI and VII will occur again. As discussed above, and as demonstrated in IEU-Ohio’s Merit Brief, the currently authorized capacity charges are unlawful and unreasonable. When IEU-Ohio previously presented the Commission with a reasoned basis for rejecting the previous unlawful and unreasonable capacity charges contained in the ESP Stipulation, the Commission agreed that the ESP Stipulation’s package of terms of conditions was not in the public interest. The Commission nonetheless gave in to AEP-Ohio’s unlawful demands and authorized unlawful and unreasonable capacity charges based upon AEP-Ohio’s unsupported claims. Thus, the Commission has already demonstrated its willingness to appease AEP-Ohio’s unlawful demands and authorize extra-record capacity charges. By addressing IEU-Ohio’s Propositions of Law VI and VII, the Court can prevent the Commission from re-

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<sup>34</sup> *Id.* (quoting *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231 (2000)).

<sup>35</sup> *Cincinnati Gas & Elec. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, ¶ 9.

imposing the unlawful and unreasonable two-tiered shopping tax if the case is remanded back to the Commission.

Moreover, without being able to challenge the legality of the two-tiered shopping tax, IEU-Ohio would always be in the precarious position of winning on appeal and then being exposed to unlawful and unreasonable interim rates until the Commission issued a new final appealable order. Following the logic in the Joint Motion to Dismiss, the Commission could establish any rate on a temporary basis, no matter how unjust and unlawful, and the Court could never review the Commission's actions.

Finally, IEU-Ohio has recently suffered this exact harm on remand following a successful appeal. In the appeal of AEP-Ohio's initial ESP, the Court held that AEP-Ohio's POLR charges and its 2001-2009 environmental carrying costs were unlawful and unreasonable.<sup>36</sup> On remand, the Commission correctly ordered AEP-Ohio to file tariffs removing both the POLR charges and environmental charges.<sup>37</sup> However, just like in this case, AEP-Ohio protested against reducing its rejected charges and requested that the Commission allow AEP-Ohio to continue collecting both charges on an interim basis, at least until the Commission had conducted further hearings on remand and issued its decision. In the alternative, AEP-Ohio requested to collect the charges subject to refund. Just as it did in this proceeding, the Commission gave in to AEP-Ohio's

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<sup>36</sup> The Court found that the POLR charges lacked record support and the environmental charges were defective because the Commission held that it could authorize recovery in an ESP of items not specifically provided for in the provisions of R.C. 4928.143(B)(2). *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 22-35.

<sup>37</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Entry at 2 (May 4, 2011) (hereinafter, "ESP I Case"), available at <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11E04B54018G59386>.

demand and allowed AEP-Ohio to continue collecting the POLR charges and environmental charges.<sup>38</sup>

IEU-Ohio also faced a similar harm on remand in yet another case, where despite winning its appeal IEU-Ohio has been denied an effective remedy. In August 2006, IEU-Ohio and others appealed a Commission decision conditionally allowing AEP-Ohio to collect research and development costs associated with a hypothetical integrated gasification combined-cycle ("IGCC") plant; the Commission provided AEP-Ohio five years to begin construction or it would have to refund the research and development costs plus interest.<sup>39</sup> On March 13, 2008, the Court affirmed, in part, reversed, in part, and remanded the Commission's Order. The Court held that while there may be merit to the Commission's regulation of the design, construction and operation of the hypothetical IGCC plant, the "evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility."<sup>40</sup> Importantly, the Court declined to rule on IEU-Ohio's request for a refund of costs already collected from AEP-Ohio's customers because of its remand to the Commission

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<sup>38</sup> *ESP I Case*, Entry at 4 (May 25, 2011), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11E25B55432B67532>.

<sup>39</sup> Specifically the Commission stated that if "AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest." *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Entry on Rehearing at 17 (June 28, 2006), available at: [http://dis.puc.state.oh.us/ViewImage.aspx?CMID=IRGGPN\\$AODL22KTZ](http://dis.puc.state.oh.us/ViewImage.aspx?CMID=IRGGPN$AODL22KTZ).

<sup>40</sup> *Indus. Energy Users-Ohio v. Pub. Util. Comm*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶¶ 32.

for further development of the record and because the Commission's conditional refund provision remained in effect.<sup>41</sup>

On remand, the Commission directed AEP-Ohio to

provide the Commission with additional information, and to further develop the record in this matter, the Attorney Examiner believes it is imperative that AEP-Ohio provide a detailed statement outlining the status of the construction of the IGCC facility, including whether AEP-Ohio is engaged in a continuous course of construction on the IGCC facility.<sup>42</sup>

AEP-Ohio indicated that it still might begin construction within the Commission-ordered five-year window, which ended on June 28, 2011. The Commission did not taken any further action beyond its request for more information quoted above. IEU-Ohio and others filed a motion on June 28, 2011 seeking a refund of the \$23.7 million, plus interest, unlawfully collected from customers. Eight years after the proceeding began, five years after a successful appeal, and two years after the Commission-imposed refund deadline has passed, and customers are still out \$23.7 million, plus interest. Thus, even where IEU-Ohio and other customers have a specific right to restitution on remand, the Commission has effectively denied customers that right as well.

In sum, even if IEU-Ohio's Propositions of Law VI and VII do not present a live controversy, they present the type of harm that is capable of repetition yet evading review. Accordingly, the Court should deny the Joint Motion to Dismiss and address IEU-Ohio's Propositions of Law VI and VII on the merits.

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<sup>41</sup> *Id.* at ¶ 4.

<sup>42</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Entry at 3 (Jan. 8, 2009), available at <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A09A08B62616I09579>.

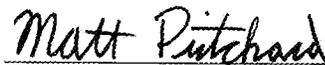
**C. IEU-Ohio could not have sought a stay of the temporary two-tiered shopping tax pursuant to R.C. 4903.16 as the Joint Motion to Dismiss asserts**

The Joint Motion to Dismiss urges dismissal of IEU-Ohio's Propositions of Law VI, VII, and VIII and claims that the three propositions of law are "particularly inappropriate given IEU-Ohio's failure to comply with R.C. 4903.16 so as to obtain a stay of the interim rates pending appeal." IEU-Ohio could not have sought a stay of the interim two-tiered shopping tax under R.C. 4903.16 because that section only applies to "[a] proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission." By its terms the statute applies in the context of an appeal and requires that there first be a final appealable order. The only stay IEU-Ohio could have sought was before the Commission, and IEU-Ohio in fact requested that the Commission establish the interim two-tiered shopping tax subject to refund, but the Commission refused. Accordingly, IEU-Ohio pursued all available remedies.

**IV. CONCLUSION**

As demonstrated above, the Joint Motion to Dismiss IEU-Ohio's Propositions of Law VI, VII, and VIII are without merit. Accordingly, the Court should deny the Joint Motion to Dismiss.

Respectfully submitted,



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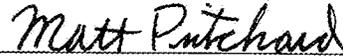
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**CERTIFICATE OF SERVICE**

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



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