ORIGINAL

In The
SUPREME COURT OF OHIO

Industrial Energy Users-Ohio, *et al.*,	:	Case Nos. 2013-0228
	:	2012-2098
Appellants,	:	
	:	Appeal from the Public Utilities
v.	:	Commission of Ohio, Case No. 10-2929-
	:	EL-UNC, *In the Matter of the*
The Public Utilities Commission of Ohio,	:	*Commission Review of the Capacity*
	:	*Charges of Ohio Power Company and*
Appellee.	:	*Columbus Southern Power Company.*

SECOND MERIT BRIEF SUBMITTED ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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SECOND MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Achieving balance is the Commission's[1] duty. In this case the Commission was considering capacity costs and the need was to set a price for capacity low enough for competitors of AEP-Ohio[2] to survive, and thus, facilitate a competitive market, but high enough to fairly compensate AEP-Ohio for its service. What capacity is, how it is provisioned, and what the legal structure is surrounding this, are complex and will be explained below. But in the final analysis the Commission balanced two conflicting obligations so as to simultaneously further both. This was the Commission's duty and it did it.

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1 Public Utilities Commission of Ohio ("Commission" or "PUCO").

2 Ohio Power Company ("AEP-Ohio" or "Company").

BACKGROUND

In this case the Commission achieved two equally important objectives. First, the Commission adopted a state compensation mechanism ("SCM") to address a volatile capacity market and restore just and reasonable compensation to AEP-Ohio for its provision of wholesale capacity service. The Commission approved rate reasonably compensates AEP-Ohio for its incurred capacity costs to satisfy the Company's Fixed Resource Requirement ("FRR") obligations under PJM's Reliability Assurance Agreement ("RAA"). AEP-Ohio is obligated to stand ready to supply power to Competitive Retail Electric Service ("CRES") providers that serve shopping customers in the Company's service territory.

And, secondly, the SCM the Commission adopted protects customers' retail choice and ensures a level playing field for competition between AEP-Ohio and CRES providers in AEP-Ohio's service territory. The SCM expressly prevails over other compensation mechanisms in PJM's RAA, so any risk that AEP-Ohio could acquire market power by seeking an anticompetitive capacity rate at the Federal Energy Regulatory Commission ("FERC") has been eliminated. FERC denied AEP-Ohio's application, a filing that triggered this investigation, due to the Commission's adoption of the SCM. *See* 134 FERC ¶ 61,039 (2011), App. at 55-60.

"Capacity" is not electricity itself but the ability to produce it when necessary." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F. 3d 477 (D.C. Cir. 2009). "A capacity market is a means of providing revenue to owners of power plants who in return agree to stand ready to supply power when needed." Voyles, Seth & Caplan, Elise (2013), RTO Capacity Markets and Their Impacts on Consumers and Public Power, *American Public Power Association.* To ensure a reliable supply of power and reliable service, an adequate supply of capacity at all times is necessary. "Capacity payments are intended to cover the power plants' fixed capital and other costs not recovered through electricity sales in energy and other markets." *Id.*

The Commission's rate design in the SCM preserved PJM's auction-based Reliability Pricing Model ("RPM") market-rate charge to CRES providers. Any incurred capacity cost not recovered from CRES providers was deferred for collection from retail customers. This design has a wholesale component and a retail component that separates federal/state ratemaking and jurisdictions. In fact, the FERC conducted a review of the SCM design the Commission adopted and approved it along with the wholesale component, finding the SCM adopted by the Commission to be "consistent with the RAA." *See* 143 FERC ¶ 61,164 p. 26 (May 23, 2013), App. at 54.

The Commission applied Ohio law to determine what rate was just and reasonable for AEP-Ohio to meet its incurred costs in satisfying AEP-Ohio's FRR obligations. The Commission, applying Ohio law, established the retail component to the SCM and overall wholesale capacity rate. The wholesale component maintained RPM pricing for marketers to promote shopping, stimulate true competition among suppliers in AEP-Ohio's territory, and facilitate AEP-Ohio's transition to full participation in the competitive market. *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 ("*Capacity Case*") (Opinion and Order at 22) (July 2, 2012), IEU App. at 67.[3] The SCM the Commission designed and adopted accomplishes both federal and state policy objectives, and protects/benefits the interests of all stakeholders.

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[3] References to the appendix submitted with the First Brief of the Appellant/Cross-Appellee Industrial Energy Users-Ohio are denoted "IEU App. at ___;" references to the Supplement filed by IEU are denoted "IEU Supp. at ___;" references to the supplement submitted with the First Brief of Appellant/Cross-Appellee FirstEnergy Solutions Corp. are denoted "FE Supp. at ___;" references to the appendix submitted with the First Brief of Appellant/Cross-Appellee The Office of the Ohio Consumers' Counsel are denoted "OCC App. at ___;" references to the appendix attached hereto are denoted "App. at ___;" references to the supplement submitted by appellee Public Utilities Commission of Ohio are denoted "Supp. at ___."

Who benefits from the SCM? Retail customers benefit by having a choice in retail suppliers and lower electric generation rates. Marketers benefit by being charged the RPM auction-based market rate so they can compete for customers in AEP-Ohio's service territory. AEP-Ohio benefits by having a certain and stable rate to recover its incurred costs in providing AEP-Ohio's capacity resources to CRES providers. The Commission's review of AEP-Ohio's capacity service rate was necessary to assess whether it was reasonable and to maintain competition and reliability in AEP-Ohio's service territory.

The backdrop to this case is a volatile wholesale capacity market. Since the Commission initiated this investigation in 2010, the RPM market price produced a high of $220.96[4] in 2010/2011 and a low of $20.01 in 2012/2013. This dramatic fall in RPM pricing created uncertainty and a risk of financial harm to AEP-Ohio due to its obligation, as an FRR entity, to supply CRES providers its capacity through May 31, 2015.

AEP-Ohio is subject to PJM's RAA tariff. The tariff obligates AEP-Ohio, as an FRR entity, to self supply capacity for its entire load, including serving as the supplier to all CRES providers that serve shopping customers, in the Company's service territory. It is undisputed that AEP-Ohio is the only provider of capacity for its load and CRES providers serving shopping customers in its service territory until May 31, 2015. This makes AEP-Ohio's capacity a non-competitive service.

The Commission has broad authority and discretion under R.C. Chapter 4905 to supervise and regulate utility companies under its jurisdiction, and determine whether their rates for services are just and reasonable. Nothing in R.C. Chapter 4905 prohibits the Commission from

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[4] Capacity prices are quoted per Megawatt day ("MW-day").

establishing a rate for a noncompetitive wholesale capacity service. There is also no requirement that the Commission must first invoke R.C. Chapter 4909 prior to fixing a new utility rate if it finds that an existing rate is unjust and unreasonable following a proceeding under R.C. 4905.26.

Under R.C. 4905.22, 4905.26, 4928.02, and 4928.06, the Commission is obligated to address a rate that does not reasonably compensate a utility for a service it provides and this obligation extends to ensuring that the policy objectives of retail choice and competition are effectuated in the process. The Commission accomplished those objectives, while also protecting the interests of all stakeholders.

After a lengthy discovery, hearing and briefing process involving all stakeholders, the Commission adopted a SCM with a cost-based capacity rate of $188.88/MW-day. This rate, as a matter of fact, reasonably compensates AEP-Ohio for its capacity resources during 2012-2015 when AEP-Ohio must fulfill its FRR obligations.

The Commission adopted an SCM consistent with the RAA (as FERC recently confirmed), state policy objectives, and Ohio law. The SCM capacity rate the Commission adopted and approved reasonably compensates AEP-Ohio for its incurred costs in providing the Company's capacity resources to satisfy its FRR obligations, while preserving and promoting retail choice for customer shopping and retail competition in AEP-Ohio's service territory consistent with state policy objectives.

STATEMENT OF THE FACTS

Capacity must be provided for all suppliers of electricity. To accomplish this, PJM operates an auction process referred to as RPM where electricity suppliers, both CRES and utilities, can buy. This auction process resulted in a Megawatt-day ("MW-day") capacity charge of $220.96 for 2010/2011, $145.79 for 2011/2012, $20.01 for 2012/2013, $33.71 for 2013/2014,

and $153.89 for 2014/2015. *Capacity Case* (Opinion and Order at 10) (July 2, 2012), IEU App. at 54. AEP-Ohio elected to opt out of participation in PJM's RPM capacity market and instead became an FRR entity. This means that AEP-Ohio was obligated to provide sufficient capacity for all connected load, including shopping load, in its service territory, although it had to do so at the auction price. *Id.* at 10, IEU App. at 54. AEP-Ohio will remain an FRR entity through May 31, 2015. *Id.*

If the RPM auction rate proved too low for the FRR, the RAA offered the FRR entity a way out. It could request that the FERC set a capacity rate based on the FRR entity's actual cost. On November 24, 2010, American Electric Power Service Corporation ("AEPSC"), on behalf of AEP-Ohio, filed just that sort of application with the FERC. *Id.* at 3, IEU-App. at 47. AEP-Ohio's application proposed to raise the capacity price from the yearly swinging RPM auction prices listed above to $355.72.

The RAA offered a way around this too. If there was a SCM, that state-determined rate would prevail. In light of the capacity rate change proposed by AEP-Ohio at FERC, on December 8, 2010 the Commission adopted a SCM for AEP-Ohio with the capacity charges established by RPM's three-year capacity auction conducted by PJM, during the pendency of the review. *Id.* at 4, IEU App. at 48, FE App. at 30, OCC App. at 12. The Commission also found that an investigation was necessary to determine the impact of AEP-Ohio's proposed change to its capacity charge. *Id.*

Specifically, the Commission sought comments regarding (1) what changes to the SCM were appropriate to determine AEP-Ohio's FRR capacity charge to CRES providers; (2) the degree to which AEP-Ohio's capacity charge was currently being recovered through retail rates or other capacity charges; and (3) the impact of AEP-Ohio's capacity charge upon CRES provid-

ers and retail competition in Ohio. *Id.* That review was conducted under the *Capacity Case.* This case was first consolidated and then separated from AEP-Ohio's standard service offer ("SSO") case. This procedure is unimportant for present purposes but is explained in the footnote.[5]

On March 7, 2012, the Commission implemented an interim capacity pricing mechanism proposed by AEP-Ohio in a motion for relief filed on February 27, 2012. *Capacity Case* (Opinion and Order at 6) (July 2, 2012), IEU App. at 50. The Commission approved a two-tiered capacity pricing mechanism modeled after the one recommended in the Stipulation and supported by that record. *Id.* The two-tiered capacity pricing mechanism had RPM pricing for the first 21 percent of each customer class and everyone above was charged $255.00/MW-day on an interim basis until May 31, 2012 (later extended to July 2, 2012). *Id*, IEU App. at 50.

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[5] On September 16, 2011, the Capacity Case was consolidated with AEP-Ohio's application for a standard service offer and electric security plan in *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.* (Opinion and Order) (Aug. 8, 2012) ("*ESP 2*"). *Capacity Case* (Opinion and Order at 5) (July 2, 2012), IEU App. at 49. A Joint Stipulation and Recommendation ("Stipulation") was filed in the consolidated case and a hearing on the Stipulation was held in October 2011. *Id.*

On December 14, 2011, the Commission issued its Opinion and Order adopting the Stipulation, with modifications, in the consolidated case. *Id.* at 5-6, IEU App. at 49-50. The Commission approved a capacity charge for CRES providers at an interim rate of $255 per megawatt-day ("MW-day") for all shopping above 21 percent of retail load in 2012, 29 percent in 2013 until securitization is completed, 31 percent for all or the remaining portion of 2013, and 41 percent in 2014. *ESP 2* (Opinion and Order at 25) (Dec. 14, 2011), IEU App. at 219. The capacity charge below the established percentages was the RPM rate. *Id.* On rehearing, the Commission rejected the Stipulation as a package on February 23, 2012. *Capacity Case* (Opinion and Order at 6) (July 2, 2012), IEU App. at 50. Following that rejection, the Commission ordered the consolidated cases proceed separately under their original case numbers. *Id.* (Entry on Rehearing at 13) (Feb. 23, 2012), IEU App. at 181.

On April 10, 2012, as corrected on April 11, 2012, IEU filed a motion to dismiss the Capacity Case asserting the Commission lacked jurisdiction. *Id.* at 8, IEU App. at 52. On April 17, 2012, the evidentiary hearing in the Capacity Case commenced and continued until May 15, 2012. *Id.* at 6, IEU App. at 50.

On July 2, 2012, the Commission issued its Opinion and Order. *Id.* IEU App. at 50. The Commission, stating it had jurisdiction to establish a SCM, denied IEU's motion to dismiss. *Id.* at 12-14, 38, IEU App. at 56-58, 82. The Commission stated the record revealed that RPM based capacity pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations. *Id.* at 23, IEU App. at 50.

The Commission established $188.88/MW-day as an appropriate charge for AEP-Ohio to recover its capacity costs while satisfying the Company's FRR obligations to serve CRES providers. *Id.* at 33, IEU App. at 50. The Commission authorized AEP-Ohio to charge CRES providers only the RPM rate in order to promote shopping and competition. *Id.* at 23, IEU App. at 50. The Commission further authorized AEP-Ohio to modify its accounting procedures to defer its incurred capacity costs not recovered from CRES providers up to $188.88/MW-day during the ESP 2 period. *Id.* IEU App. at 50.

The Commission noted that it would establish an appropriate recovery mechanism for the deferred costs and address any additional financial considerations in the *ESP 2* case. *Id.*, IEU App. at 50. The Commission also authorized AEP-Ohio to collect carrying charges on the deferral. *Id.*, IEU App. at 50. The Commission ordered that the SCM would not take effect until it issued a decision in the *ESP 2* case or August 8, 2012, whichever was sooner. *Id.* at 24, IEU

App. at 50. The Commission noted that the SCM, once effective, would remain in effect until on or before June 1, 2015, or until otherwise directed. *Id.*, IEU App. at 50.

ARGUMENT

Proposition of Law No. I:

The Commission had reasonable grounds to investigate and establish a new rate under R.C. 4905.26.

The Commission initiated this investigation in December 2010 consistent with its authority under R.C. 4905.26 to review and determine if AEP-Ohio's proposed change to its capacity charge was reasonable, assess its impact on CRES providers and retail competition, and adopt a SCM. *Capacity Case* (Entry on Rehearing at 9, 28-29, 32) (Oct. 17, 2012), IEU App. at 98; *Id.* (Entry on Rehearing at 7-9) (Dec. 12, 2012), IEU App. at 160-162; *Id.* (Entry at 2) (Dec. 8, 2010), IEU App. at 183. Thus, the Commission had reasonable grounds to initiate its investigative authority to comprehensively evaluate AEP-Ohio's capacity rate, to facilitate a competitive retail electric market, and to enforce state policy objectives. *Id.* (Entry on Rehearing at 9-10) (Dec. 12, 2012), IEU App. at 162-163.

This Court has repeatedly held that the Commission has considerable authority under R.C. 4905.26 to initiate proceedings to investigate the reasonableness of any rate or charge and impose new utility rates or change existing rates of a public utility. *Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, ¶¶ 29, 32. See, e.g., *Allnet Communications Servs., Inc. v. Pub. Util. Comm.*, 32 Ohio St. 3d 115, 117, 512 N.E. 2d 350 (1987) ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO.")

In the *Consumers' Counsel* case the OCC argued that a utility seeking to change its existing rates for customers must file an application under R.C. 4909.18 and follow all of the

requirements of that statute and R.C. 4909.19. *Id.* at ¶ 26. The agreement to raise utility rates in that case arose in the context of a complaint case rather than in a rate-increase proceeding. *Id.* at ¶ 28. The Court held that the Commission acted lawfully and noted that it had allowed the Commission to impose new utility rates in other R.C. 4905.26 proceedings. *Id.* at ¶ 32. The Court held the Commission complied with all of the procedural requirements in R.C. 4905.26 and that is all that was required. *Id.*

This precedent, cited by the Commission[6], makes clear that there is no requirement to invoke R.C. Chapter 4909 prior to fixing new utility rates where existing rates are found to be unjust and unreasonable pursuant to R.C. 4905.26. Although the Commission relied on traditional ratemaking/rate of return principles from R.C. 4909.15 for guidance in fixing this rate, it was not required to do so under R.C. 4905.26, which gives the Commission broad authority, or by any section under R.C. Chapter 4909. The Commission fixed this rate after finding the RPM rate unjust and unreasonable following a proceeding under R.C. 4905.26.

Under R.C. 4905.26 the Commission shall fix a time for hearing, give notice, and parties to the proceeding "shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." R.C. 4905.26, App. at 2. The Commission complied with this by holding several weeks of hearing and taking testimony from many witnesses, including several who testified on behalf of FES and IEU (OCC did not present any witnesses). The Commission reviewed the RPM market rate, AEP-Ohio's proposed cost-based rate, and all other stakeholders' rate proposals presented in the proceedings. *Capacity Case* (Opinion and Order at

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6 *Capacity Case* (Entry on Rehearing at 9) (Oct. 17, 2012), IEU App. at 98, FE App. at 80, OCC App. at 98; *Id.* (Entry on Rehearing at 7-9) (Dec. 12, 2012), IEU App. at 160-162, FE App. at 142-144, OCC App. at 182-184.

33) (July 2, 2012), IEU App. at 77. The Commission complied with all of the procedural requirements in R.C. 4905.26.

Both FES and IEU claim that the Commission must adhere to R.C. Chapter 4909 before adjusting any rate that it finds to be unreasonable under R.C. 4905.26. They rely principally on five cases.[7] Those cases are distinguishable from this one. Three of those cases involved an application in whole, or in part, under either R.C. Chapter 4909 or R.C. Chapter 4928 for rate increases.[8] The remaining two cases concerned a rate decrease under R.C. 4905.26. One was dismissed for lacking reasonable grounds because it sought retroactive ratemaking for relief[9] and the other addressed a rate impacted by a change in the law that affected how the rate base calculation was made under R.C. Chapter 4909.[10] None of those cases support appellants' claims that R.C. Chapter 4909 must apply to complaint cases initiated by the Commission, when fixing a new rate in a R.C. 4905.26 proceeding after finding the existing rate unreasonable.[11]

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7 FES Merit Brief at 35-38, *citing City of Cleveland v. Pub. Util. Comm.*, 164 Ohio St. 442, 442-443, 132 N.E.2d 216 (1956); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 537, 620 N.E.2d 835 (1993); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 28; and IEU Merit Brief at 22-24, *citing Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St. 3d 344, 347-348 (1997); *Ohio Util. Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 153, 12 O. O3d 167, 389 N.E. 2d 483 (1979).

8 *City of Cleveland, Columbus So. Power Co.*, and *Indus. Energy Users-Ohio.*

9 *Lucas Cty. Commrs.*

10 *Ohio Util. Co.*

11 Moreover, IEU incorrectly paraphrased *Lucas Cty. Commrs.* by stating the Court there "addressed this issue and held that R.C. 4905.26 does not provide the Commission with independent ratemaking authority." IEU Merit Brief at 23. Nowhere does the Court say that. Each rate situation is different and the General Assembly left it to the Commission to decide when and how those sections should be applied. This case did not require a R.C. Chapter 4909 rate case because it was limited to determining AEP-Ohio's capacity costs. Nonetheless, the Commission considered the traditional ratemaking principles of R.C. 4909.15 in determining those costs.

Finally, in *Ohio Util. Co.*[12] the Court stated that "the commission could, as it did below, invoke its authority under R.C. 4909.15(D)(2)(b) to 'fix and determine the just and reasonable rate *** to be *** charged ***.'"[13] The Court made that statement in the context of finding no distinction between the Commission initiating an investigation under R.C. 4905.26 to adjust either a new rate not previously passed upon or an existing one previously fixed. The plain wording of R.C. 4905.26 did not support the limitation appellant there attached to it. The Court further noted:

> This joining of statutory authority to support the commission's investigation of existing rates and subsequent substitution of new rates was approved by the United States Supreme Court in *Public Utilities Comm. of Ohio v. United Fuel Gas Co.* (1943), 317 U.S. 456, 464. There the court was concerned with an attempt by the commission to fix rates retroactively. To support its holding that the commission's authority was prospective only, the court combined G.C. 614-21 and 614-23 (predecessors of R.C. 4905.26 and 4909.15, respectively). We concur in this combined reading of R.C. 4905.26 and 4909.15(D), as being appropriate in situations such as the instant cause, and as effectuating the public interest.

There the Court affirmed the Commission's exercise of discretion to join and read R.C. 4905.26 and R.C. 4909.15 together to investigate and prospectively fix an existing rate it recently had

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12 The existing rate in that case was approved January 18, 1977, upon an application for a rate increase under R.C. 4909.18. However, the rate law changed and the Commission initiated its investigation on September 7, 1977 under the unique circumstance and belief that the existing rates might not be reasonable when tested under the new law. At the outset, the Commission indicated that the procedures of R.C. 4909.18 would be followed in the case. However, despite problems with the utility providing necessary information and records, the Commission found the existing rates excessive and decreased them. Appellant there alleged that the Commission improperly used R.C. 4905.26 to alter its January 18, 1977 rate order and asserted that only R.C. 4909.15(E) would give the Commission that authority. The Court stated the utility misconstrued the investigation and interpreted R.C. 4905.26 too narrowly. The Court stated it previously found that R.C. 4905.26 was extremely broad and would permit a "collateral attack" in many instances. *Ohio Util. Co.* at 153-159.

13 *Ohio Util. Co.* at 157.

approved pursuant to R.C. 4909.18. The Court there found that the tie of authority by the Commission was appropriate to address that factual situation.[14]

The Court in the *Ohio Util. Co.* case did not hold that the Commission was required to tie R.C. 4909.15 to any situation that needed a new rate to be fixed under R.C. 4905.26. Hence, the Court used the word "could" to indicate the Commission either can or decide not to invoke R.C. 4909.15 in a R.C. 4905.26 proceeding. The Commission still has discretion and broad authority to determine on a case-by-case basis whether a situation calls for it to join and read the two statutes together for fixing a new rate under R.C. 4905.26. In this case a new capacity rate was established by the Commission under R.C. 4905.26. No existing rate was previously established under R.C. 4909.18 here to distinguish it from the *Ohio Util. Co.* case. The Commission adhered to all requirements of R.C. 4905.26 and all parties had ample opportunity to be heard.

Even if the Commission were required to comply with R.C. 4909.15(D), after having found existing rates to be unreasonable after a R.C. 4905.26 hearing, the Commission has done so. It must be remembered that this case was decided only seven months after new distribution rates were established for AEP-Ohio in *In re Application of AEP-Ohio for an Increase in Electric Distribution Rates,* Case Nos. 11-351-EL-AIR and 11-352-EL-AIR (Opinion and Order) (Dec. 14, 2011), as amended by *Id.* (*Entry Nunc Pro Tunc*) (Dec. 15, 2011). It would have been pointless to have reproduced the same analysis that the Commission had just completed in AEP-Ohio's distribution cases. Nothing would have changed and no purpose would have been served. The hearings were nearly simultaneous for all three cases. The distribution rates were obviously reasonable; the only item in question was the reasonableness of the capacity charge itself. In

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[14] *Ohio Util. Co.* at 158.

making this capacity determination the Commission looked to the cost of providing the capacity and the return that AEP-Ohio would earn, just as is required by R.C. 4909.15(D). There is no dispute that the plant was used and useful on all relevant dates (rendering a date certain moot) and annual costs were examined (establishing a test year). The Commission has fully complied with R.C. 4909.15(D) and mere substantial compliance is required. R.C. 4905.09, App. at 1.

A. The Commission's Statutory Jurisdiction

The Commission, as stated in its decision, is a creature of statute and may exercise only the authority conferred upon it by the General Assembly. *Capacity Case* (Opinion and Order at 12) (July 2, 2012), IEU App. at 56. Also, *see Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88 (1999).

The Commission found that it had jurisdiction to establish a SCM in this case pursuant to its general supervisory authority found in R.C. Sections 4905.04, 4905.05, and 4905.06. *Capacity Case* (Opinion and Order at 22) (July 2, 2012), IEU App. at 66. The Court in *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991), stated:

> The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49.

See, also, *State ex rel. Columbus S. Power Company v. Fais*, 117 Ohio St.3d 340, 343, 2008-Ohio-849, 884 N.E.2d 1, 4. The Commission is not precluded from regulating wholesale rates

under R.C. Chapter 4905 or R.C. 4905.26, in particular.[15] *Capacity Case* (Entry on Rehearing at 9) (Dec. 12, 2012), IEU App. at 162. Neither R.C. Chapter 4905 nor R.C. 4905.26 prohibits the Commission from initiating a review of a wholesale rate.[16] *Id.* at 9-10, IEU App. at 162-163.

The Commission stated that the provisions of R.C. Chapter 4928, which provides for market-based pricing for retail electric generation, do not apply because capacity is a wholesale rather than a retail service.[17] *Capacity Case* (Opinion and Order at 22) (July 2, 2012), IEU App. at 66. Appellants assert that the Commission's authority with respect to generation service is limited to the authorization of retail SSO rates that are established in conformance with the requirements of R.C. 4928.141 to 4928.144. The Commission disagrees.

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15 In *Consumers' Counsel*, 110 Ohio St. 3d 394, OCC challenged a PUCO order made under R.C. 4905.26 that changed the way in which Dayton Power & Light ("DP&L") could recover its billing-system costs, as a result of Senate Bill 3 ("S.B. 3"), to provide consolidated billing for both distribution and generation services. A stipulation approved by the PUCO allowed DP&L to recover from CRES providers' customers any of DP&L's out-of-pocket costs resulting from the default of a CRES provider. OCC challenged the order on grounds that the default-recovery mechanism approved by the PUCO was unlawful because no statutory or regulatory provisions in Ohio expressly permit that kind of financial protection to be given to an electric distribution utility ("EDU") like DP&L. The PUCO stated that the mechanism "is not prohibited by any current statute or rule" and is in fact "permissible under the current statutory system." *Consumers' Counsel* at ¶ 38. The Court affirmed the PUCO stating that the PUCO's "legal conclusion that the provision is not unlawful is correct." *Id.* ¶ 39.

16 Any limitation on the Commission's ability to review wholesale rates would arise from federal preemption but there is no preemption issue here. The FERC has examined the Commission's action and adopted that action as its own.

17 It should be noted that, although the Commission was not acting under R.C. Chapter 4928, the policy provisions of R.C. 4928.02 apply to all Commission actions. See R.C 4929.06(A), App. at 3. See, also, IEU App. at 131.

1. Capacity service does not meet the definition of retail electric service.

Under R.C. 4928.01(A)(27) "retail electric service" is defined as "...any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." AEP-Ohio's provision of capacity to CRES providers, as required by the Company's FRR capacity obligations, is not a retail service as defined by R.C. 4928.01(A)(27).

The capacity service in question is not provided directly by AEP-Ohio to retail customers, but is rather a wholesale transaction between the Company and CRES providers. *Capacity Case* (Entry on Rehearing at 20, 29) (Oct. 17, 2012), IEU App. at 109. Further, capacity is not consumed. Energy is what is actually produced and consumed. Capacity resources are physical resources able to produce, and reserve access to, energy when needed to meet demand and reliability requirements.

2. AEP-Ohio's capacity service is noncompetitive.[18]

As an FRR entity, AEP-Ohio is obligated to provide sufficient capacity for all connected load, including shopping load, in its service territory. *Capacity Case* (Opinion and Order at 10) (July 2, 2012), IEU App. at 54. It is the only supplier of capacity service in its service territory

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[18] Some terminology needs to be clarified here. "Competitive" and "noncompetitive" are terms used in R.C. Chapter 4928 and each kind of service is treated differently under that chapter. As the Commission was not acting under R.C. Chapter 4928, it was unnecessary for the Commission to make that distinction. "Noncompetitive" is not a term of art in the section that the Commission was acting under, R.C. 4905.26, App. at 2. Rather, in this context, "noncompetitive" is simply the factual observation that capacity can only be purchased from AEP-Ohio and is not available from any competitor. This context is confirmed through testimony that AEP-Ohio is a monopoly supplier of capacity in its service territory. *Capacity Case* (Direct Testimony of Robert B. Stoddard at 4) (April 4, 2012) ("Stoddard Testimony"), FE Supp. at 6.

until June 1, 2015. Stoddard Testimony at 9-10, FE Supp. at 11-12. The Commission has jurisdiction to establish a cost-based rate for a noncompetitive capacity service that is provided only within the service territory of AEP-Ohio, and only rendered by AEP-Ohio.

The recovery of some market costs for capacity and energy, the two components of generation, continue to be regulated by the Commission and recovered by utilities under R.C. Chapter 4928 through the retail standard service offer. Under R.C. 4928.142(C) "[a]ll costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity...shall be timely recovered through the standard service offer price." Also, under R.C. 4928.143(B)(2)(a) an EDU can have "[a]utomatic recovery of...the cost of purchased power supplied under the offer, including the cost of energy and capacity." Finally, under R.C. 4928.20(J) "[o]n behalf of the customers that are part of a governmental aggregation...[a]ny such customer that returns to the utility...shall pay the market price of power incurred by the utility...[s]uch market price shall include...capacity and energy charges."

The Commission does not dispute that capacity is a component of generation necessary to provide competitive retail electric service to customers. But capacity in this case is different. It is wholesale by definition and, based on the evidence, a noncompetitive service.[19]

Capacity and energy are components of generation historically regulated by the Commission when utility companies were vertically integrated and provided bundled services. *Elyria*

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[19] Even if R.C. Chapter 4928 applied and the service were retail, "...a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law." R.C. 4928.05(A)(2), App. at 2-3.

Foundry Co. v. Pub. Util. Comm., 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 52. Since S.B.3 became effective energy is no longer subject to the Commission's regulation.[20] Energy is a competitive service that CRES providers offer to serve shopping customers to compete in Ohio. Capacity can be either a competitive or noncompetitive service and in this case it is the latter.[21] The Commission has authority to regulate a noncompetitive service. R.C. 4928.05(A)(2), App. at 2-3.

Under R.C. 4928.05(A)(2), a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the Commission under R.C. Chapters 4901 to 4909 to the extent that authority is not preempted by federal law. This case deals with a noncompetitive wholesale capacity service that FERC expressly did not preempt the Commission from regulating. In fact, FERC authorized the SCM to prevail over the federal mechanisms FERC authorized in the RAA. FERC does not preempt the Commission in adopting the SCM and establishing a rate for AEP-Ohio's noncompetitive wholesale capacity service.

3. The Commission's adoption of an SCM is consistent with federal law.

Based on R.C. Chapter 4905 in combination with the Commission exercising an option FERC authorized in the RAA for it to adopt a SCM, the Commission had authority, not

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20 An exception is through the standard service offer. R.C. 4928.141, App. at 5.

21 The RAA allows any eligible load serving entity ("LSE") [including CRES providers] within an FRR designated area [AEP-Ohio's service area] that has retail access to establish its own FRR capacity plan [3 years in advance]. *Capacity Case* (Direct Testimony of Robert B. Stoddard at 10) (April 4, 2012), FE Supp. at 12. In this case, no CRES provider previously made this election and now CRE providers are not eligible to make such an election until after AEP-Ohio's FRR plan ends on June 1, 2015. *Id.* See March deadlines in 2009, 2010, and 2011 that CRES providers did not elect to supply capacity for delivery years 2012-2015. *Id.* at Ex. RBS-2, Supp. at 72.

preempted by federal law, to create a hybrid mechanism to fully compensate AEP-Ohio for its capacity resources. The Commission's sole purpose in exercising jurisdiction in this case was to establish an appropriate SCM. *Capacity Case* (Opinion and Order at 13) (July 2, 2012), IEU App. at 57; *Id.* (Entry on Rehearing at 28) (Oct. 17, 2 012), IEU App. at 117. The Commission's adoption of an SCM for AEP-Ohio was well within the bounds of its broad authority pursuant to R.C. 4905.04, 4905.05, and 4905.06. *Capacity Case* (Entry on Rehearing at 9) (Oct. 17, 2012), IEU App. at 98.

a. FERC expressly authorized, and subsequently upheld, the SCM to prevail under the RAA.

The Commission exercised authority the FERC had recognized through the RAA. *Id.* at 10, IEU App. at 99. The pertinent part of PJM's tariff approved by FERC, states:

> 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 [load serving entities] LSEs. *In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail 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. 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.

RAA at 111, Sch. 8.1, ¶ D.8 (emphasis added), IEU Supp. at 112.

FRR entities, like AEP-Ohio, are compensated for their capacity resources under one of three different options in the RAA. The SCM is one option. *Id.* Only a state can adopt an SCM

and, if it has, that SCM prevails over the other options available in the RAA. There are no requirements or limitations for how the SCM is structured and designed anywhere in the RAA. *Id.* at 120, IEU Supp. at 121.

Absent a state-created compensation mechanism or SCM, the RAA has a default RPM option that tracks the capacity prices established each year through PJM's capacity auctions. *Id.* Before the Commission initiated this case and before AEP-Ohio filed its FERC application, AEP-Ohio was compensated for its capacity under the default option of the RAA.

The last option under the RAA provides an FRR entity the right to petition FERC, under Section 205 of the Federal Power Act, and to propose an alternative compensation mechanism so long as it is just and reasonable. *Id.* AEP-Ohio filed its application at FERC in November 2010 requesting a change to a cost-based mechanism under Section 205 of the Federal Power Act. That filing triggered the Commission to initiate this investigation in December 2010.

After the Commission exercised jurisdiction in this case and adopted an SCM with an interim RPM rate, FERC denied AEPSC's Section 205 application on the basis that the Commission established an SCM. *Capacity Case* (Entry on Rehearing at 10) (Oct. 17, 2012) *citing* 134 FERC ¶ 61,039 (2011), IEU App. at 99. FERC upheld the expressed provision of the RAA that an SCM prevails over all other pricing options in PJM's tariff. FERC recently approved the Commission's wholesale component and overall design of the SCM. *See* 143 FERC ¶ 61,164 (May 23, 2013), App. at 46-54.

The SCM the Commission adopted is a hybrid charge that preserves RPM-market pricing for CRES providers and creates a deferral to reconcile the balance of the charge to make AEP-Ohio whole for its incurred capacity costs. The SCM is in effect until AEP-Ohio's transition to

full market participation is complete[22] and the Company no longer is subject to its FRR capacity obligations, on or before June 1, 2015. *Capacity Case* (Opinion and Order at 24) (July 2, 2012), IEU App. at 68.

The Commission's rate design in the SCM, in essence, credits the RPM market rate that CRES providers are charged toward the $188.88/MW-day cost-based capacity rate. Any balance of AEP-Ohio's incurred capacity costs not recovered from CRES providers, up to the ceiling of $188.88/MW-day, is deferred and charged to retail customers. This design provides two components that balance wholesale and retail pricing. The SCM combines these two components to compensate AEP-Ohio for its incurred capacity costs. Now AEP-Ohio can satisfy its FRR obligations without risking financial harm.

The Commission established a capacity rate that has a wholesale and a retail component. FERC recently reviewed and approved the wholesale component. The remaining piece to be reviewed in this appeal is the retail component. The two components appropriately balance the Commission's objectives of enabling AEP-Ohio to fully recover its capacity costs incurred from carrying out its FRR obligations, while encouraging retail competition in the Company's service territory. *Capacity Case* (Entry on Rehearing at 38-39) (Oct. 17, 2012), IEU App. at 127-128.

The Commission adopted an SCM that contains both a market rate for wholesale suppliers, so they can compete with AEP-Ohio and a deferral for retail customers who benefit from retail choice, reliability of service, and lower rates. The Commission protected the interests of all stakeholders with the SCM it adopted and designed. *Capacity Case* (Opinion and Order at

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[22] This is to say the SCM will be in effect until all of the power needed for AEP-Ohio's standard service offer is obtained through an auction process.

36) (July 2, 2012), IEU App. at 80. The SCM is consistent with both federal and Ohio law and policy.

b. The orders below do not conflict with any FERC requirements. PJM Interconnection, L.L.C. and Ohio Power Company, 143 FERC ¶ 61,164.

Several of appellants' Propositions of Law are premised on a presumed violation of some requirement established by the FERC. *See*, FES I, IEU I.3, and III. Appellants argue that the Commission's order either violates some provision of the RAA or requires the Commission to interpret the RAA. It is clear now[23] that these claims are baseless.

The FERC has now had the opportunity to speak to the SCM that the Commission ordered below. It is unnecessary to recount the details of the procedures before the FERC in this regard. These are fully explained in the Amended Motion to Dismiss of Ohio Power Company.[24] Suffice it to say that the SCM adopted by the Commission in its orders below was presented to the FERC by AEP. This was presented along with a request that the FERC approve an appendix to the RAA which would adopt the Commission's state compensation mechanism. The FERC did exactly this stating:

> On March 25, 2013, American Electric Power Service Corporation, on behalf of Ohio Power Company (AEP Ohio), filed a proposed appendix (Appendix) to the PJM Interconnection, L.L.C. (PJM) Reliability Assurance Agreement (RAA). 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

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23 The FERC's action did not become final until after the time that appellants filed their briefs in this case.

24 Amended Motion to Dismiss of Ohio Power Company, Case Nos. 2012-2098/2013-228 (July 16, 2013), App. at 17-42.

> become effective August 8, 2012, subject to a compliance filing requiring AEP Ohio to implement certain revisions to which it has agreed.

PJM Interconnection, L.L.C. and Ohio Power Company, 143 FERC ¶ 61,164, App. at 46-54 (internal footnotes deleted).[25] Lest there be any misunderstanding, the FERC, in response to arguments made by the same parties who are appellants here, stated that: "Having established that the proposed Appendix accords with the RAA and the state compensation mechanism, as detailed above, we therefore, reject the protests." *Id.* at 30. The FERC has determined that there is no conflict between the RAA and the Commission's order below. Appellants' arguments to the contrary are simply incorrect. Further the Commission was not interpreting the RAA, the FERC was. The RAA is a FERC-approved agreement and it is for the FERC to construe it. The FERC did so and found no disagreement between the Commission's order (the SCM) and the RAA.

In sum, there is no disagreement and no federal issue here. The Commission's orders below do not conflict with federal requirements and arguments to the contrary should be rejected.

4. The Commission's authority to adopt a Provider of Last Resort ("POLR") charge provides an additional basis to set a capacity rate.

Another example demonstrating Commission authority to regulate a cost-based capacity rate is the ability to approve a charge for costs incurred by an electric distribution utility in connection with the POLR function. While the retail ratemaking issues are not presented for review in this appeal and should not be decided here, the fact is that the deferred part (retail component)

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[25] The compliance filing was approved on July 29, 2013. *PJM Interconnection, L.L.C. and Ohio Power Company*, FERC No. ER13-1164, App. at 44.

of the SCM capacity charge is essentially a POLR charge.[26] AEP Ohio's FRR capacity obligation requires the Company to provide capacity service to support all retail customers and includes providing capacity to SSO customers and standing ready to serve shopping customers. The POLR obligation to stand ready to accept returning customers is provided in R.C. 4928.14.

This Court has upheld POLR charges in prior cases and it is established that the Commission can lawfully adopt a POLR charge for an electric distribution utility. *Constellation New-Energy, Inc. v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39; *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St. 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 26. In AEP-Ohio's *ESP 1* Case[27] the POLR charge included compensation for capacity costs. *Capacity Case* (Entry on Rehearing at 11-12) (Oct. 17, 2012), IEU App. at 100-101. The POLR charge compensates the Company for the risks associated with its obligation to stand ready to serve returning shoppers under R.C. Chapter 4928. The SCM capacity charge compensates the Company for its incurred costs, as an FRR entity with an obligation under the RAA, to stand ready to supply power to CRES providers who serve their customers. It is AEP-Ohio's FRR obligation to stand ready to supply power to CRES providers serving shopping customers.

The Court previously stated that "[w]hile the commission may allow recovery of an electric-distribution utility's [EDU's] noncompetitive costs that are associated with its effort to secure competitive retail electric service in furtherance of its statutory POLR obligation, the

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26 Although we must note AEP is not the provider of *last* resort; it is the provider of *only* resort.

27 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of its 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 and 08-918-EL-SSO (Opinion and Order at 38-40) (March 18, 2009) ("*ESP 1*"), App. at 14-16. *See, also In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788.

commission's approval must be given in accordance with R.C. Chapters 4905 and 4909." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 27. AEP-Ohio's POLR charge is based on the right of retail customers to switch to a CRES provider and subsequently return to the Company for generation service under standard service offer ("SSO") rates, which makes AEP-Ohio a default provider. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 23. The Electric Distribution Utility's (AEP-Ohio in this case) POLR obligation is to stand ready to accept returning customers.

The Commission initially used the RPM-market rate temporarily for the SCM during the pendency of its review in this case. The Commission believed the RPM rate was appropriate because it was used to calculate AEP-Ohio's last POLR charge in 2009. *Capacity Case* (Entry at 1-2, ¶ 4) (Dec. 8, 2010), IEU App. at 182-183. An input to the POLR charge was the market price, a large component of which was intended to reflect AEP-Ohio's capacity obligations as a member of PJM. *Capacity Case* (Entry on Rehearing at 11) (Oct. 17, 2012), IEU App. at 100. The POLR charge was approved, in part, to recover capacity costs associated with customer shopping. *Id.* The Court reversed and remanded the Commission's decision on the POLR charge in AEP-Ohio's *ESP 1* case due to a lack of record support. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶¶ 24, 29 (On remand, the Court stated at ¶ 30 that the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs).

The POLR-obligation and compensation issue was previously addressed by the Court in AEP-Ohio's *ESP 1* case. The concept survived review for AEP-Ohio to prove and recover its cost-based capacity costs. *Id.* at ¶ 30. The difference here is that the capacity obligation in this case arises out of the fact that AEP-Ohio is an FRR entity subject to the RAA. But as was

demonstrated in the record of this case the wrong capacity rate ($355.72/MW-day vs. $188.88/MW-day) under the RAA for this service can impact competition in a utility's service territory in a significant and negative way. This is why the Commission acted and adopted the SCM to prevent those impacts. In any case, the record here fully supports the adopted SCM and, unlike the decision involving AEP Ohio's prior POLR charge, there is abundant evidence supporting AEP Ohio's cost incurred to provide FRR capacity service.

This Court has already recognized that EDUs may be compensated for providing POLR service. In that circumstance the EDU is paid to act as a backstop in case a CRES provider does not meet its obligation. The present situation is stronger than that. The capacity resources provided by AEP-Ohio, through its FRR obligation, are always committed and used to provide energy. And not just in a default situation like POLR.

5. The Commission established a SCM charge for capacity service that is just and reasonable.

The Commission found that RPM-based capacity pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations. *Capacity Case* (Opinion and Order at 23) (July 2, 2012), IEU App. at 67; *Id.* (Entry on Rehearing at 18, 31) (Oct. 17, 2012), IEU App. at 107, 120. A chart provided in the Commission's decision shows a volatile capacity market between 2010 and 2015.[28] *Capacity Case* (Opinion and Order at 10) (July 2, 2012), IEU App. at 54. *See also, Id.* (Direct Testimony of Kelly D. Pearce at Ex. KDP-7 at 1) (Mar. 23, 2012), Supp. at 4; (Stoddard Testimony at Ex. RBS-6 at iv-v) (April 4, 2012), FE Supp. at 51-53, 55, 57; *Id.* (Direct Testimony of Jonathan A. Lesser at 32) (April 4, 2012), Supp. at 6, 7-8. The Commission noted that

[28] The RPM auctions set prices three years in advance.

the record indicated that the RPM-based price for capacity had decreased greatly since the December 8, 2010 entry was issued and that the adjusted RPM rate currently in effect was substantially below all estimates provided by the parties regarding AEP-Ohio's cost of capacity. *Capacity Case* (Opinion and Order at 22-23) (July 2, 2012), IEU App. at 66-67.

The Commission stated that the record reflected a range in AEP-Ohio's cost of capacity from a low of $78.53/MW-day, put forth by FirstEnergy Solutions ("FES"), to the Company's high of $355.72/MW-day, with Staff and the Ohio Energy Group ("OEG") offering recommendations more in the middle of the range. *Id.* (The Commission cited AEP-Ohio Ex. 102 at 21; FES Ex. 103 at 55; Staff Ex. 105 at Ex. ESM-4; and OEG Ex. 102 at 10-11). The Commission found Staff's determination of AEP-Ohio's capacity costs to be reasonable, supported by the evidence of record, and adopted it with modifications. *Capacity Case* (Opinion and Order at 33) (July 2, 2012), IEU App. at 77.

The Commission found that the method its Staff used for determining AEP-Ohio's capacity cost was appropriate. *Id.* The Commission adopted most, but not all, of the adjustments its Staff made. For example, it agreed with the adjustments its Staff made to account for margins from off-system energy sales and ancillary receipts. *Id.* at 33-35, IEU App. at 77-79; *see, also, Id.* (Direct Testimony of Emily S. Medine at 14-20 and Exs. ESM-1, ESM-2, ESM-3, and ESM-4) (May 7, 2012), Supp. at 24-30, and 35, 36-37, 38-39, 40. The Commission, however, took issue with some of the other adjustments its Staff made. *Capacity Case* (Opinion and Order at 34-35) (July 2, 2012), IEU App. at 78-79.

The Court must presume that the Commission's order establishing a capacity rate for AEP-Ohio is reasonable; it falls to the appellant to upset that presumption. See *In re Application of Columbus S. Power Co.*, 951 N.E.2d 751, 2011-Ohio-2638, 129 Ohio St.3d 271, *citing*

Columbus v. Pub. Util. Comm., 170 Ohio St. 105, 163 N.E.2d 167 (1959), ¶ 2 of the syllabus, *E. Ohio Gas Co. v. Pub. Util. Comm.*, 137 Ohio St. 225, 28 N.E.2d 599 (1940).

In conjunction with this finding, the Commission found that AEP-Ohio did not demonstrate that its proposed charge of $355.72/MW-day fell within the zone of reasonableness, nor did it believe that FES' proposed charge of $78.53/MW-day would result in reasonable compensation for the Company's FRR capacity obligations. *Capacity Case* (Opinion and Order at 33) (July 2, 2012), IEU App. at 77.

The Commission has an obligation under R.C. 4905.22 to ensure that all charges for service are just and reasonable and not more than allowed by law or by order of the Commission. *Id* (Entry on Rehearing at 28) (Oct. 17, 2017), IEU App. at 117. The Commission is vested with exclusive initial jurisdiction over matters specified in R.C. 4905.22 and R.C. 4905.26, concerning a public utility's rates and charges. *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St. 3d 340, 2008-Ohio-849.

There is a cost for AEP-Ohio to discharge its FRR obligation by providing capacity resources to support shopping load. The evidence made clear that if AEP-Ohio had only received RPM pricing for its capacity between August 2012 and May 31, 2015, part of its incurred costs would not have been reimbursed. The evidence showed that RPM pricing in this time period was not compensatory to AEP-Ohio for its capacity. The SCM relieves AEP-Ohio from providing the use of its assets at a rate below its costs.

The Commission found that, if RPM market pricing was adopted, AEP-Ohio would have earned a return on equity of 7.6% in 2012 and a return on equity of only 2.4% in 2013. *Capacity Case* (Opinion and Order at 23) (July 2, 2012), IEU App. at 67, FE App. at 49. See, also, *Id.* (Direct Testimony of William Allen at 3-5, Ex. WAA-1) (Mar. 23, 2012), Supp. at 76-78, 79; Tr.

III at 701, Supp. at 74. Moreover, the Company's earnings would have suffered a $240 million decrease between 2012 and 2013. *Id.*

When the Commission considered this return on equity it did not violate the separation mandate of R.C. 4928.17 because the Commission did not mix regulated and unregulated services.[29] FES's allegation to the contrary is without merit. Also, FES's anti-competitive claim that AEP-Ohio's assets will be owned by an unregulated affiliate come January 1, 2014 and will be subsidized under the SCM capacity rate until June 1, 2015 is also without merit. AEP-Ohio's FRR obligation ends June 1, 2015 and it, not the unregulated affiliate, will remain obligated and accountable to PJM for the capacity service until that date. The obligation does not transfer to the unregulated affiliate come January 1, 2014.

One area in which the Court has "consistently deferred to the expertise of the commission" is in determining rate-of-return matters. *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276 *citing Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 561, 589 N.E.2d 1292, fn. 3 (1992). "Limited judicial review of a rate of return determination is sound" because "cost of capital analyses * * * are fraught with judgments and assumptions." *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.2d 71, 79, 413 N.E.2d 799 (1980), *quoting In re Dayton Power & Light Co.*, Case No. 78-92-EL-AIR (Opinion and Order at 26) (Mar. 9, 1979).

R.C. Chapters 4905 and 4909 require the Commission to use traditional rate base/rate of return regulation in approving a cost-based rate that is just and reasonable and consistent with

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[29] The appropriate remedy/relief for appellants' claim asserting a violation of R.C. 4928.17 is available to appellants through a complaint action under R.C. 4905.26. R.C. 4928.18(B), App. at 6.

R.C. 4905.22. *Capacity Case* (Opinion and Order at 22) (July 2, 2012), IEU App. at 66. The Commission, establishing this new rate under the broad discretion provided it under R.C. 4905.26, was not required to follow the procedural requirements of R.C. Chapter 4909 and conduct a full-blown traditional base rate proceeding.

The case was not about a rate increase. AEP-Ohio's capacity service and rate had not previously been addressed in any Commission-approved tariff. Nonetheless, the record in this case confirms that the adjudicatory process was more than adequate. The parties participated in extensive discovery, written testimony, oral testimony, cross examination, presentation of evidence through hearing exhibits, and additional argument through paper briefings.

In traditional rate cases, the procedural requirements of R.C. 4909.18 apply to increases of an "existing" rate charged by a utility. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 305, 2006-Ohio-5789, 856 N.E. 2d 213. The Commission has discretion under R.C. 4909.18 in determining whether an application seeks a rate increase. *Id.* Here, the Commission decided that the requirements of R.C. 4909.18 did not apply to its investigation and adoption of AEP-Ohio's capacity charge.

AEP-Ohio's proposed rate failed to credit off-system market sales of energy and ancillary services that the Company made with its generating assets paid for by ratepayers. *Capacity Case* (Opinion and Order at 34) (July 2, 2012), IEU App. at 78. *See, also, Id.* (Direct Testimony of Kelly D. Pearce at 13) (Mar. 23, 2012), Supp. at 2. This is a significant shortcoming. It would mean that AEP-Ohio's capacity customers would bear the entire cost of supporting its generating facilities while not using all of them. AEP-Ohio also uses these facilities to make off-system sales, with the cost already paid by its capacity customers. Not excluding off-system energy sales and ancillary services inflated the Company's capacity price and would have overcompen-

sated AEP-Ohio. *Id.* (Direct Testimony of Ryan T. Harter at 5-6) (April 16, 2012), Supp. at 42-43; *see, also*, Stoddard Testimony at 40, FE Supp. at 42.

The Commission stated that the $188.88/MW-day capacity charge it approved should reasonably and fairly compensate AEP-Ohio and ensure the Company's ability to earn an adequate return on its investment, as well as enable the further development of competition in the Company's service territory. *Capacity Case* (Opinion and Order at 35-36) (July 2, 2012), IEU App. at 79-80.

Appellants are asking this Court to reweigh the evidence and substitute its judgment for that of the Commission in determining what is a just and reasonable rate for AEP-Ohio's capacity resources. The Court has previously stated that was not the prerogative of the Court in PUCO appeals. See *Payphone Assn. of Ohio v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 16.

6. The Commission must regulate to ensure effective competition and prevent market power by any single utility.

AEP-Ohio asked FERC to approve a $355.72 MW-day charge to CRES providers. As an FRR entity under the RAA, AEP-Ohio is the only supplier to CRES providers. This rate would have severely and negatively impacted retail choice and competition in AEP-Ohio's service territory. (Stoddard Testimony at 18) (April 4, 2012), FE Supp. at 20 ("retail competition in AEP-Ohio's service territory would collapse"); *Capacity Case* (Testimony of Tony C. Banks at 3) (April 4, 2012), FE Supp. at 71 (AEP-Ohio's proposed capacity pricing "is anti-competitive"); *Id.* (Direct Testimony of the Belden Brick Company at 4) (April 5, 2012), Supp. at 67 ("AEP-Ohio's proposal inhibits customers' ability to shop for alternative suppliers and save money").

The Commission is obligated to ensure effective competition in the provision of retail service and ensure retail electric service consumers' protection against a utility company acquiring market power pursuant to R.C. 4928.02(H) and (I). The Commission is obligated under R.C. 4928.06 to ensure that the policy specified in R.C. 4928.02 is effectuated.

In *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 44, the Court stated it "recognized the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3, and we have accorded due deference in this regard to the commission's statutory interpretations and expertise in establishing and modifying rates," *citing Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 23. Furthermore, under R.C. 4928.06(E)(1), the Commission has authority under R.C. Chapters 4901 to 4909 to resolve abuses of market power by any electric utility that interferes with effective competition in the provision of retail electric service.

Under the SCM-capacity rate CRES providers will only be charged the RPM market price to further the development of competition, which was a primary objective of the Commission. *Capacity Case* (Opinion and Order at 23) (July 2, 2012), IEU App. at 67. It was the Commission's belief that RPM-based capacity pricing would stimulate true competition among suppliers in AEP-Ohio's service territory. *Id.* The Commission also believed that RPM-based capacity pricing would facilitate AEP-Ohio's transition to full participation in the competitive market, as well as promote shopping. *Id.*

Proposition of Law No. II:

The Commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code and it has not done so. R.C. 4928.38, App. at 11.

Appellant IEU claims that the Commission has authorized the collection of transition revenues in violation of R.C. 4928.38. Appellant is incorrect. The case below had nothing whatever to do with transition revenues.

Transition revenues were a facet of the restructuring that occurred in the year 2000 when electricity competition was first permitted in Ohio. Per statute[30], the then-existing rates were to be broken up, "unbundled", into components. First the charges set by the FERC that were included within the then-existing rates were to be broken out into a component called "transmission." R.C. 4928.34(A)(1), App. at 7. Then the portion of the then-existing rates associated with providing distribution service was to be broken out into a component called "distribution." R.C. 4928.34(A)(2), App. at 7. What remained was termed "generation." R.C. 4928.34(A)(4), App. at 7. The sum of the transmission, distribution, and generation charges equaled the then-existing rates. R.C. 4928.34(A)(6), App. at 8. For a customer who continued to purchase her power through the electric distribution utility (EDU), although the appearance of her bill would change, the total of the charges would not. For a customer who chose to purchase power from an alternative supplier, that customer would no longer pay the generation charge.

The General Assembly recognized that this system would allow customers who shopped to avoid paying what were termed "stranded costs." These were the amounts of money invested by the EDUs in reliance upon the continuation of a regulated market for electricity which the

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[30] There were many nuances in the restructuring process which are not relevant to the current discussion and are, therefore, ignored.

EDUs would not be able to recoup from retail customers in the new, unregulated electricity market. To remedy this perceived problem, the General Assembly authorized the Commission to identify the amounts that might be stranded, terming them "transition costs," and allowing the imposition of "transition charges" on retail customers to collect them. R.C. 4928.39, 4928.37, App. at 11, 9-11. Thus the EDU's investment would not be stranded and it would have an "...opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market." R.C. 4928.37(A), App. at 9-11. The end result of all of this was that a shopping customer would avoid paying the generation charge but would see a portion of this back in the form of a transition charge.

None of the above had anything to do with AEP-Ohio either then or now. The AEP-Ohio EDUs[31] neither sought, nor received, authorization to impose a transition charge on shopping customers during the restructuring process.[32] Further, it received nothing of the sort in the case below.

A "transition charge" was (1) a portion of a previously-existing rate; (2) for electricity; (3) charged to a shopping customer; (4) at retail; (5) to aid the EDU to move to a competitive energy market; (6) by reducing or eliminating stranded costs. As should be clear, none of this has anything to do with the case below. The case below concerns *capacity* not *electricity*. Capacity is a monopoly service, only AEP-Ohio provides capacity.[33] The transition to a

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31 There were two at the time, Ohio Power Company and the Columbus Southern Power Company. These have subsequently been merged.

32 Per statute, transition charges were tacitly included in the unbundled rates that the non-shopping customers continued to pay. R.C. 4928.37(A)(1)(b), App. at 10. This had little meaning for the non-shopping customers as their overall rates did not change.

33 As has been noted, AEP-Ohio is the monopoly provider of capacity in its service territory until the end of the FRR period.

competitive energy market occurred years ago. What the Commission was concerned about below was the continuation of an existing competitive market not transition. The charge is a wholesale rate not a retail rate. There is nothing about stranded costs in the Commission's analysis. Rather the Commission set a cost-based rate as is appropriate for a non-competitive service. The capacity charges established below are not made on retail customers, they are imposed on competitive suppliers. There is no correlation between transition charges and the Commission's decision below.

The Commission has explained its reasoning stating:

> The Commission disagrees that the Interim Relief Entry authorized the recovery of transition costs. We do not believe that the capacity costs associated with AEP-Ohio's FRR obligations constitute transition costs. Pursuant to Section 4928.39, Revised Code, transition costs are costs that, among meeting other criteria, are directly assignable or allocable to retail electric generation service provided to electric consumers in this state. AEP-Ohio's provision of capacity to CRES providers, as required by the Company's FRR capacity obligations, is not a retail electric service as defined by Section 4928.01(A)(27), Revised Code. The capacity service in question is not provided directly by AEP-Ohio to retail customers, but is rather a wholesale transaction between the Company and CRES providers. Because AEP-Ohio's capacity costs are not directly assignable or allocable to retail electric generation service, they are not transition costs by definition. IEU's assignment of error should be denied.

Capacity Case (Entry on Rehearing at 19-20, ¶ 52) (Oct. 17, 2012), IEU App. at 108-109. Further the Commission stated:

> As previously discussed, the Commission does not believe that AEP-Ohio's capacity costs fall within the category of transition costs. Section 4928.39, Revised Code, defines transition costs as costs that, among meeting other criteria, are directly assignable or allocable to retail electric generation service provided to electric consumers in this state. As we have determined, AEP-Ohio's provision of capacity to CRES providers is not a retail electric service as defined by Section 4928.01(A)(27), Revised Code. It is a

> wholesale transaction between AEP-Ohio and CRES providers. IEU's request for rehearing should thus be denied.

Id. at 56-57, ¶ 141, IEU App. at 145-146.

In sum, the claim that the charges set below are "transition charges" has no basis whatsoever.

Proposition of Law No. III:

The Commission lawfully authorized AEP-Ohio to defer actual incurred capacity costs not recovered from CRES providers during the ESP period up to the cost of $188.88/MW-day.

In its capacity order, the Commission: (1) adopted an SCM that directs AEP-Ohio to charge CRES providers RPM-based pricing for the capacity it supplies to them, (2) stated that it would authorize AEP-Ohio to modify its accounting procedures to defer incurred capacity costs not recovered from CRES providers during the ESP period up to the cost of $188.88/MW-day, and (3) stated that it would establish an appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the *ESP 2* proceeding. *Capacity Case* (Opinion and Order at 23) (July 2, 2012), IEU App. at 67. OCC and IEU claim the Commission lacks authority to create the deferrals with carrying charges, the deferrals violate Ohio policy, and their due process rights were violated. These claims are unfounded.

A. OCC's Proposition of Law No. 2 should be dismissed and be considered instead in the pending *ESP 2* Appeal where OCC has preserved the issue in its notice of appeal.[34]

OCC's Proposition of Law No. 2 specifically challenges the Commission's decision to allow AEP-Ohio to defer capacity costs not recovered from CRES providers. *OCC First Brief* at

[34] The Commission moved for dismissal of OCC's Proposition of Law No. 2 in the "Joint Motion to Dismiss of Ohio Power Company and The Public Utilities Commission of Ohio" that was filed on August 14, 2013 and is still pending before the Court.

19-20. The Commission, under R.C. 4905.13, authorized AEP-Ohio to modify its accounting procedures to defer capacity costs not recovered from CRES providers, but expressly stated that the recovery mechanism would be established in the *ESP 2* proceeding. *Id.*

OCC now seeks to challenge the deferral recovery mechanism in this appeal. But that issue is not subject to review in this appeal because the Commission did not establish the deferral recovery mechanism here. Rather, the Commission established the recovery mechanism in the *ESP 2* case, where OCC has separately appealed the same issue to this Court.[35] The *ESP 2* appeal is where OCC's challenge to the deferral recovery mechanism should be addressed.

This Court should not address the merits of a Proposition of Law challenging actions that the Commission did not actually take in the proceeding being appealed from. The Court should dismiss OCC's Proposition of Law No. 2 because the deferral recovery mechanism was established in the *ESP 2* case – not the underlying docket.

B. The Commission has statutory authority to create the capacity-cost deferrals.[36]

The Commission can authorize accounting deferrals with carrying charges under R.C. 4905.13 as part of its general jurisdiction over utilities. R.C. 4905.13 states:

> The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. * * * The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or

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35 *See* Ohio Supreme Court Case No. 2013-0521 (OCC Notice of Appeal filed May 23, 2013).

36 The Commission did not authorize the capacity cost deferrals under R.C. 4928.144 because R.C. 4928.141 through R.C. 4928.143 did not apply to this case.

> railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. * * * The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed. * * *

R.C. 4905.13, App. at 1. The Commission cited R.C. 4905.13 as the basis for the deferrals authorized in its decision. *Capacity Case* (Opinion and Order at 23) (July 2, 2012), IEU App. at 67. The Commission has broad supervisory authority under R.C. 4905.13 to authorize both the deferrals and the associated carrying costs. This Court has often afforded broad deference to the Commission's expertise in interpretation and application of statutes that deal with utility rate matters. *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955. Therefore, the Commission had the requisite authority to authorize the deferrals under R.C. 4905.13. The claims by OCC and IEU to the contrary are without merit.

C. The capacity-cost deferrals ordered by the Commission satisfy Ohio's policy goals.

The Commission's decision achieves Ohio's policy goals as Ohio transitions into a fully competitive market for electricity suppliers. The Commission stated in its entry on rehearing: "we believe that a capacity charge assessed to CRES providers on the basis of RPM pricing will advance the development of true competition in AEP-Ohio's service territory." *Capacity Case* (Entry on Rehearing at 40) (Oct. 17, 2012), IEU App. at 129. OCC and IEU argue that the deferrals create anticompetitive subsidies that harm customers in violation of policies set forth in R.C. 4928.02(A), (H), (L) and R.C. 4928.06. On the contrary, the Commission's decision, which

includes deferrals, satisfies state policy by moving Ohio to a fully competitive market. The Commission established an SCM for AEP-Ohio that reasonably and fairly compensates the Company without significantly undermining the Company's ability to earn an adequate return on its investment. *Capacity Case* (Opinion and Order at 22, 36) (July 2, 2012), IEU App. at 66, 80. The order only authorized AEP-Ohio to charge CRES providers RPM-based pricing for capacity. The SCM involves both a wholesale component (RPM pricing to CRES providers) and a retail component (the retail recovery determined in the *ESP 2* decision). *Id.* at 23-24, IEU App. at 67-68.

Contrary to claims by IEU and OCC, the Commission's decision does not create an anti-competitive subsidy.[37] The $188.88/RPM differential from AEP-Ohio's costs is funded by all customers because all customers benefit from the opportunity to shop afforded by RPM-priced capacity. *Id.* at 23, IEU App. at 67. And it is reasonable for all customers, whether they shop or not, to fund the $188.88/RPM differential because all customers are benefiting from the associated capacity.[38]

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37 In *Consumers' Counsel*, 110 Ohio St. 3d 394, OCC challenged a PUCO order made under R.C. 4905.26 that changed the way in which Dayton Power & Light ("DP&L") could recover its billing-system costs, as a result of S.B. 3, to provide consolidated billing for both distribution and generation services. Initially, CRES providers were to be charged for the billing-system changes, but CRES providers complained the charges would discourage shopping and constituted a barrier to competition. PUCO approved our agreement that reduced the DP&L charge to CRES providers and allowed DP&L to recover from all of its customers the balance of those costs of the billing-system changes. Shifting those costs would foster competition and make it easier for CRES providers to offer savings to customers. *Consumers' Counsel*, 110 Ohio St. 3d 394 at ¶ 31. The reduced charge to CRES providers removed a significant barrier to competition. "[I]t is reasonable to ask all customers to pay for that benefit." *Id.* at ¶ 22.

38 OCC's claim that approval of the capacity deferrals violated the regulatory principle of cost causation is without merit. Marketers did not cause AEP-Ohio to have an unreasonable RPM rate to compensate the Company for its incurred capacity costs. A

(footnote continued on next page)

In the *ESP 2* case, the Commission found that "as a result of the Capacity Case, customers may be able to lower their bill impacts by taking advantage of CRES provider offers allowing customers to realize savings that may not have otherwise occurred without the development of a competitive market." *ESP 2* Case (Opinion and Order at 76) (Aug. 8, 2012), OCC App. at 271. The Commission further found that the Retail Stability Rider ("RSR"), including the capacity deferrals, enabled all of AEP-Ohio's customers to receive substantial and valuable benefits that would not otherwise be achieved:

> [W]hile the RSR and the inclusion of the deferral within the RSR are the most significant cost associated with the modified ESP, but for the RSR it would be impossible for AEP Ohio to completely participate in full energy and capacity based auctions beginning in June 1, 2015. Although the decision for AEP Ohio to transition towards competitive market pricing is something this Commission strongly supports and the General Assembly anticipated in enacting Senate Bill 221, the fact remains that the decision to move towards competitive market pricing is voluntary under the statute and in the event this ESP is withdrawn or even replaced with an MRO, there is no doubt that AEP Ohio would not be fully engaged in the competitive marketplace by June 1, 2015.

Id. at 76, OCC App. at 311. As the Commission has determined, the creation of the capacity deferrals is intended to benefit all AEP-Ohio customers, not just shopping customers or CRES providers. OCC's claims that the difference between $188.88/MW-day and RPM pricing is solely an obligation of CRES providers are without merit.

(footnote continued from previous page page)

> volatile RPM market did. Marketers did not cause competition in AEP-Ohio's service territory to be at risk – AEP-Ohio did with its filing at FERC. Contrary to OCC's claim, the Commission did not violate its precedent.

OCC further asserts the deferral is unreasonable because it resulted in harm to AEP-Ohio's customers. OCC cites to the *Elyria Foundry* case in support of its anticompetitive subsidy and harm arguments. *OCC First Brief* at 25-26. In *Elyria Foundry*, this Court found that the Commission violated R.C. 4928.02(G) – now R.C. 4928.02(H) – when it gave FirstEnergy authority to collect deferred costs in future distribution cases. *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 70.

Unlike *Elyria*, the Commission's decision here does not create an anticompetitive subsidy. In *Elyria*, the rate-certainty plan the Commission approved allowed FirstEnergy to defer recovery of the increased cost of fuel used for providing generation service and later collect the cost through distribution-service base rates in future FirstEnergy distribution rate cases. If fuel-cost increases were less than the revenues collected through the fuel-recovery mechanism in each year of the rate-certainty plan, the excess revenues would be applied to reduce the distribution-expense deferrals.

Fuel is an incremental cost component of generation service. The deferral in *Elyria* created an anticompetitive subsidy because: (1) the rate-certainty plan *created* the mechanism allowing FirstEnergy to partially recover its fuel-cost increases; (2) using that mechanism, FirstEnergy was allowed to recover a generation-cost component in a future distribution rate case, or alternatively applying generation revenues (competitive retail electric service) to reduce distribution expenses (noncompetitive retail electric service); and (3) the Court held that the Commission's accounting order authorizing the increased fuel-cost deferrals was conclusive for ratemaking purposes and ripe for its consideration.

This case is distinguishable from *Elyria* in the following ways. AEP-Ohio's capacity is a noncompetitive wholesale service governed by R.C. Chapter 4905 and R.C. 4905.26, in particu-

lar. R.C. Chapter 4928, which governs competitive electric services, does not apply to this case. The Commission authorized the deferral by an accounting order pursuant to R.C. 4905.13. The accounting deferral does not provide for generation cost recovery in a subsequent distribution or transmission rate case, so there is no cross-subsidization between two of the three major electric-service components. The mechanism for the recovery of the deferral was *created* in AEP-Ohio's *ESP 2* case, so the ratemaking effect of the accounting order must be reviewed in the *ESP 2* appeal now pending.

OCC's reliance on *Elyria* is wrong. Likewise, OCC's cost causation arguments are misguided for similar reasons. *OCC First Brief* at 26-27. The deferral benefits all stakeholders, including all retail customers, not just shopping customers and CRES providers.

D. The Commission properly determined that the capacity-cost deferrals and related carrying costs should be addressed in AEP-Ohio's *ESP 2* case.

The Commission's decision to address the recovery mechanism for the deferral in the *ESP 2* case in order to "effectively consider how the deferral recovery mechanism would fit within the mechanics of AEP-Ohio's ESP 2" was within its broad discretion to manage its dockets. *Capacity Case* (Entry on Rehearing at 53-54) (Oct. 17, 2012), IEU App. at 142-143. This Court has recognized that the Commission is vested with broad discretion to manage its dockets so as to avoid undue delay and the duplication of effort, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264, 275 (1978); *Toledo Coalition far Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982). The Commission enjoys broad authority in the conduct of its business. *Weiss v. Pub. Util. Comm.*, 90

Ohio St.3d 15, 2000-Ohio-491, 734 N.E.2d 775, citing *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 275 (1978).

Because the Commission considered the mechanics of the deferrals in another proceeding, IEU argues that its due process rights were violated. IEU is wrong. The Commission, in its entry on rehearing, found that the arguments regarding the mechanics and recovery of deferrals "were prematurely raised in this case." *Capacity Case* (Entry on Rehearing at 51) (Oct. 17, 2012), IEU App. at 140. The Commission stated:

> The [July 2, 2012] Capacity Order did not address the deferral recovery mechanism. Rather, the Commission merely noted that an appropriate recovery mechanism would be established in the ESP 2 Case and that any other financial considerations would also be addressed by the Commission in that case. The Commission finds it unnecessary to address arguments that were raised in this proceeding merely as an attempt to anticipate the Commission's decision in the ESP 2 Case.

Id. Any arguments relating to the deferral were more appropriate for the *ESP* 2 case. IEU was a party to the *ESP 2* case and had the full opportunity to challenge the mechanics of the deferrals in that case.

Moreover, the Commission did not change retail rates in this proceeding and IEU suffers no harm resulting from the decision. The *ESP 2* docket is where the Commission adopted the Retail Stability Rider (RSR), in part to compensate AEP-Ohio for the capacity deferral authorized in the case below. Accordingly, the Commission lawfully rejected any substantive deferral arguments as being premature.

IEU also takes issue with the Commission's decision authorizing AEP-Ohio to collect a carrying charge on the deferral. The Commission stated:

> Regarding the specific carrying cost rates authorized, the Commission finds that it was appropriate to approve the WACC rate until such time as the recovery mechanism was established in the ESP 2 Case, in order to ensure that AEP Ohio was fully compensated, and

> to approve the long-term debt rate from that point forward. As we have noted in other proceedings, once collection of the deferred costs begins, the risk of non-collection is significantly reduced. At that point, it is more appropriate to use the long-term cost of debt rate, which is consistent with sound regulatory practice and Commission precedent. In any event, as AEP-Ohio notes, OCC's argument is moot. Because the SCM took effect on the same date on which the deferral recovery mechanism was approved in the ESP 2 Case, there was no period in which the WACC rate applied. Accordingly, OCC's and IEU's assignments of error should be denied.

Id. at 43-44, IEU App. at 132-133. In the Opinion and Order, the Commission recognized that "AEP-Ohio should be authorized to collect carrying charges on the deferral based on the Company's weighted average cost of capital ["WACC"], *until such time as a recovery mechanism is approved in 11-346* * * * [.]" *Id.* (Opinion and Order at 23) (July 2, 2012), IEU App. at 67 (emphasis added). The SCM and associated deferral did not go into effect until August 8, 2012. *Id.* at 38, IEU App. at 82. On the same day, the Commission approved a recovery mechanism in the Company's *ESP 2* proceeding. Because recovery was approved on August 8, 2012, at the same time the new capacity pricing became effective, the WACC carrying charge was not triggered. Rehearing of that portion of the Commission's decision was, therefore, unwarranted.

Proposition of Law No. IV:

Mootness and the prohibition against retroactive ratemaking compel dismissal of IEU's Propositions of Law No. 6, 7, and 8.[39]

IEU's Propositions of Law Nos. 6, 7, and 8 all attack *interim* rates for capacity that are no longer being charged. AEP-Ohio has not charged any CRES providers (including IEU) the interim capacity prices since August 2012, when the interim capacity pricing mechanism expired

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[39] The Commission moved for dismissal of IEU's Propositions of Law 6, 7, and 8 in the "Joint Motion to Dismiss of Ohio Power Company and The Public Utilities Commission of Ohio" that was filed on August14, 2013 and is still pending before the Court.

and was replaced by the rates authorized by the Commission in the *ESP 2* proceeding. *ESP 2* (Opinion and Order at 79) (Aug. 8, 2012), OCC App. at 314; *see also, Capacity Case* (Entry on Rehearing) (Aug. 15, 2012), IEU App. at 185-186. Although IEU sought rehearing with respect to the March 7 and May 30 Commission Entries establishing and continuing the interim capacity pricing mechanism, IEU did not request stays of those entries or post the bond required to obtain a stay pursuant to R.C. 4903.16.

IEU improperly seeks an advisory opinion of this Court by challenging the Commission's March 7 and May 30 Entries authorizing interim rates in its Propositions of Law Nos. 6, 7, and 8. *IEU First Brief* at 42-46.[40] IEU further asserts that AEP-Ohio should refund a "portion of capacity charges in place since January 2012 or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges." *Id.* at 45. IEU therefore seeks a refund for rates that are no longer being collected and that were already paid. Appellate courts may review only live controversies. When circumstances prevent an appellate court from granting relief, the mootness doctrine precludes consideration of the issues in the case. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 15-16. As the Court has noted "[i]n the absence of the possibility of an effective remedy, this appeal constitutes only a request for an advisory ruling from the court." *Id.* at ¶ 17.

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[40] In its Proposition of Law No. 6, IEU contends that the Commission's March 7 and May 30 Entries are unlawful and unreasonable. IEU Merit Br. at 42-43. In its seventh Proposition of Law, IEU complains that the interim rates were not based upon the record from the capacity proceeding. *Id.* at 43-45. And in its Proposition of Law No. 8, IEU posits that the Court should direct the Commission to refund what IEU characterizes as the "above-market charges AEP Ohio collected" while interim rates were in place. *Id.* at 45-46.

In this case, IEU can no longer challenge the interim rates as those rates have been paid and this Court cannot reinstitute an expired rate. Even where rates are still being collected, such retroactive refunds are barred by the prohibition against retroactive ratemaking. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 15.

A. The Commission lawfully authorized AEP-Ohio's temporary two-tiered rates through its entries.

The Commission properly rejected IEU claims that the relief granted in the Interim Relief Entry was not based on record evidence. The Commission relied on the record evidence from the *ESP 2* case and other consolidated records. The Commission stated:

> The present case was consolidated with the ESP 2 Case and the other consolidated cases for the purpose of considering the ESP 2 Stipulation. As we noted in the Interim Relief Entry, the testimony and exhibits admitted into the record for that purpose remain a part of the record in this proceeding. Although the Commission subsequently rejected the ESP 2 Stipulation, that action did not purge the evidence from the record in this case. It was thus appropriate for the Commission to rely upon that evidence as a basis for granting AEP-Ohio's motion for interim relief.

Capacity Case (Entry on Rehearing at 16) (Oct. 17, 2012), IEU App. at 105. From the evidence in the consolidated records, the Commission reasonably concluded that an SCM based on the current RPM pricing could risk an unjust and unreasonable result for AEP-Ohio. The Commission stated that:

> [I]n the Interim Relief Entry, the Commission cited three reasons justifying the interim relief granted, specifically the elimination of AEP-Ohio's POLR charge, the operation of the pool agreement, and evidence indicating that RPM-based capacity pricing is below the Company's capacity costs. * * * Although the Commission determined that AEP-Ohio's POLR charge was not supported by the record on remand, nothing in that order negated the fact that there are capacity costs associated with an electric distribution utility's POLR obligation and that such costs may be properly recoverable upon a proper record. [Footnote omitted]. Having noted that AEP-Ohio was no longer receiving recovery of capacity

> costs through the POLR charge, the Commission next pointed to evidence in the record of the consolidated cases indicating that the Company's capacity costs fall somewhere within the range of $57.35/MW-day to $355.72/MW-day, as a merged entity. Finally, we noted that, although AEP-Ohio may sell its excess supply into the wholesale market when retail customers switch to CRES providers, the pool agreement limits the Company's ability to fully benefit from these sales, as the margins must be shared with its affiliates. * * *

Id. at 17, IEU App. at 106. In considering the above evidence, the Commission approved the two-tier capacity pricing mechanism on an interim basis, with the first tier set at $146/MW-day and the second tier fixed at $255/MW-day, representing a reasonable charge in the mid portion of the range reflected in the record. *Capacity Case* (Entry at 8) (May 30, 2012), IEU App. at 40. The Commission's conclusions regarding the interim capacity charge were well supported by the record. It was under the Commission's discretion to approve the interim rate.

In matters involving the Commission's special expertise and the exercise of discretion, the Court will generally defer to the judgment of the Commission. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St.3d 177, 180, 2001-Ohio-134, 749 N.E.2d 262, 264; *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.,* 51 Ohio St.3d 150, 154, 555 N.E.2d 288, 292 (1990); *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 107-108, 346 N.E.2d 778, 781 (1976). Where the relevant statute does not prescribe a particular formula, the Commission is vested with broad discretion in performing its duties. *Columbus v. Pub. Util. Comm.*, 10 Ohio St.3d 23, 24, 460 N.E.2d 1117, 1119 (1984). The Commission has an obligation under traditional rate regulation to ensure that Ohio's jurisdictional utilities, like AEP-Ohio, have an opportunity to earn just and reasonable compensation for their services.

The Commission's rationale for granting AEP-Ohio's interim relief was thoroughly explained, warranted under the unique circumstances, and supported by the evidence of record in the consolidated cases. Accordingly, IEU's argument should be rejected.

Proposition of Law No. V:

> **IEU received a full and fair opportunity to be heard via a hearing, opportunity to file exhibits and present and cross examine witnesses, submit briefs, and file for rehearing and ultimately to appeal. *Vectren Energy Delivery v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 192, 2006-Ohio-1386, 863 N.E.2d 599.**

Appellant IEU complains that it was denied due process in the proceedings below. Even a cursory review of the record belies this claim. Appellant IEU certainly had notice of the issues in the case. It was so aware of the issues it filed a motion to dismiss prior to the beginning of the hearing. *Capacity Case* (Motion to Dismiss) (April 11, 2012), IEU Supp. at 525-541. There was a hearing that lasted 12 days with twenty-five witnesses presented. *Capacity Case* (Opinion and Order at 6) (July 2, 2012), IEU App. at 50. IEU itself presented two witnesses and chose to cross-examine at least eleven others. *Capacity Case* (Composite Index) (May 16, 2012), Supp. at 44-62. Multitudes of exhibits were admitted including 24 by IEU. *Id.* Briefs were submitted. *Capacity Case* (Opinion and Order at 6) (July 2, 2012), IEU App. at 50. IEU submitted applications for rehearing. In short, all components of due process have been afforded; IEU is simply dissatisfied with the outcome.

Insofar as IEU's argument contains any specifics, it appears that it believes that the Commission did two things unconstitutionally: it took too long on rehearing and it did not allow IEU to avoid the stay requirement of R.C. 4903.16. Neither argument has merit.

Fully examining a case on rehearing is what the Commission is supposed to do. Indeed this Court has noted that the availability of rehearing is a component of the process that is due. *Vectren Energy Delivery v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 192, 2006-Ohio-1386, 863 N.E.2d 599. The Commission should be commended not criticized.

As to the lack of a stay, the General Assembly has provided the mechanism for IEU or any other appellant to obtain a stay of a Commission order *pendente lite*, R.C. 4903.16. Appel-

lant IEU has chosen not to utilize the statutory mechanism. In any event, a stay *pendente lite* is statutory, not constitutional. Its criticism of the Commission is meaningless.

IEU was afforded all the process that was due. It is merely unhappy with the result of the Commission decision. Its effort to dress this disappointment in constitutional clothes should be rejected.

CONCLUSION

The Commission's adoption of an SCM that fixed a just and reasonable noncompetitive wholesale capacity rate for AEP-Ohio to fulfill its FRR obligations is consistent with state law and policy objectives, federal law and policy objectives, and the RAA. FERC confirmed that the Commission's SCM rate design, which is comprised of a wholesale and retail component, was consistent with the RAA. FERC also confirmed that the wholesale component in the SCM was not preempted by federal law. The Commission fixed a new rate for AEP-Ohio's FRR capacity service obligation under its broad and traditional ratemaking authority to provide retail choice and a level playing field for wholesale suppliers to compete in AEP-Ohio's service territory. The Commission exercised jurisdiction over AEP-Ohio to prevent it from acquiring market power with its proposed cost-based rate at FERC. The Commission adopted a SCM that effectuates Ohio policy objectives and reasonably compensates AEP-Ohio for its incurred costs so it does not risk financial harm in satisfying its FRR obligations.

Respectfully submitted,

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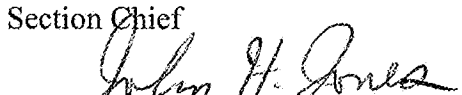

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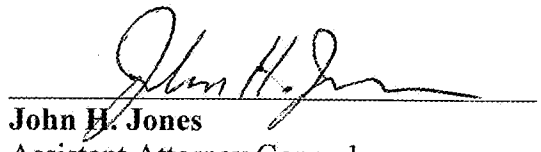
PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage pre-paid, or hand-delivered, upon the following parties of record, this 23rd day of September, 2013.



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4905.09 Substantial compliance.

A substantial compliance by the public utilities commission with the requirements of Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code is sufficient to give effect to all its rules and orders. Those rules and orders shall not be declared inoperative, illegal, or void for an omission of a technical nature . And, those chapters do not affect, modify, or repeal any law fixing the rate that a company operating a railroad may demand and receive for the transportation of passengers.

4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall, when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such section upon request of the public utilities commission by mandamus or other appropriate proceedings.

4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

4928.05 Extent of exemptions.

(A)

(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the

authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission. The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated. On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

4928.06 Commission to ensure competitive retail electric service.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903. of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective

competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations for legislation to the standing committees of both houses of the general assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the commission and the consumer's counsel also shall provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive retail electric services in this state. In addition, until the end of all market development periods as determined by the commission under section 4928.40 of the Revised Code, those standing committees shall meet at least biennially to consider the effect on this state of electric service restructuring and to receive reports from the commission, consumers' counsel, and director of development.

(D) In determining, for purposes of division (B) or (C) of this section, whether there is effective competition in the provision of a retail electric service or reasonably available alternatives for that service, the commission shall consider factors including, but not limited to, all of the following:

(1) The number and size of alternative providers of that service;

(2) The extent to which the service is available from alternative suppliers in the relevant market;

(3) The ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services. The burden of proof shall be on any entity requesting, under division (B) or (C) of this section, a determination by the commission of the existence of or a lack of effective competition or reasonably available alternatives.

(E)

(1) Beginning on the starting date of competitive retail electric service, the commission has authority under Chapters 4901. to 4909. of the Revised Code, and shall exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The

measure shall remain the commission, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated.

(F) An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An electric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information. The commission shall require each electric utility to file with the commission on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt hours of electricity, and shall require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of the retail customer.

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

4928.18 Jurisdiction and powers of commission concerning utility or affiliate.

(A) Notwithstanding division (E)(2)(a) of section 4909.15 of the Revised Code, nothing in this chapter prevents the public utilities commission from exercising its authority under Title XLIX of the Revised Code to protect customers of retail electric service supplied by an electric utility from any adverse effect of the utility's provision of a product or service other than retail electric service.

(B) The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations. Any such examination or investigation by the commission shall be governed by Chapter 4903. of the Revised Code.

(C) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section, may do any of the following:

(1) Issue an order directing the utility or affiliate to comply;

(2) Modify an order as the commission finds reasonable and appropriate and order the utility or affiliate to comply with the modified order;

(3) Suspend or abrogate an order, in whole or in part;

(4) Issue an order that the utility or affiliate pay restitution to any person injured by the violation or failure to comply;

(D) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section and commensurate with the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation, may do either of the following:

(1) Impose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation. The recovery and deposit of any such forfeiture shall be subject to sections 4905.57 and 4905.59 of the Revised Code.

(2) Regarding a violation by an electric utility relating to a corporate separation plan involving competitive retail electric service, suspend or abrogate all or part of an order, to the extent it is in effect, authorizing an opportunity for the utility to receive transition revenues under a transition plan approved by the commission under section 4928.33 of the Revised Code.

Corporate separation under this section does not prohibit the common use of employee benefit plans, facilities, equipment, or employees, subject to proper accounting and the code of conduct ordered by the commission as provided in division (A)(1) of this section.

(E) Section 4905.61 of the Revised Code applies in the case of any violation of section 4928.17 of the Revised Code or of any rule adopted or order issued under that section.

4928.34 Determinations for approval or prescribing of plan.

(A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and

other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with section 4928.12 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code. In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

4928.37 Receiving transition revenues.

(A)

(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. An electric utility for which transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service

and ending on the expiration date of its market development period as determined under section 4928.40 of the Revised Code:

(a) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;

(b) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under section 4928.40 of the Revised Code. The transition charge shall be payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved and shall be billed on each kilowatt hour of electricity delivered to the customer by the electric distribution utility as registered on the customer's meter during the utility's market development period as kilowatt hour is defined in section 4909.161 of the Revised Code or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer. The transition charge for each customer class shall reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the effective date of this section. Additionally, as reflected in section 4928.40 of the Revised Code, the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge shall be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules.

(2)

(a) Notwithstanding division (A)(1)(b) of this section, the transition charge shall not be payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or distribution facilities singly or jointly owned or operated by the municipal electric utility, and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999.

(b) The transition charge shall not be payable on electricity supplied or consumed in this state except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge shall be payable on electricity that is both produced and consumed in this state by a self-generator.

(3) The transition charge shall not be discounted by any party.

(4) Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

(B) The electric utility shall separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code.

4928.38 Commencing and terminating transition revenues.

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

4928.39 Determining total allowable transition costs.

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs. Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section. Further, the commission's order under this section shall separately identify regula-

tory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code. The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated or unregulated products or services.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	Case No. 08-918-EL-SSO

OPINION AND ORDER

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that additional information is necessary to implement a successful Phase I program, we do not believe that all information is required before the Commission can conclude that the program is beneficial to ratepayers and should be implemented. Therefore, we will approve the development of a gridSMART rider, as we agree with the Staff that a rider has several benefits over the proposed annual increase to distribution rates, including separate accounting for gridSMART, an opportunity to approve and update the plan each year, assurance that expenditures are made before cost recovery occurs, and an opportunity to audit expenditures prior to recovery. The Commission notes that recent federal legislation makes matching funds available to smart grid projects. Accordingly, the Companies' gridSMART proposal contained in its proposed ESP to recover $109 million over the term of ESP, should be revised to $54.5 million, which is half of the Companies' requested amount. Additionally, we direct CSP to make the necessary filing for federal matching funds under the American Recovery and Reinvestment Act of 2009 for the balance of the projected costs of gridSMART Phase I. The gridSMART rider shall be initially established at $33.6 million for the 2009 projected expenses subject to annual true-up and reconciliation based on the company's prudently incurred costs.

With the creation of the ESRP rider and the gridSMART rider, the Commission finds that annual distribution rate increases in the amounts of 7 percent for CSP and 6.5 percent for OP to recover the costs for the ESRP and gridSMART programs are unnecessary and should be rejected. Accordingly, the Commission finds that AEP-Ohio's proposed ESP should be modified to include the ESRP rider and the gridSMART rider, as approved herein, and to eliminate the annual distribution rate increases.

B. Riders

1. Provider of Last Resort (POLR) Rider

The Companies proposed to include in their ESP a distribution non-bypassable POLR rider (Cos. App. at 6-8). The POLR charge was proposed to collect a POLR revenue requirement of $108.2 million for CSP and $60.9 million for OP (Cos. Ex. 2-A at 34; Cos. Ex. 1, Exhibit DMR-5). The Companies stated that they have a statutory obligation to be the POLR,[22] and thus, the proposed POLR charge is based on a quantitative analysis of the cost to the Companies to provide to customers the optionality associated with POLR service (Cos. Ex. 2-A at 25-26). AEP-Ohio argued that this charge covers the cost of allowing a customer to remain with the Companies, or to switch to a Competitive Retail Electric Service (CRES) provider and then return to the Companies' SSO after shopping (Id.). To further support the proposed increase, the Companies added that their current POLR charge is significantly below other Ohio electric utilities' POLR charges (Cos. Ex. 2 at 8). The Companies utilized the Black-Scholes Model to calculate their cost of fulfilling

[22] See Section 4928.141(A) and 4928.14, Revised Code.

the POLR obligation, comparing the customers' rights to "a series of options on power" (Cos. Br. at 43; Cos. Ex. 2-A at 31). AEP-Ohio listed the five quantitative inputs used in the Black-Scholes Model: 1) the market price of the underlying asset; 2) the strike price; 3) the time frame that the option covers; 4) the risk free interest rate; and 5) the volatility of the underlying asset (Id.). The Companies assert that the resulting POLR charge is conservatively low (Cos. Br. at 44).

The numerous intervenors and Staff opposed the level of POLR charge proposed by the Companies, as well as the use of the Black-Scholes Model to calculate the POLR charge (OPAE/APAC Br. at 14-17; OCC Ex. 11 at 8-14). Specifically, OCC and others questioned the use of the LIBOR rate as the input for the risk-free interest rate (Tr. Vol. X at 165-182, 188-189; Tr. Vol. XI at 166-182). Staff questioned the risk that the POLR charge was intended to compensate the Companies for, explaining that there are only two risks involved: one risk is the risk of customers returning to the SSO and the other risk is that the customers leave and take service from a CRES provider (migration risk) (Staff Ex. 10 at 6). Staff witness Cahaan testified that the risk associated with customers returning to the SSO could be avoided by requiring the customer to return at a market price, instead of the SSO rate, which would either be paid directly by the returning customer or any incremental cost of the purchased power could be flown through the FAC (Id.). Staff witness Cahaan admitted that if customers are permitted to return at the SSO rate, without paying the market price or without compensating the Companies for any incremental costs of the additional purchased power that they would be required to purchase, then the Companies would be at risk (Tr. Vol. XIII at 36-37). Thus, Staff witness Cahaan concluded that, if the risk of returning is addressed, then the migration risk is the only risk that should be compensated through a POLR charge (Id. at 7).

The Companies responded that their risk is not alleviated by customers agreeing to return at market price, arguing that future circumstances or policy considerations may require them to relieve customers of their promises to pay market price when circumstances change (Cos. Ex. 2-A at 27-30). AEP-Ohio's witness expressed skepticism as to a future Commission upholding such promises (Id). AEP-Ohio also opposed recovering any costs for market purchases incurred for returning customers through the FAC as an improper subsidization of those customers who chose to shop, and then return to the electric utility, by non-shopping customers (Cos. Ex. 2-E at 14-16). Furthermore, the Companies claim that their risk of being the POLR exists, regardless of historic or current shopping levels (Id.). Nonetheless, AEP witness Baker testified that, even adopting Staff witness Cahaan's theory that the Companies are only at risk for migration (the right of customers to leave the SSO), migration risk equals approximately 90 percent of the Companies' POLR costs pursuant to the Black-Scholes model (Tr. Vol. XIV at 204-205; Cos. Ex. 2-E at 15-16).

As the POLR, the Commission believes that the Companies do have some risks associated with customers switching to CRES providers and returning to the electric utility's SSO rate at the conclusion of CRES contracts or during times of rising prices. However, we agree with the intervenors and Staff that the POLR charge as proposed by the Companies is too high, but we do not agree that there is no risk or a very minimal risk as suggested by some. As noted by several intervenors and Staff, the risk of returning customers may be mitigated, not eliminated, by requiring customers that switch to an alternative supplier (either through a governmental aggregation or individual CRES providers) to agree to return to market price, and pay market price, if they return to the electric utility after taking service from a CRES provider, for the remaining period of the ESP term or until the customer switches to another alternative supplier. In exchange for this commitment, those customers shall avoid paying the POLR charge. We believe that this outcome is consistent with the requirement in Section 4928.20(J), Revised Code, which allows governmental aggregations to elect not to pay standby service charges, in exchange for agreeing to pay market price for power if they return to the electric utility. Therefore, based on the record before us, we conclude that the Companies' proposed ESP should be modified such that the POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith, including the migration risk. The Commission accepts the Companies' witness' quantification of that risk to equal 90 percent of the estimated POLR costs,[23] and thus, finds that the POLR rider shall be established to collect a POLR revenue requirement of $97.4 million for CSP and $54.8 million for OP. Additionally, the POLR rider shall be avoidable for those customers who shop and agree to return at a market price and pay the market price of power incurred by the Companies to serve the returning customers. Accordingly, the Commission finds that the POLR rider, which is avoidable, should be approved as modified herein.

2. Regulatory Asset Rider

The Companies proposed to begin the recovery of a variety of regulatory assets that were authorized in various Commission proceedings regarding the Companies' electric transition plan (ETP), rate stabilization plan (RSP), line extension program, green pricing power program, and the transfer of the MonPower's service territory to CSP. In their application, the Companies proposed to begin the amortization of these regulatory assets in 2011 and complete the amortization over an eight-year period. The projected balances at the end of 2010 to amortize are $120.5 million for CSP and $80.3 million for OP. AEP-Ohio asserts that these projected balances, or the value on June 30, 2008, were not challenged by any party. To recover these regulatory assets, the Companies created a RAC rider to be collected from customers in 2011 through 2018. The rider revenues will be reconciled on an annual basis for any over- or under-recoveries.

[23] See Cos. Ex. 1, Exhibit DMR-5.

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

AMENDED MOTION TO DISMISS OF OHIO POWER COMPANY

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MOTION TO DISMISS OF OHIO POWER COMPANY

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

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

A. Initial Proceedings Before FERC

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

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

established *retail* charges assessed to retail customers. Relying on the Ohio Commission's representation, however, FERC rejected AEP Ohio's filing in early 2011, citing "the existence of a state compensation mechanism." *Id.* at P13.

B. Proceedings Before the Ohio Commission

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

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

appropriate state compensation mechanism, is ***consistent with*** the governing section of the [Reliability Assurance Agreement], which, as a part of PJM's tariffs, has been approved by FERC." *Id.* (emphasis added). That is so, the Ohio Commission contended, because "Section D.8 of Schedule 8.1 of the [Reliability Assurance Agreement] acknowledges the authority of a state regulatory jurisdiction . . . to establish a state compensation mechanism." *Id.*

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

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

the deferred recovery mechanism in its Order, it did set the cost level that AEP Ohio could recover under the two-part mechanism at $188.88/MW-day. *Id.* at 33.

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

C. Further Proceedings Before FERC

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

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

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

discriminatory, unjust and unreasonable contrary to the requirements of FPA Section 205," id. at 13. The Ohio Commission, by contrast, encouraged FERC to accept AEP Ohio's submission for filing because that would "avoid the need for the Supreme Court of Ohio to opine on the meaning of the [Reliability Assurance Agreement] and further will avoid arguments claiming that there is some sort of jurisdictional dispute" between it and FERC. Ohio PUC Comments at 4 (Apr. 16, 2013).

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

D. Proceedings Before This Court

On February 6 and 11, 2013, before FERC issued its Order, Appellants filed notices of appeal from the Capacity Charge Order. *See* Notice of Appeal of IEU-Ohio, Case No. 13-0228 (Feb. 6, 2013); FES's Notice of Cross-Appeal, Case No. 13-0228 (Feb. 11, 2013). In those notices, they generally challenge the state capacity charge compensation mechanism the Ohio Commission established in the Capacity Charge Order. But they include, among their assignments of error, challenges to the Ohio Commission's jurisdiction to approve a state compensation mechanism that includes wholesale charges (on the theory it invades exclusive

federal jurisdiction). See Notice of Appeal of Industrial Energy Users-Ohio, Case No. 13-0228, ¶ 2 (Feb. 6, 2013) (Ohio Commission jurisdiction "does not include wholesale transactions between AEP Ohio and competitive retail electric service ('CRES') providers."); id. ¶ 3 ("The Commission is without jurisdiction to determine what, if any, rights AEP Ohio may have under an agreement and this is particularly true in this case since the [Reliability Assurance Agreement] is subject to the exclusive jurisdiction of FERC."). They challenge the Ohio Commission's authority under the Reliability Assurance Agreement to adopt a cost-based (rather than an auction-based) compensation mechanism. See id. ¶ 5 (Reliability Assurance Agreement does not allow "cost-based rates").And they challenge the Ohio Commission's interpretation and authority to interpret the Reliability Assurance Agreement. See FirstEnergy Solutions Corp.'s Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013) ("The Commission acted unlawfully and unreasonably in setting a rate for capacity based on the utility's fully embedded costs, which is contrary to and inconsistent with PJM Interconnection, LLC's Reliability Assurance Agreement, as approved by the Federal Energy Regulatory Commission.").

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

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

ARGUMENT

The Court lacks jurisdiction over Appellants' contention that the Ohio Commission exceeded its jurisdiction by regulating markets that are FERC's exclusive domain, or that the Commission's Orders are inconsistent with a federal tariff. Those claims would require this Court to second guess or undermine FERC's May 23, 2013 Order. But the Federal Power Act requires that any challenges to a FERC order, explicit or implicit, be made in the relevant federal court of appeals or not at all. The filed-rate doctrine, moreover, precludes this Court from reviewing Appellants' effort to press an interpretation of a FERC tariff that departs from the one adopted by FERC or entities charged with its implementation; if they disagree with the implementation of a FERC tariff, their remedy lies with FERC. And Appellants' arguments that the Ohio Commission lacked jurisdiction because FERC has exclusive jurisdiction are now moot, FERC having exercised its jurisdiction to approve the determinations under review here. Those portions of Appellants' appeals should be dismissed.

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

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

The Federal Power Act sets forth the exclusive method to challenge, directly or indirectly, the lawfulness of FERC Orders. Section 313(b) of the Act provides that a party "aggrieved" by a FERC Order may obtain review of that Order "in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." 16 U.S.C. § 825*l*(b). "Congress in 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). "It thereby necessarily precluded . . . all other modes of

judicial review." *Id.*; *see also, e.g.*, *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009); *W. Area Power Admin. v. FERC*, 525 F.3d 40, 51 (D.C. Cir. 2008); *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187-88 (2d Cir. 2001). "Even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute." *Investment Co. Institute v. Bd. of Governors of the Fed. Reserve Sys.*, 551 F.2d 1270, 1279 (D.C. Cir. 1977); *see also, e.g.*, *Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 791 (9th Cir. 2001). Consequently, any "objections" to FERC Orders "must be made in the Court of Appeals or not at all." *City of Tacoma*, 357 U.S. at 336.

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

But those same Federal law issues were before FERC, which has issued an Order to address them. That Order "accept[ed] AEP Ohio's proposed Appendix" and concluded that "the

proposed Appendix accords with the [Reliability Assurance Agreement] and the state compensation mechanism." *See* 143 FERC ¶ 61,164, at PP26, 30. Accordingly, to address the federal-law assignments of error, this Court would need to decide whether FERC's May 23, 2013 Order properly confirmed Ohio's state compensation mechanism when it accepted AEP Ohio's proposed Appendix to the Reliability Assurance Agreement. But FERC has now addressed whether the Ohio Commission's rulings were permissible under the Reliability Assurance Agreement and federal law. Appellants may not now challenge or otherwise seek to collaterally attack those determinations in this Court. *City of Tacoma*, 357 U.S. at 341, 344. Rather, pursuant to Section 313(b) of the Federal Power Act, such a challenge "must be made in the Court of Appeals or not at all." *Id.* at 336.

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

The United States Supreme Court reversed, unequivocally rejecting the possibility of a state court decision overturning the effect of a FERC Order—even indirectly. Once FERC had approved construction of the power project, the State's attempt to enjoin the project in effect challenged that FERC decision. But Section 313 of the Federal Power Act permitted such challenges to be brought only in a federal court of appeals, and "necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy," as well as "all other modes of judicial review." *City of Tacoma*, 357 U.S. at 336. Section 313(b) likewise "preclude[d] a district court from hearing a particular claim [when] the claim 'could and should have been' presented to and decided by a court of appeals." *Merritt*, 245 F.3d at 188 (quoting *City of Tacoma*, 357 U.S. at 338); *see also Skokomish Indian Tribe v. United States*, 332 F.3d 551, 558 (9th Cir. 2003) ("***Any*** collateral attacks" are "governed by § 825*l*(b)." (emphasis added)).

City of Tacoma precludes Appellants' collateral attacks to FERC's Order unless those challenges are properly presented in a federal court of appeals. In this Court, Appellants assert many of the same issuesthat were raised before FERC. IEU-Ohio, for example, contends that the Reliability Assurance Agreement does not allow "cost-based rates." Notice of Appeal of IEU-Ohio, Case No. 13-0228, ¶ 5 (Feb. 6, 2013). It likewise argued before FERC that the Ohio Commission impermissibly "invented and applied a cost-based ratemaking methodology." Protest of IEU-Ohio in No. ER13-1164-000, at 17 (Apr. 15, 2013); *id.* at 18 ("RPM-Based Pricing is the only price for wholesale capacity that can be viewed as just and reasonable and not unduly discriminatory."); FES's Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013). But FERC approved AEP Ohio's Appendix to the Reliability Assurance Agreement, incorporating the Ohio Commission's cost-based pricing mechanism, nonetheless. *See* 143

FERC ¶ 61,164, at PP26, 30 (May 23, 2013) at PP.26, 30. Appellants' efforts to assert those same arguments in this Court are squarely foreclosed by Section 313(b) of the Federal Power Act. If Appellants disagree with FERC's decision to accept the Ohio Commission's pricing as consistent with federal requirements, they must pursue a challenge against FERC in federal court.

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

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

would create precisely the risk of duplicative litigation—or an end-run on federal review—that Section 313(b) is designed to avoid.[3] State courts applying the Natural Gas Act's substantively identical exclusivity provision[4] have reached the same conclusion.[5] Like those courts, this Court too should rule that it lacks jurisdiction to entertain a collateral attack on FERC's rulings.

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

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

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

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

Reliability Reassurance Agreement, the impact of FERC's exclusive jurisdiction, or the permissibility of the Ohio Commission's decision under federal law should be dismissed.

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

The Federal Power Act provides that a challenge to a FERC Order shall not be considered "unless such objection shall have been urged before the Commission in [an] application for rehearing unless there is reasonable ground for failure so to do." 16 U.S.C. § 825*l*(b). It likewise states that "[n]o proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon." *Id.* § 825*l*(a).

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

It is uncontested that Appellants have not sought rehearing of the May 23, 2013 FERC Order. And the 30-day deadline for seeking rehearing, *see* 16 U.S.C. § 825*l*(a), expired on June

24, 2013. Because Appellants never sought rehearing at FERC, the courts lack jurisdiction to overturn FERC's decision. For that reason too, insofar as Appellants' assignments of error urge that the Ohio Commission invaded FERC's jurisdiction, took action contrary to the federal the Reliability Assurance Agreement, or otherwise clain a violation of federal law, those assignments of error should be dismissed.

C. Appellants' Challenges Violate the Filed-Rate Doctrine

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

Appellants' challenge to the Ohio Commission ruling runs afoul of that requirement. As explained above, Appellants' notices of appeal in large part challenge the Ohio Commission's interpretation of the Reliability Assurance Agreement. *See, e.g.*, FirstEnergy Solutions Corp.'s Notice of Cross-Appeal, Case No. 13-0228, ¶ 1 (Feb. 11, 2013) (urging that a rate "based on the utility's fully embedded costs" violates the "Reliability Assurance Agreement" approved by

FERC). Consistent with the filed-rate doctrine, any dispute over AEP Ohio's or the Ohio Commission's compliance with that federal tariff must be addressed to FERC, not the state courts. *AEP Texas*, 473 F.3d at 585.

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

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

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

Conclusion

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

Respectfully submitted,

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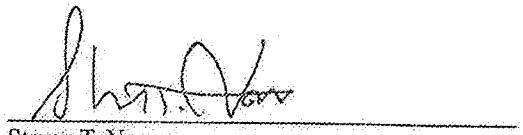
Ohio Power Company

PROOF OF SERVICE

I certify that the *Amended Motion to Dismiss of Appellee/Cross-Appellant Ohio Power Company* was served by electronic mail upon counsel for parties to this proceeding, identified below, this 16th day of July, 2013.



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20130729-3028 FERC PDF (Unofficial) 07/29/2013

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY MARKET REGULATION

PJM Interconnection, L.L.C.
Ohio Power Company
Docket No. ER13-1164-001

Issued: 7/29/13

Amanda Riggs Conner
Senior Counsel
American Electric Power Service Corporation
801 Pennsylvania Avenue, N.W. Suite 320
Washington, D.C. 20004-2684

Attention: Amanda Riggs Conner
Senior Counsel – American Electric Power Service Corporation

Reference: Compliance Filing

Dear Ms. Conner:

On June 20, 2013, you filed on behalf of American Electric Power Service Corporation's (AEP) utility affiliate Ohio Power Company a compliance filing pursuant to the Commission's May 23, 2013 Order in Docket No. ER13-1164-000.[1] You state that AEP proposes revisions to PJM Interconnection, L.L.C.'s (PJM) Reliability Assurance Agreement (RAA), Schedule 8.1 Appendix-Ohio Power Company FRR Capacity Rate.[2]

Pursuant to the authority delegated to the Director, Division of Electric Power Regulation – East, under 18 C.F.R. §375.307, your submittal is accepted for filing, effective August 8, 2012, as requested.

The filing was noticed on June 20, 2013, with comments, interventions and protests due on or before July 11, 2013. Pursuant to Rule 214 (18 C.F.R. § 385.214

[1] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,164, at P 24 (2013).

[2] PJM, Reliability Assurance Agreement, Schedule 8.1 Appendix-Ohio Power FRR Capacity (Appendix) (0.1.0).

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(2012)), to the extent that any timely filed motions to intervene and any motion to intervene out-of-time were filed before the issuance date of this order, such interventions are granted. Granting late interventions at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

This acceptance for filing shall not be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation, or practice affecting such rate or service contained in your filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against PJM or Ohio Power Company.

This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

Sincerely,

Jignasa Gadani, Director
Division of Electric Power
Regulation – East

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)[1] to the PJM Interconnection, L.L.C. (PJM) Reliability Assurance Agreement (RAA).[2] 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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[1] PJM, Intra-PJM Tariffs, RAA, SCHEDULE 8.1 Appendix-Ohio Power FRR Capacity Ra (Appendix) (0.0.0).

[2] 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.[3] 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.[4] 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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[3] Alternative retail suppliers, or alternative LSEs, are known under Ohio state law as competitive retail electric service (CRES) providers.

[4] *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.[5] 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.[6]

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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[5] 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).

[6] *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);[7] and the Retail Energy Supply Association (RESA).[8] FirstEnergy Service Company (FirstEnergy);[9] 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,[10] 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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[7] Energy Users-Ohio is an association of large Ohio-based energy consumers.

[8] 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.

[9] On behalf of FirstEnergy Solutions Corp.

[10] 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.[11]

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.[12] 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.[13] 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.[14] 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.[15] 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.[16]

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.[17] 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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[11] Ohio Commission Comments at 2-5.

[12] 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).

[13] Exelon Comments at 2-3.

[14] RESA Protest at 8 (citing January 2011 Order, 134 FERC ¶ 61,039 at PP 8, 10).

[15] *Id.* at 9.

[16] *Id.* at 14.

[17] 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.[18]

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:[19]

> 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).~~

[18] 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.

[19] 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 Augusts 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.[20]

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.[21]

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.[22]

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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[20] PJM Answer at 2-3.

[21] AEP Ohio Answer at 7-8.

[22] 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.[23]

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

[23] *Id.* at 6-7.

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.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

134 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

American Electric Power Service Corporation Docket No. ER11-2183-000

ORDER REJECTING FORMULA RATE PROPOSAL

(Issued January 20, 2011)

1. On November 24, 2010, American Electric Power Service Corporation (AEP) filed on behalf of Columbus Southern Power Company (CSPC) and Ohio Power Company (OPC) (collectively, AEP Ohio Companies)[1] new rate schedules under Schedule 8.1 – Appendix to the PJM Interconnection, L.L.C. (PJM) Reliability Assurance Agreement (RAA) to collect their respective capacity costs for meeting the capacity obligation of the PJM Resource Procurement Model (RPM). As discussed below, the Commission will reject the proposal as unauthorized under the RAA.

I. Background

2. The RAA, a rate schedule on file with the Commission, contains an alternative method for meeting the RPM capacity obligation, the Fixed Resource Requirement (FRR) Alternative, which applies to entities that choose not to participate in the RPM auctions. The RAA requires an eligible load-serving entity (FRR Entity) that chooses the FRR Alternative to submit a capacity plan, for all load in the FRR service area, to meet the capacity requirement with specific capacity resources, as an alternative to participation in the RPM auction process. Section D.8 of Schedule 8.1 of the RAA provides:

[1] On October 18, 2010, CSPC and OPC filed with the Public Utilities of Ohio an application to merge the two companies, with OPC being the sole surviving company. AEP states that CSPC and OPC intend to file with FERC for authority to merge. AEP states that the merger transaction is expected to close in 2011.

> 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. 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.* (Emphasis added.)

3. Section D.8 of Schedule 8.1 of the RAA 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 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. (Emphasis added.)

II. The AEP Ohio Companies' Filing

4. The AEP Ohio Companies participate in the PJM capacity market under the FRR Alternative as FRR Entities. Since the start of the PJM RPM capacity market, the AEP Ohio Companies have been receiving capacity compensation from alternative retail LSEs[2] based on the RPM clearing prices in the unconstrained part of PJM. Under this mechanism, each retail LSE would pay the RPM clearing price for its proportionate share of the total capacity procured. The AEP Ohio Companies argue that the auction prices are not permitting them to fully recover their costs, and therefore they propose to change the basis for compensation for their FRR capacity obligations to cost-based recovery. More specifically, the AEP Ohio Companies seek Commission approval to change the basis of their capacity compensation from the PJM RPM clearing price to annually adjusting formulas that track actual capacity costs. The proposed rate schedules are formula rate templates under which the AEP Ohio Companies propose to calculate their respective capacity costs. The AEP Ohio Companies contend that the proposed formulas

[2] In Ohio, alternative retail LSEs are referred to as Competitive Retail Electric Suppliers.

are standard cost-of-service trackers. The AEP Ohio Companies propose to make these rate schedules effective on January 1, 2011. The AEP Ohio Companies also assert that Ohio had not established a state compensation mechanism.

III. Notice of Filing and Responsive Pleadings

5. Notice of the AEP Ohio Companies' filing was published in the *Federal Register*, 75 Fed. Reg. 76,725 (2010), with interventions and protests due on or before December 10, 2010. Timely motions to intervene were filed by FirstEnergy Service Company (FirstEnergy),[3] Industrial Energy Users-Ohio (IEU-Ohio), Direct Energy Business, L.L.C. (Direct Energy), Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation), American Municipal Power, Inc. (AMP), Public Utilities Commission of Ohio (Ohio Commission), Office of Ohio Consumer Counsel, DPL Energy Resources, Inc., Dayton Power and Light Company, Ohio Partners for Affordable Energy (Ohio Partners), Monitoring Analytics, LLC,[4] PSEG Companies,[5] Exelon Corporation, Duke Energy Ohio, Inc. DTE Energy Trading, Inc. (DTEET), AEP Retail Energy Partners LLC. (AEPREP), and Ohio Energy Group (OEG) filed motions to intervene out of time. OEG, IEU-Ohio, and FirstEnergy filed protests, and Direct Energy, Constellation, and the Ohio Commission filed comments in opposition to the AEP Ohio Companies' proposal. AMP filed comments seeking clarification. On December 17, 2010, the AEP Ohio Companies filed a response to the protests and comments.[6]

6. The Ohio Commission states that the state implicitly adopted the use of the RPM auction price to value capacity since the inception of AEP-Ohio's current standard service offer, and, on December 8, 2010, has now expressly adopted the use of the RPM auction price as its state compensation mechanism. In addition, the Ohio Commission states that it has started an investigation concerning the AEP Ohio Companies' capacity charges to Ohio's alternative retail providers.

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[3] On behalf of FirstEnergy Solutions Corp.

[4] Acting in its capacity as the Independent Market Monitor for PJM.

[5] Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

[6] Ohio Partners and IEU-Ohio filed an answer to the AEP Ohio Companies answer, and the AEP Ohio Companies filed a second response.

IV. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), 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 OEG, DTEET, and AEPREP. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the AEP Ohio Companies' answer because it has provided information that assisted us in our decision making process. We are not persuaded to accept the Ohio Partners and IEU-Ohio answer, or the AEP Ohio Companies second response and will, therefore, reject them.

V. Discussion

8. We reject the AEP Ohio Companies' filing. Section D.8 of Schedule 8.1 of the RAA provides that a "state compensation mechanism will prevail" in allocating capacity costs to retail LSEs. In this case, the Ohio Commission has adopted such a state mechanism and we therefore reject the AEP Ohio Companies' filing.

9. The AEP Ohio Companies recognized in their initial filing that the absence of a state mechanism was a prerequisite to their filing, stating "Ohio has not established a compensation mechanism for capacity sales."[7] It is uncontroverted that such a mechanism has now been adopted by the Ohio Commission, even if the parties disagree over whether such a mechanism existed on the date the AEP Ohio Companies submitted its filing.

10. The AEP Ohio Companies argue that the RAA expressly provides for making a section 205 filing to change the compensation mechanism. However, when read in context, the provision for making a section 205 filing applies only when no state compensation mechanism exists; the adverbial phrase in Section D.8 of Schedule 8.1 of the RAA, "in the absence of a state compensation mechanism," qualifies the remainder of that sentence and therefore conditions the right to make a section 205 filing.[8]

11. The AEP Ohio Companies further argue that interpreting the RAA only to provide them with the option to file for cost-based compensation in the absence of a state compensation mechanism would usurp the Commission's exclusive jurisdiction over

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[7] AEP Ohio Companies Petition at 3.

[8] 16 U.S.C. § 824d (2006).

wholesale rates, and would deprive the AEP Ohio Companies of their Federal Power Act (FPA) section 205 rights.[9] The AEP Ohio Companies suggest that the RAA should not be interpreted to prevent them from exercising their FPA section 205 rights. The AEP Ohio Companies note that *Atlantic City* indicates that utilities may, by contract, voluntarily give up some of their FPA section 205 rights, but contend that they did not expressly do so.

12. The AEP Ohio Companies, however, voluntarily signed the RAA,[10] and, therefore, in fact, they have voluntarily relinquished such rights under *Atlantic City*, and the AEP Ohio Companies made this filing pursuant to the PJM RAA. Since the PJM RAA does not permit AEP to change a state imposed allocation mechanism, and AEP is a signatory to the RAA and does not have the right to change the PJM RAA unilaterally through a section 205 filing, this section 205 filing is not the appropriate vehicle for challenging the justness and reasonableness of Section D.8 of Schedule 8.1 of the PJM RAA.[11]

13. Therefore, we find that, pursuant to the RAA, the AEP Ohio Companies are not permitted to submit their proposed formula rate, given the existence of a state compensation mechanism, and we will reject this filing.

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[9] AEP Ohio Companies Response at 7-8 (citing *Atlantic City Elec. Co. v. FERC*, 295 F. 3d 1, at 11 (D.C. Cir. 2002) (*Atlantic City*). *Atlantic City* dealt only with the section 205 filing rights for PJM-member, transmission-owner and provider utilities. In this proceeding, the AEP Ohio Companies are not filing in that capacity, but rather as distribution companies. In this context, *Atlantic City* is inapposite).

[10] The Commission approved a settlement agreement, which the AEP Ohio Companies signed, of the PJM RPM, which included the RAA and FRR Alternative. *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 75-78 (2006), *order on reh'g*, 119 FERC ¶ 61,318, *reh'g denied*, 121 FERC ¶ 61,173 (2007), *aff'd sub nom. Pub. Serv. Elec. & Gas Co. v. FERC* D.C. Circuit Case No. 07- 1336 (Mar. 17, 2009) (unpublished). *See also* PJM RAA Schedule 17.

[11] We need not, and do not address here whether the AEP Ohio Companies may challenge this provision of the RAA under section 206 of the FPA, 16 U.S.C. § 824e (2006).

The Commission orders:

The AEP Ohio Companies' formula rate proposal is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.