ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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I. INTRODUCTION

As demonstrated in Industrial Energy Users-Ohio's ("IEU-Ohio") Merit Brief, Ohio law does not provide the Public Utilities Commission of Ohio ("Commission") with authority to invent and apply a cost-based ratemaking methodology to increase the compensation AEP-Ohio[1] receives for wholesale generation capacity service. Ohio and federal law confine the Commission's jurisdiction to retail electric services. Ohio law also generally prohibits the Commission from regulating competitive services, such as generation capacity service. The Commission summarizes what it did in the proceeding below as: "[t]he Commission's task below was to determine a reasonable charge for adequately compensating AEP-Ohio for" its capacity costs, *i.e.* the cost of its "iron in the ground." Commission Third Merit Brief at 1-2. Thus, the Commission concedes that it is attempting to re-regulate the generation function.

In response to the Propositions of Law in IEU-Ohio's Merit Brief, the Commission and AEP-Ohio assert that the Commission has jurisdiction under R.C. Chapters 4905 and 4909 and assert that R.C. 4905.26 provides the Commission with an independent basis to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. Further, they assert, for the first time in their merit briefs, that the Commission has derived jurisdiction to invent and apply a cost-based ratemaking methodology based upon the Reliability Assurance Agreement ("RAA"), a federal tariff that is within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").

As discussed below in greater detail, the Commission's and AEP-Ohio's legal claims are without merit. State law does not authorize the Commission to invent and apply a cost-based

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[1] As used herein, AEP-Ohio refers to Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") on a merged basis. The merger of OP and CSP was initially authorized in 2011 and was reauthorized in March 2012.

ratemaking methodology to increase AEP-Ohio's compensation for a wholesale service. Additionally, the RAA does not and cannot provide the Commission with jurisdiction to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for any wholesale service. The Federal Power Act ("FPA")[2] creates a bright line regarding regulation of wholesale electricity prices and provides FERC with exclusive jurisdiction over wholesale electricity pricing. As two recent federal cases confirm, state utility commissions are preempted from increasing the total compensation that an electric generator can receive for wholesale capacity and energy services. *PPL Energyplus, LLC v. Nazarian*, Case No. 1:12-cv-01286-MJG at 84-86, 111-112 (D.MD Sept. 30, 2013) (2nd Supp. at 84-86, 111-112) (hereinafter "*PPL I*"); *PPL Energy Plus, LLC, et al., v. Robert M. Hanna, et al.*, Civ. Action No. 11-745 at 65 (D.N.J. Oct. 11, 2013) (hereinafter "*PPL II*") (2nd Supp. at 214); *see infra* at 22-24. In the PJM Interconnection, L.L.C. ("PJM")[3] region, which includes all of Ohio, FERC has approved, pursuant to the FPA, a market approach to setting a generator's compensation for wholesale electricity services and, therefore, these two federal cases concluded that Maryland's and New Jersey's authorization of compensation in excess of what was available in the PJM markets was unconstitutional under the doctrine of field preemption. *Id.* (2nd Supp. at 84-86, 214). The clear division of jurisdiction between wholesale and retail electric service pricing requires the Court to interpret Ohio law to avoid constitutional preemption problems and conclude that Ohio law does not provide the Commission with authority to establish prices for wholesale electricity services.

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[2] 16 U.S.C. § 824 (2nd Supp. at 217).

[3] PJM is a regional transmission organization ("RTO") that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. Information on PJM is available *via* the Internet at: http://www.pjm.com/home.aspx (last visited Oct. 20, 2013).

Finally, it is clear that the Commission has temporarily reversed its support of the market prices established by PJM's Reliability Pricing Model ("RPM") auction process ("RPM-Based Pricing") as AEP-Ohio's sole compensation for wholesale generation capacity service to advance AEP-Ohio's claim that it must secure above-market compensation to maintain its desired level of earnings. This temporary deviation from RPM-Based Pricing results in an unlawful and unreasonable authorization of transition revenue and a disregard of the mandate in Ohio law that requires AEP-Ohio's generation service business component to be on its own in the competitive market.

As demonstrated herein, the Court should grant IEU-Ohio's appeal and should direct the Commission to restore the lawful market-based pricing that was in place prior to the Commission's unlawful and unreasonable actions. Additionally, the Court should direct the Commission to issue such orders as necessary to eliminate AEP-Ohio's deferred above-market compensation for wholesale generation capacity service and reverse AEP-Ohio's authorization of accounting authority that allows AEP-Ohio to defer such above-market compensation for future collection. Finally, the Court should direct the Commission to order AEP-Ohio to refund the unlawful above-market charges for wholesale generation capacity service that have been in place since January 2013 or credit the excess collection against regulatory asset balances otherwise eligible for amortization and collection through retail rates and charges..

II. COMMISSION JURISDICTION

A. The Commission does not have jurisdiction to regulate wholesale generation capacity service; R.C. Chapters 4905, 4909, and 4928 explicitly limit the Commission's authority to the regulation of *retail* sales of electricity

As explained in IEU-Ohio's Proposition of Law II, the Commission's reliance on R.C. Chapters 4905 and 4909 to regulate wholesale generation capacity service is unlawful and unreasonable because those Chapters only apply to retail services. IEU-Ohio Merit Brief at 29-

31. The same limitation applies to R.C. Chapter 4928. R.C. Chapters 4905, 4909, and 4928 all apply to electric light companies as that term is defined in R.C. 4905.03. R.C 4905.03 specifies that the Commission's authority over electric light companies extends to those companies when they are "engaged in the business of supplying electricity for light, heat, or power purposes *to consumers* within this state." (emphasis added). Thus and by definition, R.C. Chapter 4905, 4909, and 4928 do not apply to wholesale services which involve sales for resale upstream of any sale to consumers in this state.

Neither the Commission nor AEP-Ohio addressed the preclusion of the Commission's regulation of wholesale electric services that flows from R.C. Chapters 4905, 4909, and 4928 and as a consequence of federal law. Instead, the Commission advances a theory that is devoid of any statutory or case law support, and would result in a violation of the Supremacy Clause of the United States Constitution. The Commission claims that it can review the reasonableness of any existing rate, including a wholesale rate, under R.C. 4905.26, and set a new rate if it finds that the existing rate is unreasonable. Commission Merit Brief at 9-15, 26-31.

Contrary to its prior position, and after it secured a significant above-market increase in compensation for wholesale generation capacity service from the Commission, AEP-Ohio's position on the Commission's jurisdiction has flip-flopped. AEP-Ohio now claims that the Commission has authority pursuant to R.C. 4905.26 over wholesale generation capacity service and that the Commission has the power to increase AEP-Ohio's compensation for such service so that AEP-Ohio can collect above-market compensation for wholesale capacity service. *Compare* AEP-Ohio Merit Brief at 19, 23-26, *with* AEP-Ohio Application for Rehearing at 3, 18-21 (Supp. at 345, 360-363) (Commission lacks jurisdiction to establish AEP-Ohio's compensation for wholesale capacity service under both Ohio and federal law), *and American*

Electric Power Service Corporation, FERC Docket ER11-2183-000, Section 205 Application (Nov. 24, 2010) (hereinafter "*Section 205 Application*"), Request for Rehearing of AEPSC at 13-14 (Feb. 22, 2011) (FERC has exclusive jurisdiction to regulate wholesale generation capacity service).[4]

The Commission's and AEP-Ohio's reliance on R.C. 4905.26 as a basis for the Commission's authority to regulate wholesale electric services and to authorize increases in compensation for such services is not supported by the key definitions governing the sections that they cite on brief. R.C. 4905.26 permits a public utility or the Commission to initiate a proceeding to review the justness and reasonableness of any rate or service provided by a public utility. R.C. 4905.02 provides "as used in this chapter, 'public utility' includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code." R.C. 4905.03 then provides a list of the types of public utilities subject to the Commission's jurisdiction under R.C. Chapter 4905:

> As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:
>
> ...
>
> (C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

R.C. 4905.03(C) specifically exempts RTOs, such as PJM, from the definition of an electric services company. Thus, the Commission's jurisdiction under R.C. 4905.26 to conduct investigations of public utilities' rates extends to electric light companies that are supplying

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[4] Available at: http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12569314 (last visited Oct. 22, 2013).

electricity to consumers, *i.e.* providing retail electric services. The Commission has no jurisdiction to adjust wholesale rates under R.C. 4905.26. R.C. Chapter 4909 and R.C. Chapter 4928 also use the same definition of public utility and electric light company as R.C. Chapter 4905. R.C. 4909.01(A)-(B) (2nd Appx. at 4); R.C. 4928.01(A)(7), (A)(9), & (A)(11) (Appx. at 495).[5] Thus, the Commission's jurisdiction under R.C. Chapters 4905, 4909, and 4928 is limited to regulating *retail* electric services.

Even assuming the Commission has jurisdiction under R.C. 4905.26 to set a rate for a wholesale electricity service, R.C. 4905.26 requires that the Commission find that the existing rate is unjust and unreasonable before it may set a new rate. As discussed herein, the Commission has not found the existing rate, RPM-Based Pricing, is unjust and unreasonable. Entry at 1-2 (Dec. 8, 2010) (Appx. at 182-183); Capacity Order[6] at 23 (Appx. at 67). Before this proceeding began, the Commission found that it had authorized an increase in AEP-Ohio's electric security plan ("ESP") rates based upon AEP-Ohio continuing to receive compensation for wholesale generation capacity service at RPM-Based Pricing. Entry at 1-2 (Dec. 8, 2010) (Appx. at 182-183). When this proceeding began, the Commission held that RPM-Based Pricing would dictate AEP-Ohio's compensation for wholesale generation capacity service during the pendency of its review. *Id.* (Appx. at 182-183). When the Commission issued the Capacity Order, the Commission found that RPM-Based Pricing was just and reasonable because it promotes competition and approved RPM-Based Pricing for determining the price at which competitive retail electric service ("CRES") providers must compensate AEP-Ohio for wholesale generation capacity service. Capacity Order at 23 (Appx. at 67). And, the Commission found

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[5] The Commission's jurisdiction under R.C. Chapter 4928 extends to an electric services company and electric utility, which are further defined with reference to R.C. 4905.03.

[6] Opinion and Order (July 2, 2012) (hereinafter "Capacity Order") (Appx. at 45-89).

RPM-Based Pricing would again control AEP-Ohio's compensation for wholesale generation capacity service beginning in 2015. Capacity Order at 24 (Appx. at 68). Thus, even if the Commission could use R.C. 4905.26 to set AEP-Ohio's compensation for wholesale generation capacity service, the threshold requirement that existing rates are unjust and unreasonable has not been satisfied.

In sum, neither the Commission nor AEP-Ohio address the retail service limits of any authority the Commission may have under R.C. 4905.26, which was discussed in IEU-Ohio's Proposition of Law II. IEU-Ohio Merit Brief at 29-31. Instead, they claim that the Commission can review the reasonableness of any existing rate and has jurisdiction to establish new just and reasonable rates regardless of whether the Commission has jurisdiction to establish the initial rate; again, disregarding that the Commission found that the existing rate, RPM-Based Pricing, was and remains just and reasonable. Because the Commission lacks jurisdiction under Ohio law to establish the price of a wholesale generation capacity service, the Capacity Case Decisions[7] are unlawful and unreasonable.

B. The Commission's only jurisdiction over the competitive generation service component, which includes capacity, is contained in R.C. Chapter 4928. That Chapter does not provide the Commission with jurisdiction to invent and apply a cost-based ratemaking methodology to provide AEP-Ohio with above-market compensation for wholesale generation capacity service

As demonstrated in IEU-Ohio's Proposition of Law I, the Commission's only authority over the generation service component is contained in R.C. Chapter 4928. IEU-Ohio Merit Brief at 19-29. That Chapter does not provide the Commission with authority to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale

[7] IEU-Ohio seeks a reversal of the March 7, 2012 Entry, May 30, 2012 Entry, July 2, 2012 Opinion and Order, October 17, 2012 Entry on Rehearing, December 12, 2012 Entry on Rehearing, and January 30, 2013 Entry on Rehearing issued in the proceeding below. Collectively, these decisions are referred to herein as the "Capacity Case Decisions."

generation capacity service. *Id.* at 19-29. R.C. 4928.05(A)(1) limits the Commission's ratemaking authority over the competitive generation service component to establishing the standard service offer ("SSO") for non-shopping customers pursuant to R.C. 4928.141 to 4928.144. *Id.* These Sections governing the SSO do not provide the Commission with any authority to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale capacity service.

Although the Commission concedes that it did not follow the requirements in R.C. Chapter 4928, the Commission and AEP-Ohio, instead, argue that the capacity service at issue is neither a retail electric service nor a competitive service and therefore not governed by R.C. Chapter 4928. Commission Merit Brief at 15-16; AEP-Ohio Merit Brief at 15-16. IEU-Ohio agrees with the Commission and AEP-Ohio that the capacity service at issue is wholesale; however, the Commission and AEP-Ohio incorrectly assert that the Commission can regulate wholesale generation capacity service.

Additionally, the Commission and AEP-Ohio claim that wholesale capacity is noncompetitive because only AEP-Ohio has committed Capacity Resources[8] to PJM associated with the load in AEP-Ohio's certified distribution service area. Commission Merit Brief at 16-18; AEP-Ohio Merit Brief at 14, 21-23.[9] (As discussed *infra* at 28-31, this assertion is factually

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[8] The RAA includes a definitional section which includes definitions of "Capacity Resources," "Fixed Resource Requirement Alternative or FRR Alternative," "FRR Capacity Plan," "FRR Entity," "FRR Service Area," "Load Serving Entity or LSE," "PJM Region," "Demand Response," and other terms having significance for purposes of the RAA are defined. FES Ex. 110A at 5-20 (Supp. at 6-21).

[9] AEP-Ohio also cites Commissioner Roberto's concurring and dissenting opinion in the Capacity Order for support that wholesale capacity service is noncompetitive. Commissioner Roberto's opinion, however, labels wholesale capacity service as a noncompetitive transmission service. The FPA provides that FERC has exclusive jurisdiction over transmission in interstate commerce. 16 U.S.C. § 824(b)(1) (2nd Supp. at 217). FERC has held that it has exclusive jurisdiction over the transmission component of a utility, such as AEP-Ohio, that provides

incorrect; the record demonstrates that AEP-Ohio did not commit Capacity Resources to PJM and also demonstrates that the Capacity Resources that were committed were not based upon the load in AEP-Ohio's distribution service area). From this claim that the service is noncompetitive, they assert that the Commission has authority to increase AEP-Ohio's compensation for wholesale capacity service based on the Commission's invented and applied cost-based ratemaking methodology. Commission Merit Brief at 25-30.

As demonstrated herein, however, the Commission does not have authority over wholesale electricity services and the Commission's only authority over the competitive generation service component is confined to R.C. Chapter 4928.

1. The generation service component, which includes capacity, is competitive

Prior to Ohio's restructuring of its regulatory framework in 1999, electric generation, transmission and distribution functions were provided to retail consumers on a bundled basis by an electric light company having the certified service area in which the consumers were located. In Amended Substitute Senate Bill 3 ("SB 3"), the General Assembly declared the generation service component to be a competitive retail electric service and required the generation, transmission and distribution service components to be unbundled so that retail consumers could choose their supplier of competitive generation service and, rather than be captive to a regulated

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unbundled transmission service, regardless of whether the transmission is considered wholesale or retail. *New York v. F.E.R.C.*, 535 U.S. 1, ¶ 19 (2002) ("Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid."). Thus, AEP-Ohio's reliance on Commissioner Roberto's concurring and dissenting opinion is baseless since Commissioner Roberto's opinion misstates the nature of the service and the Commission's ability to regulate transmission service.

monopoly, obtain the benefits of a competitive market. R.C. 4928.03 (Appx. at 504); R.C. 4928.05(A)(1) (Appx. at 506).[10]

The Commission concedes that capacity is part of the generation service component: "[t]he Commission does not dispute that capacity is a component of generation necessary to provide competitive retail electric service to customers." Commission Merit Brief at 17. The Commission has previously held that if a service is a necessary component of the competitive generation function, the Commission is without authority to regulate that service unless the narrow exceptions in R.C. 4928.05 apply. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case Nos. 10-1454-EL-RDR, *et al.*, Finding and Order at 16-17 (Jan. 11, 2012).[11] Nonetheless, the Commission issued the unlawful and unreasonable Capacity Case Decisions and invented and applied a cost-based ratemaking methodology increasing AEP-Ohio's compensation for wholesale generation capacity service. As described below, the Commission's concession in its Merit Brief is correct and therefore the command in R.C. Chapter 4928 prohibiting the Commission from regulating the generation service component renders the Capacity Case Decisions unlawful and unreasonable.

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[10] The distribution function remained a noncompetitive function subject to the Commission's traditional cost-based ratemaking authority in R.C. Chapter 4909. R.C. 4928.05(A)(2) (Appx. at 506). FERC has exclusive jurisdiction over the unbundled transmission component. *New York v. F.E.R.C.*, 535 U.S. 1, 16-20 (2002).

[11] Recognizing that the Court had previously found the construction and maintenance of a generating facility to be a competitive service, the Commission held: "Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the closure of an electric generating facility." The Commission concluded, therefore, AEP-Ohio's request was beyond its jurisdiction. Available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12A11B35831F43601 (last visited Oct. 22, 2013).

R.C. 4928.03 declares the generation service component as competitive: "[b]eginning on the starting date of competitive retail electric service, retail electric generation . . . [is a] competitive retail electric service[]." The General Assembly defined retail electric service to encompass all services from the point of generation to the point of consumption:

> "Retail electric service" means 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.* For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

R.C. 4928.01(A)(27) (Appx. at 497) (emphasis added). These definitions provided by the General Assembly make clear that for purposes of R.C. Chapter 4928, "retail electric service" includes all services from the point of generation to the point of consumption, and declares the generation service component as competitive. Further, the Commission has no authority to regulate the competitive generation service component outside of setting the default SSO rates for non-shopping customers. R.C. 4928.05(A)(1) (Appx. at 506); R.C. 4928.141 to 4928.144 (Appx. at 511-519, 506). R.C. 4928.01(A)(27) and R.C. 4928.03 combine to provide that the Commission does not have any ratemaking authority over the generation service component outside of establishing SSO rates (and, as discussed above, other portions of R.C. Chapter 4928 make clear that the Commission has no jurisdiction over wholesale services).

Further, capacity is specifically listed as part of the competitive generation service component. R.C. 4928.141 provides that an electric distribution utility ("EDU") shall provide an offering "of all *competitive retail electric services* necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." (Emphasis added). That Section also provides the SSO may take the form of either an ESP or a market rate offer

("MRO"). R.C. 4928.143 governs the ESP option and provides that an ESP may include "[a]utomatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy ***and capacity***." R.C. 4928.143(B)(2)(a) (Appx. at 515) (emphasis added). Thus, the General Assembly included capacity as a part of the competitive generation service component.[12]

Finally, both AEP-Ohio and the Commission previously treated capacity as a competitive retail electric service. As mentioned above, the General Assembly restructured the regulation of the electric utility industry in 1999. SB 3 provided the incumbent EDUs the opportunity to request transition revenue. R.C. 4928.39 provides the specific criteria to determine the incumbent EDU's total allowable transition revenue: "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.

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[12] 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.* ("AEP-Ohio's ESP proceeding"), the Commission also treated capacity as a competitive retail electric service when it authorized collection of the above-market portion of the Commission's $188.88/megawatt-day ("MW-day") price from retail customers through a nonbypassable rider authorized under R.C. 4928.144. *AEP-Ohio's ESP proceeding*, Opinion and Order at 52 (Aug. 8, 2012), available at http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138. That Section only applies to competitive retail electric services. Further, in its merit brief regarding the appeal of AEP-Ohio's ESP proceeding, the Commission claims that capacity costs can be recovered in an ESP. *The Kroger Co. v. Pub. Util. Comm.*, Case No 2013-521, Commission Merit Brief at 27 (Oct. 21, 2013).

(D) The utility would otherwise be entitled an opportunity to recover the costs."

When AEP-Ohio submitted its electric transition plan ("ETP") as required by SB 3, AEP-Ohio included a request for transition revenue. AEP-Ohio Merit Brief at 14-15. AEP-Ohio's transition revenue claim calculation included wholesale capacity revenue it expected to lose to retail competition. IEU-Ohio Merit Brief at 35-38; IEU-Ohio Ex. 101 at 8-9, 11-13, 18 (Supp. at 146-147, 149-151, 156); IEU-Ohio Ex. 102A at 16-20 (Supp. at 186-190). Thus, AEP-Ohio treated wholesale capacity revenue as part of the competitive generation service component.

There is not a legitimate argument that capacity is not a part of the competitive generation service component. Because the generation service component has been declared competitive, the Commission has no authority to regulate competitive generation services except in the instance of establishing the default SSO rates for non-shopping customers. Moreover, there is no authority under R.C. Chapter 4928 to invent and apply a ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. Accordingly, the Capacity Case Decisions are unlawful and unreasonable.

C. The Commission no longer has jurisdiction to authorize transition revenue or its equivalent

As demonstrated in IEU-Ohio's Proposition of Law V.1, R.C. 4928.38 provides a jurisdictional bar to the Commission's authorization of any new transition revenue for an EDU. IEU-Ohio Merit Brief at 35-38. Under Ohio law, an EDU was required to request transition revenue as part of its ETP application that was required to be filed in 1999. R.C. 4928.31 (Appx. at 523); R.C. 4928.39 (Appx. at 527). If such a request was made, the Commission was directed to determine the total allowable amount of transition revenue. R.C. 4928.39 (Appx. at 527). Ohio law also limited the timeframe in which the Commission could authorize the collection of

any allowable transition revenue; that timeframe was confined to the market development period ("MDP") which could end no later than December 31, 2005. R.C. 4928.38 (Appx. at 526); R.C. 4928.40 (2nd Appx. at 5).[13] Following the end of each EDU's MDP, each EDU "shall be fully on its own in the competitive market." R.C. 4928.38 (Appx. at 526). Further, the Commission must exclude any transition revenue from the SSO. R.C. 4928.141 (Appx. at 511). As admitted by AEP-Ohio, the timeframe to collect transition revenue has passed: EDUs "were given a temporary opportunity to recover stranded generation investments during a transition period [and] [t]hat transition period is over."[14] Thus, the Commission is barred from authorizing the collection of transition revenue or its equivalent.

In response to IEU-Ohio's Proposition of Law V.1, the Commission and AEP-Ohio claim that the above-market compensation that the Commission awarded AEP-Ohio is not transition revenue because AEP-Ohio did not request transition revenue and because the above-market compensation is not allocable to the retail electric generation function. Commission Merit Brief at 34-35; AEP-Ohio Merit Brief at 14-16; *see also* Entry on Rehearing at 19-20, 56-57 (Oct. 17, 2012) (Appx. at 108-109, 145-146). The Commission also invents its own definition of transition revenue that is inconsistent with the definition provided in R.C. 4928.38 and then claims that wholesale capacity service does not fit within its invented definition. Commission Merit Brief at 34. As discussed below, these arguments are without merit.

The Commission first claims that the proceeding below has nothing to do with transition revenue because AEP-Ohio never sought transition revenue either as part of the ETP process or in this case. The Commission is factually incorrect. As AEP-Ohio concedes in its Merit Brief,

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[13] If a portion of the authorized transition revenue was attributable to generation-related regulatory assets, that portion of the transition revenue recovery had to end no later than December 10, 2010. R.C. 4928.39 (Appx. at 527); R.C. 4928.40 (2nd Appx. at 5).

[14] IEU-Ohio Ex. 101 at 13 (Supp. at 151).

AEP-Ohio sought transition revenue as part of the ETP case. AEP-Ohio Merit Brief at 14-15. In the stipulation in AEP-Ohio's ETP case, AEP-Ohio sought and received approval of over $700 million of transition revenue for regulatory assets and agreed to not "impose any lost revenue charges (generation transition charges (GTC)) on any switching customer." IEU-Ohio Ex. 101 at 10-11 (Supp. at 148-149); *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Opinion and Order at 11 (Sept. 28, 2000).[15] If the premise of the Commission's grant of transition revenue now is that AEP-Ohio did not previously seek or recover transition revenue, then the premise is patently wrong.

Further, the mere fact that neither the Commission nor AEP-Ohio labeled AEP-Ohio's above-market compensation for wholesale capacity service as transition revenue has no bearing on whether the above-market compensation amounts to transition revenue or its equivalent. As the record demonstrates, AEP-Ohio's request for above-market compensation was calculated in the same manner and contains the same inputs and assumptions as its transition revenue claim in its ETP case.[16] Rather than respond to this evidence, the Commission and AEP-Ohio decide to simply attach a different label to the charge. Whether calculated as part of an ETP case or later, the Commission's invented and applied cost-based ratemaking methodology still results in above-market compensation for competitive wholesale generation capacity service. By

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[15] Available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=YZE52O@NG17PZP8X (last visited Oct. 22, 2013).

[16] AEP-Ohio's calculation of transition revenue in its ETP application and the Commission's invented and applied cost-based ratemaking methodology in this proceeding were both based upon AEP-Ohio's total net book value of AEP-Ohio's generating assets and both included assumptions on the generation-related revenue that AEP-Ohio would be able to receive in the electric market (both wholesale and retail). IEU-Ohio Ex. 101 at 8-9, 11-13, 18 (Supp. at 146-147, 149-151, 156); *see also* IEU-Ohio Merit Brief at 35-38.

definition, this above-market revenue is "unrecoverable in a competitive market." *See* R.C. 4928.39 (Appx. at 527).

Next, the Commission and AEP-Ohio claim that AEP-Ohio's above-market compensation for wholesale capacity service does not amount to transition revenue or its equivalent because it is not allocable to the retail electric generation function: "The capacity charges established below are not made on retail customers, they are imposed on competitive suppliers." Commission Merit Brief at 35; *see also* AEP-Ohio Merit Brief at 15. Like their assertion that the above-market price does not afford AEP-Ohio with transition revenue, the Commission and AEP-Ohio ask the Court to ignore what the Commission actually ordered. After the Commission applied its invented cost-based ratemaking methodology and found the price for capacity would be $188.88/MW-day, it authorized AEP-Ohio to collect the market-based portion, *i.e.* RPM-Based Pricing, from CRES providers and authorized accounting changes that allowed AEP-Ohio to defer for future collection the above-market portion. The Commission then authorized the collection of the above-market portion from retail customers through non-bypassable charges. *AEP-Ohio's ESP proceeding,* Opinion and Order at 36, 51-52 (Aug. 8, 2012).[17] The Commission has allocated to retail customers the responsibility to pay the above-market portion of the $188.88/MW-day rate. The claim that the above-market portion of the $188.88/MW-day charge that is collected from retail customers is not transition revenue because it is not allocable to retail customers is complete nonsense.

Finally, the Commission asserts that its invented and applied cost-based ratemaking methodology resulting in the $188.88/MW-day price does not qualify as transition revenue under

[17] Available at: http://dis.puc.state.oh.us/TiffToPDf/A1001001A12H08B40046F08138.pdf (last visited Oct. 22, 2013).

its invented definition of transition revenue. Commission Merit Brief at 34.[18] The Commission's invented definition and resulting analysis is without merit because it conflicts with the statutory definition of transition revenue. As noted above, R.C. 4928.39 defines transition revenue as:

> 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.

The Commission's definition adds the word "for electricity," and inserts the phrase "to aid the EDU to move to a competitive *energy* market." Commission Merit Brief at 34 (emphasis added). The Commission's Brief then claims these two elements are not met in this case. The Commission's invented definition seems to imply that a transition revenue analysis is only limited to energy costs. R.C. 4928.39(B), however, addresses costs that "are legitimate, net, verifiable, and directly assignable or allocable to retail electric *generation service* . . . ." Generation service includes more than just energy. *See, e.g.,* Ohio Adm.Code 4901:1-21-01(HH) (2nd Appx. at 3) ("retail electric generation service" encompasses all "*services* performed by retail electric generation providers, power marketers, and power brokers . . . .") (emphasis added); R.C. 4928.143(B)(2) (Appx. at 515). Thus, a transition revenue analysis is not limited to only energy costs as the Commission's analysis seems to imply.

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[18] The Commission's invented definition reads: "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."

In sum, R.C. 4928.38 provides that the Commission shall not authorize any transition revenue or any equivalent revenue following the one-and-done opportunity that existed in the ETP process. As the record demonstrates, the Commission's invented and applied cost-based ratemaking methodology produces transition revenue or its equivalent and, therefore, the Capacity Case Decisions are unlawful and unreasonable. IEU-Ohio's witnesses testified that AEP-Ohio's cost-based formula that the Commission adopted and then modified was based upon the exact same inputs and formulas as AEP-Ohio's own transition revenue calculation and thus amounts to transition revenue. IEU-Ohio Ex. 101 at 4-20 (Supp. at 142-158); IEU-Ohio Ex. 102A at 16-20 (Supp. at 186-190). The Commission and AEP-Ohio ignore this testimony and instead make up their own definitions and incorrectly assert that AEP-Ohio's above-market compensation is not allocable to retail customers. The arguments of the Commission and AEP-Ohio fail to address the fundamental legal basis that prevents the Commission from authorizing above-market transition revenue. Because the Commission lacks jurisdiction to authorize transition revenue, the Capacity Case Decisions are unlawful and unreasonable.

D. The RAA does not provide the Commission any authority to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale capacity service. Both Ohio law and federal law recognize that there is a bright line regarding establishing prices for wholesale electricity services; FERC has such authority to the exclusion of the states.

As discussed in IEU-Ohio's Proposition of Law I.3, the RAA does not provide the Commission with jurisdiction to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. IEU-Ohio Merit Brief at 28-29. The RAA is a FERC-approved tariff, governed by the laws of Delaware between and among the signatories to the RAA. FES Ex. 110A at 21, 69 (Supp. at 22, 70). The RAA does not and cannot provide the Commission with jurisdiction to invent and apply a cost-based

ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. The RAA merely holds that if a state compensation mechanism exists, the pricing established by that mechanism will prevail over the default compensation tied to RPM-Based Pricing. FES Ex. 110A at 111 (Supp. at 112).

In another opportunistic shift of its legal position, AEP-Ohio argues that the Commission derives authority to invent and apply a cost-based ratemaking methodology to increase the EDU's compensation for wholesale capacity service. AEP-Ohio previously argued to both the Commission and FERC that the RAA did not provide the Commission with any independent jurisdiction.[19] Now that AEP-Ohio has secured authority to bill and collect significant above-market compensation, however, it has changed its position and agrees with the Commission that the RAA provides the Commission with jurisdiction. AEP-Ohio Merit Brief at 11-13; *see also* Commission Merit Brief at 18-23.

This position is a new one for the Commission as well, as it did not rely on the RAA as a basis to assert its jurisdiction to invent and apply a cost-based ratemaking methodology in the case below. The Commission in its Merit Brief, however, asserts that the Commission has jurisdiction "[b]ased on R.C. Chapter 4905 *in combination with the Commission exercising an option FERC authorized in the RAA* . . . " and that it has in fact "exercised authority the FERC has recognized through the RAA." Commission Merit Brief at 18-19 (emphasis added). In its orders below the Commission held its exercise of jurisdiction under R.C. Chapter 4905 was

[19] Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 21 (Jan. 7, 2011) (Supp. at 363); *American Electric Power Service Corporation*, Docket No. ER11-2183-001, Request for Rehearing of American Electric Power Service Corporation at 11-14 (Feb. 22, 2011), available at: http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12569314 (last visited Oct. 22, 2013).

"consistent with the governing section of the RAA." Capacity Order at 13 (Appx. at 57); *see also* Entry on Rehearing at 9-10 (Oct. 17, 2012) (Appx. at 98-99).

Further, the Commission's new-found basis for jurisdiction is not supported by the terms of the RAA. At issue is the authority of the Commission to increase the compensation of AEP-Ohio for wholesale generation capacity service. The relevant language in the RAA relied upon by the Commission to support its expansion of its own jurisdiction states "[i]n 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." FES Ex. 110A at 111 (Supp. at 112). (An alternative retail load serving entity ("LSE") is referred to as a CRES provider under Ohio law.) This plain language does not grant any state jurisdiction to regulate wholesale generation capacity service.

Moreover, when the RAA is read in the context of state and federal law that recognizes a bright line in the regulation of wholesale electricity services, it is even more apparent that the RAA does not and cannot expand the Commission's jurisdiction to provide the Commission with authority to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. The FPA provides FERC with exclusive jurisdiction to regulate "the sale of electric energy at wholesale." 16 U.S.C. § 824(b)(1) (2nd Supp. at 217). "Sale of electric energy at wholesale" is defined as "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d) (2nd Supp. at 217). Wholesale capacity service is included within the definition of electric energy at wholesale. *PPL I* at 81 (2nd Supp. at 81) ("Wholesale electric energy rates include energy prices as well as capacity prices . . . .") (*citing*

Miss. Indus. v. F.E.R.C., 808 F.2d 1525, 1541 (D.C. Cir. 1987); *Entergy La., Inc. v. La. Pub. Serv. Comm'n.*, 539 U.S. 39, 43, n.1 (2003)).

Because FERC has exclusive jurisdiction over wholesale electricity services, the Commission may not set the price for wholesale generation capacity service. "A State must [] give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). "FERC has exclusive authority to determine the reasonableness of wholesale rates." *Id.* at 371. In passing the FPA, Congress preempted states from regulating in the field of wholesale sales of electricity. *PPL I* at 83 (2nd Supp. at 83). Field preemption requires the state to "yield to the force of federal law . . . *notwithstanding that . . . it may fit neatly within or alongside the federal scheme.*" *Id.* at 86 (*quoting French v. Pan Am Exp., Inc.*, 869 F.2d 1, 6 (1st Cir. 1989)) (emphasis added). "The preemptive effect of the FPA [on states] does not depend on whether FERC intended to preempt the actions of the [states] . . . ." *PPL I* at 83, n. 46 (2nd Supp. at 83) (*citing N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 824 (8th Cir. 2004)).

This Court has also recognized the bright line established by the FPA over wholesale electricity services. *Cleveland Electric Illuminating Co. v. Public Utilities Commission of Ohio*, 76 Ohio St.3d 521, 525, 1996-Ohio-298. And, the Ohio Revised Code follows this bright line and specifically limits the Commission's jurisdiction to retail electric services. *See, supra* at Section II.A (R.C. 4905.03 limits the Commission's jurisdiction in R.C. Chapters 4905, 4909, and 4928 to regulating retail electric services, *i.e.* "electricity delivered to consumers in this state").

Two recent federal cases also confirm this bright line and conclude that states within the PJM region cannot increase the compensation an electric generator receives for wholesale generation capacity service because FERC has exclusive jurisdiction over wholesale electric service price setting. *PPL I* at 85 (2nd Supp. at 85); *PPL II* at 65 (2nd Supp. at 214). In *PPL I*, the United States District Court for the District of Maryland determined that the actions of the Maryland Commission approving a compensation structure which permitted a generator to recover revenue in excess of the RPM-Based Price were preempted under the Supremacy Clause because the Maryland Commission's pricing of wholesale capacity and energy sales invades a field occupied exclusively by FERC under the FPA. *PPL I* at 85 (2nd Supp. at 85).

> While Maryland may retain traditional state authority to regulate the development, location, and type of power plants within its borders, the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices under, *inter alia*, the Supremacy Clause and the field preemption doctrine. Based on this principle, Maryland cannot secure the development of a new power plant by regulating in such a manner as to intrude into the federal field of wholesale electric energy and capacity price-setting.

Id. at 85-86 (2nd Supp. at 85-86). The intention of the Maryland Commission to fill a potential shortfall in capacity resources did not justify the Commission's actions. "Where a state action falls within a field Congress intended the federal government alone to occupy, the good intentions and importance of the state's objectives are immaterial to the field preemption analysis." *Id.* at 86 (2nd Supp. at 86). The critical fact was whether the state order set the total wholesale compensation received by the generator. *Id.* at 87 (2nd Supp. at 87).

Based on the terms of the contract that allowed recovery of cost-based total compensation, the *PPL I* Court determined that the Maryland Commission's order set a price for wholesale capacity and energy service. *Id.* at 88-93 (2nd Supp. at 88-93). Having found that the Maryland Commission had set a price for wholesale capacity and energy service, the *PPL I*

Court concluded that the Maryland Commission's actions were preempted: "[U]nder field preemption principles, the [Maryland Commission] is impotent to take regulatory action to establish the price for wholesale energy and capacity sales." *Id.* at 93 (2nd Supp. at 93). FERC has exclusive domain in that field and has fixed the price for wholesale energy and capacity sales in the PJM Markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM." *Id.* Further, the *PPL I* Court stated:

> Because states have no authority, either traditional or otherwise, to set wholesale rates, the compensation received by [the generator] for its wholesale energy and capacity sales is exclusively subject to the regulation of FERC. While there exist legitimate ways in which states may secure the development of generation facilities, *states may not do so by dictating the ultimate price received by the generation facility for its actual wholesale energy and capacity sales in the PJM Markets without running afoul of the Supremacy Clause*.

Id. at 110-111 (2nd Supp. at 110-111) (emphasis added).

In *PPL II*, the United States District Court for the District of New Jersey also found that a New Jersey statute and related state utility commission actions were in violation of the Supremacy Clause because they authorized new generators to receive compensation in excess of the compensation determined in the PJM markets. Like Ohio and Maryland, the New Jersey legislature enacted legislation restructuring the retail electric generation business and its regulation in 1999. *PPL II* at 19 (2nd Supp. at 168). The legislation required New Jersey electric distribution companies to divest their generation assets and permitted retail customers to choose a generation supplier. *Id.* at 19-22 (2nd Supp. at 168-171).

In response to the concerns regarding sufficient capacity resources, the New Jersey legislature enacted the Long-Term Capacity Pilot Project Act in 2011. *Id.* at 32 (2nd Supp. at 181). An express purpose of that law and the contracts approved under the law was to provide a transaction structure that would result in new power plant construction in the PJM region that

would benefit New Jersey. *Id.* (2nd Supp. at 181). To affect that purpose, the law required New Jersey electric distribution companies to enter into long-term contracts with eligible generators selected through a competitive bidding process and pay the generators the difference between RPM-Based Pricing and the "actual development costs" of the generator. *Id.* at 33 (2nd Supp. at 182). (The approved contract for one generator required above-market payments to the generator for fifteen years.) *Id.* at 39 (2nd Supp. at 188).

Following analysis similar to that in *PPL I*, the *PPL II* Court determined that the New Jersey law was preempted under field preemption because the New Jersey law supplants the FPA. *Id.* at 60 (2nd Supp. at 209). To support that finding, the *PPL II* Court identified various terms of the contracts adopted under the law that relied on RPM terminology and related specifically to the determination of a wholesale capacity price. *Id.* at 54-55 (2nd Supp. at 203-204). The *PPL II* Court then determined that the field of wholesale electricity pricing was a field within the exclusive authority of FERC and that the New Jersey law and the contracts approved under the law sought to supplant the FPA by establishing the price that new generators would receive for their sales of wholesale capacity. *Id.* at 58-60 (2nd Supp. at 207-209). Accordingly, the *PPL II* Court held that the New Jersey law was preempted. *Id.* at 60 (2nd Supp. at 209).

Based on *PPL I* and *PPL II*, the Commission is without jurisdiction to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. Establishing a rate for wholesale generation capacity service is subject to FERC's exclusive jurisdiction. The RAA, by its terms, does not provide the Commission authority to exercise jurisdiction. The Commission itself, until its Merit Brief, never claimed otherwise. Moreover, the Commission's assertion in the Capacity Order that it

was setting a rate "consistent" with the RAA does not provide the Commission any legal authority to invade a field subject to FERC's exclusive jurisdiction.

In conclusion, the RAA does not provide the Commission with any jurisdiction to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. Nor could the RAA; as Ohio and federal law recognize, there is a bright line prohibiting states from setting wholesale electricity rates. Accordingly, the Capacity Case Decisions are unlawful and unreasonable.

III. FERC'S MAY 23RD ORDER[20] DOES NOT PREEMPT THIS COURT'S REVIEW OF THE ABOVE-MARKET RETAIL CHARGES AUTHORIZED BY THE COMMISSION

In IEU-Ohio's Proposition of Law I.3, IEU-Ohio demonstrates that the RAA did not provide the Commission with any jurisdiction to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service. In IEU-Ohio's Proposition of Law III, IEU-Ohio demonstrates that the Commission had no authority to determine contractual rights of the parties to the RAA. As the Commission correctly stated, FERC recently reviewed and approved the "*wholesale* component [RPM-Based Pricing]. The remaining piece to be reviewed in this appeal is the *retail* component." Commission Merit Brief at 21 (emphasis added).

As part of its response, the Commission adopts arguments made by AEP-Ohio in its July 16, 2013 Motion to Dismiss, which claimed that review of IEU-Ohio's Propositions of Law I.3 and III have been preempted by FERC. Commission Merit Brief at 22-23. AEP-Ohio also

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[20] *PJM Interconnection, L.L.C., et al.*, FERC Docket No. ER13-1164-000, Order Accepting Appendix to Reliability Assurance Agreement Subject to a Compliance Filing (May 23, 2013) (hereinafter "FERC's May 23rd Order") (2nd Supp. at 227).

repeats the argument it presented in its Motion to Dismiss. AEP-Ohio Merit Brief at 9-11. As discussed below, their frivolous preemption claim is without merit.

To support their preemption claim, the Commission and AEP-Ohio assert that FERC signed off on the Commission's invented and applied cost-based ratemaking methodology and the resulting $188.88/MW-day rate. Specifically, the Commission and AEP-Ohio claim that FERC found that the $188.88/MW-day rate was consistent with the RAA. That was simply not the case. FERC approved an appendix to the RAA, as ***voluntarily*** revised by American Electric Power Service Corp. ("AEPSC")[21] who filed the appendix on behalf of AEP-Ohio (the "voluntarily-revised RAA appendix"). The voluntarily-revised RAA appendix recognized that AEP-Ohio would be compensated for load used by CRES providers at the RPM-Based Price.

In its initial filing, AEPSC sought a finding from FERC that included an endorsement of the Commission's invented and applied cost-based ratemaking methodology and the resulting $188.88/MW-day price. FERC's May 23rd Order at ¶ 6 (2nd Supp. at 232). In response, IEU-Ohio, along with FirstEnergy Service Co. ("FirstEnergy"), Exelon Corp. ("Exelon"), the Retail Energy Supply Association ("RESA"), and the Office of Ohio Consumers' Counsel ("OCC") filed protests. FERC's May 23rd Order at ¶ 10 (2nd Supp. at 230). IEU-Ohio's Protest asserted that FERC could not address the above-market compensation for generation capacity service that the Commission authorized AEP-Ohio to collect from *retail* customers. *Id.* at ¶ 14 (2nd Supp. at 232). Taking a position similar to that of IEU-Ohio, FirstEnergy proposed a revised RAA appendix that removed reference to the Commission's $188.88/MW-day price and confirmed that the wholesale compensation for generation capacity service would continue to be set pursuant to the RPM-Based Pricing method.

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[21] AEPSC is an affiliate of AEP-Ohio and is the entity that generally makes filings at FERC on behalf of the operating companies, *i.e.* LSEs that operate within PJM.

In response to FirstEnergy's Protest, ***AEP-Ohio agreed to*** "FirstEnergy's proposed modifications and offer[ed] to submit a compliance filing to reflect these edits," with one exception; it disagreed with FirstEnergy's proposed modification to the effective date of August 8, 2012.[22] FERC approved the voluntarily-revised RAA appendix with AEP-Ohio's proposed effective date.[23] The voluntarily-revised RAA appendix reads as follows:

> The Public Utilities Commission of Ohio (PUCO) in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a 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 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.[24]

As modified, the voluntarily-revised RAA appendix approved by FERC confirms that the RPM-Based Pricing method alone is the compensation that AEP-Ohio is authorized to receive for the provision of wholesale generation capacity service. In approving the voluntarily-revised RAA appendix, FERC did not endorse the Commission's invented cost-based ratemaking methodology, FERC did not approve AEP-Ohio's total wholesale generation capacity service compensation of $188.88/MW-day, and FERC did not address any portion of the wholesale generation capacity service compensation that the Commission authorized AEP-Ohio to collect from ***retail*** customers. In other words, FERC's approval of the voluntarily-revised RAA

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[22] *Id.* at ¶ 20 (2nd Supp. at 233).

[23] *Id.* at ¶ 24 (2nd Supp. at 234).

[24] RAA at 129 (page 130 of the pdf), available at: http://pjm.com/~/media/documents/agreements/raa.ashx (last visited Oct. 22, 2013).

appendix does not impinge on this Court's ability or responsibility to reach the State law questions raised by IEU-Ohio's appeal. Rather, FERC's approval of the voluntarily-revised RAA appendix and the continuing use of RPM-Based Pricing are completely consistent with the position advanced by IEU-Ohio in this appeal.

IV. THE COMMISSION'S INVENTED AND APPLIED COST-BASED RATEMAKING METHODOLOGY IS NEITHER CONSISTENT WITH THE RAA NOR OHIO'S RATEMAKING STATUTES

Even if it were assumed that the Commission has authority over wholesale generation capacity service, the Commission's invented and applied cost-based ratemaking methodology is consistent with neither the RAA nor Ohio law. As described below, the Commission's actions are unlawful and unreasonable.

A. The Commission's invented and applied cost-based ratemaking methodology is not consistent with the RAA

As discussed above and demonstrated in IEU-Ohio's Propositions of Law I, II, IV, and V, the Commission lacks authority under state law and, as demonstrated in IEU-Ohio's Propositions of Law I.3 and III, lacks authority under the RAA to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale capacity service. The Commission and AEP-Ohio incorrectly respond that the Commission has jurisdiction under both state law and the RAA and further asserts that this exercise of jurisdiction is "consistent with the RAA." As discussed below, the Commission's actions are not "consistent" with the RAA.

The applicable section of the RAA, Schedule 8.1, Section D.8, provides:

> 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 **LSE**s. 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 [RPM-Based Pricing], 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.

FES Ex. 110A at 111 (emphasis added) (Supp. at 112). If it is assumed for purposes of argument that the Commission could make determinations regarding the rights and obligations of parties to the RAA, the plain meaning of the above language makes it applicable, if at all, only to an FRR Entity and to the FRR Entity's Capacity Plan. As the evidence in this proceeding demonstrates, and as admitted by AEP-Ohio, AEP-Ohio is not an FRR Entity. Rather, AEPSC is the FRR Entity as agent for the aggregated load of the combined AEP operating companies (including AEP-Ohio) known as AEP East. Tr. Vol. II at 436-437 (Supp. at 750-751); Tr. Vol. XI at 2533-2534 (Supp. at 769-770). AEP-Ohio also failed to identify or introduce the FRR Capacity Plan, which details the actual Capacity Resources committed to PJM to fulfill the FRR Entity's capacity obligation to PJM. Additionally, AEP-Ohio witness Nelson, as well as other AEP-Ohio and intervenor witnesses, testified that the Demand Response capability of AEP-Ohio's retail customers can be used as Capacity Resources to satisfy the capacity obligation of the FRR Entity in addition to the undisclosed generation assets included in the FRR Capacity Plan. *See, e.g.*, Tr. Vol. XI at 2531 (Supp. at 767). Again, AEP-Ohio did not introduce the FRR Capacity Plan, so the specific Capacity Resources relied upon are not known. Thus, there is no evidence that AEP-Ohio's generating facilities are committed to PJM to fulfill AEPSC's FRR Entity capacity obligation under the RAA.

The Commission and AEP-Ohio claim that AEP-Ohio is entitled to compensation based upon the incorrect factual assertion that AEP-Ohio has dedicated its generating facilities to

provide wholesale generation capacity service to CRES providers serving shopping customers in AEP-Ohio's service area (throughout their briefs, the Commission and AEP-Ohio refer to this factual assertion as "self-supply"). The RAA, however, is a mutual assistance agreement under which Capacity Resources are shared on a region-wide basis within PJM. Schedule 8.1.A dealing with the FRR Alternative makes this clear (emphasis added):

> The Fixed Resource Requirement ("FRR") Alternative provides an alternative means, under the terms and conditions of this Schedule, for an eligible Load-Serving Entity to satisfy its obligation hereunder to commit Unforced Capacity **to ensure reliable service to loads in the PJM Region.**

FES Ex. 110A at 106 (emphasis added) (Supp. at 107). The PJM Region includes all or part of 13 states and the District of Columbia.[25]

The fact that PJM treats Capacity Resources as a PJM Region resource was also acknowledged by several AEP-Ohio witnesses. Tr. Vol. II at 484-485 (2nd Supp. at 219-220). On a day-to-day basis, the output of all the generating assets of the AEP East operating companies (including AEP-Ohio) are bid into PJM's market by AEPSC with an offer price. Tr. Vol. XI at 2544-2545 (2nd Supp. at 223-224). On a region-wide basis, PJM then determines which resources are actually dispatched to serve load in the PJM Region. *Id.* (2nd Supp. at 223-224). On any given day, AEP-Ohio's actual load requirements are not required to be satisfied from AEP-Ohio's owned and controlled generating assets. *Id.* at 2546-2547 (2nd Supp. at 225-226). The operation of AEP-Ohio's "deregulated" generating assets cannot be separated from the operation of the combined generation fleet of the AEP East operating companies. *Id.* at 2536-2537, 2545-2547 (2nd Supp. at 221-222, 224-226).

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[25] PJM Region is defined in the RAA by reference to Attachment J to PJM's Open Access Transmission Tariff ("O.A.T.T") FES Ex. 110A at 15 (Supp. at 16). Attachment J includes a geographical representation of PJM's Region. O.A.T.T., Attachment J at 1685, available at: http://www.pjm.com/~/media/documents/agreements/tariff.ashx (last visited Oct. 22, 2013).

Neither the Commission's invented methodology nor its application has been connected to an FRR Entity, the relevant FRR Capacity Plan, or the actual Capacity Resources relied upon by the FRR Entity to satisfy its capacity obligation to PJM. Additionally, the RAA and the record dispel the notion that AEP-Ohio's generating resources are "self-supplying" wholesale generation capacity service to CRES providers serving shopping customers in AEP-Ohio's service area. Thus, even if the Commission had authority to permit AEP-Ohio to change from RPM-Based Pricing to a cost-based ratemaking method to determine the compensation for wholesale generation capacity service, the Commission's invented and applied cost-based ratemaking methodology conflicts with the RAA as the methodology is based on assumptions and numerical inputs that have no relationship to the applicable provisions of the RAA. Accordingly, the Capacity Case Decisions are unlawful and unreasonable.

B. The Commission cannot authorize new rates under R.C. 4905.26 without reference to and compliance with the ratemaking statutes that govern noncompetitive and competitive rates

The Commission's reliance on its general supervisory authority is also unwarranted. As demonstrated in IEU-Ohio's Proposition of Law II and discussed above, R.C. 4905.26 does not provide that Commission with authority to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation capacity service.[26] R.C. 4905.26 governs complaint cases and Commission investigations and provides the Commission with authority to determine whether existing rates may be unjust, unreasonable, unjustly discriminatory, or in violation of law. By its terms, the statute does not give the Commission any unconstrained rate setting authority; "R.C. Chapter 4905 governs the

[26] *See Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540 (1993) (the Commission cannot rely on its general supervisory jurisdiction to bypass the specific ratemaking requirements in Ohio law).

commission's general power to regulate public utilities, while R.C. Chapter 4909 governs the commission's power to set utility rates and charges." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 28. The Commission may establish new rates in a complaint case initiated under R.C. 4905.26 by attaching its ratemaking authority found elsewhere in Ohio law. The way to determine whether an existing rate is unjust or unreasonable is by reference to the ratemaking formula enacted by the General Assembly. The Commission cannot rely on its broad grants of supervisory authority to bypass the specific ratemaking statutes enacted by the General Assembly.[27]

The Commission, however, asserts that R.C. 4905.26 provides it with authority to set rates without reference to the requirements in R.C. Chapter 4909. Commission Merit Brief at 9-14 (Commission has discretion to determine if a situation calls for it to join and read R.C. 4905.26 and R.C. 4909.18 together); *id.* at 9 (*citing Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706 ¶¶ 29, 32). The Commission's reliance on *Consumers' Counsel* for the proposition that the Commission's authority to set a rate under R.C. 4905.26 is without merit.

In *Consumers' Counsel*, complaints were filed by two CRES providers arguing that the manner in which The Dayton Power and Light Company ("DP&L") was collecting previously authorized costs was unjust and unreasonable. All the parties but the Ohio Consumers' Counsel ("OCC") entered into a stipulation resolving how the previously-authorized costs would be recovered going forward. As explained by the Commission in its order in that case, it had already approved recovery of the billing costs at issue in the case five years earlier; its order approving the stipulation changed only the timing and manner that the recovery would begin.

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[27] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540 (1993).

See Consumers' Counsel, 2006-Ohio-4706, ¶¶ 3-5; *In the Matter of the Complaint of Dominion Retail, Inc. v. The Dayton Power and Light Company*, Case Nos. 03-2405-EL-CSS, *et al.*, Opinion and Order at 7-21 (Feb. 2, 2005).[28]

On appeal, OCC argued that the change in the time and manner that the previously authorized costs could be recovered did not follow the procedural process set forth in R.C. Chapter 4909. The Court upheld the Commission finding that the Commission had authority to modify unjust and unreasonable rates in complaint cases "without compelling the affected utility to apply for a rate increase under R.C. 4909.18." *Consumers' Counsel*, 2006-Ohio-4706, ¶ 29 (citing *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997)), 80 Ohio St.3d 344, 347 ("Pursuant to R.C. 4905.26 * * * , the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117 ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO [and] [i]n fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as `collateral attacks' on previous orders"); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 157 (1979) (in an R.C. 4905.26 proceeding, the Commission can "order[ ] that new rates be put in effect"). *Consumers' Counsel* did not hold that the substantive ratemaking formula in R.C. Chapter 4909 was inapplicable. Rather, *Consumers' Counsel* holds that the utility does not need to file an application to increase rates under R.C. 4909.18 before the Commission can order new lawful rates to be put into effect.

In contrast to the Commission's improper reliance on *Consumers' Counsel*, this Court in *Lucas County*, one of the cases the Court cites in the *Consumers' Counsel* case, supported the

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[28] Available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=ATMZFQPAZ5US8L0X (last visited Oct. 22, 2013).

proposition that the Commission's authority to establish rates under R.C. 4905.26 is governed by the substantive requirements of R.C. Chapter 4909. In *Lucas County,* the Court was asked to review whether a complaint case could be used to set new rates that would refund to customers amounts previously collected by a utility that the complainant alleged were unjust and unreasonable. 80 Ohio St.3d at 348-349. The Court summarized the Commission's ability to implement new rates under R.C. 4905.26 as follows: "Pursuant to R.C. 4905.26 *and 4909.15(D),* the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable." 80 Ohio St.3d at 347 (emphasis added). The *Lucas County* Court found that "the General Assembly did not intend the complaint *procedure* of R.C. 4905.26" to be utilized to upset the substantive statutes in R.C. Chapter 4909 that among other things requires "a public utility [to] charge its consumers in accordance with the commission-approved rate schedule." *Id.* (emphasis added). Thus, the *Lucas County* Court looked to see if the Commission's procedural authority to review the reasonableness of existing rates under R.C. 4905.26 could be coupled with its rate authority under R.C. Chapter 4909 to order a refund. Finding no authority, the Court upheld the Commission's dismissal of the complaint.

In *Ohio Utilities,* another case cited in *Consumers' Counsel*, the Court upheld a Commission order establishing new rates in a complaint case following a hearing in which the Commission concluded the existing rates were unjust and unreasonable and *in which the Commission specifically coupled its ratemaking authority in R.C. Chapter 4909 with its authority to hear complaints under R.C. 4905.26*. 58 Ohio St.2d at 156-158. The Court also noted that the United States Supreme Court approved the joining of R.C. 4905.26 with the Commission's ratemaking authority under the predecessor chapter to R.C. Chapter 4909.

Finally, the Court has held multiple times that the Commission cannot bypass the cost-based ratemaking statutes in R.C. Chapter 4909 when setting rates for noncompetitive services. In *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540 (1993), the Court held that the Commission could not rely upon its general supervisory authority in R.C. 4901.02(A) to bypass R.C. Chapter 4909.

In *Indus. Energy Users v. Pub. Util. Comm.*, 2008-Ohio-990, ¶ 31, the Court similarly held that the Commission violated the law by setting a noncompetitive rate that did not comply with R.C. Chapter 4909. "While the Commission may allow recovery of an electric-distribution utility's noncompetitive costs . . . the commission's approval must be given in accordance with R.C. Chapters 4905 and 4909." *Id.* The Court specifically held that noncompetitive rates must be set in accordance with the ratemaking process outlined in R.C. Chapter 4909. *Id.* at ¶ 32 (the Commission must verify that the utility's requested rate increase complies with the requirements of R.C. 4909.18); *see also id.* at ¶ 28 ("R.C. Chapter 4905 governs the commission's general power to regulate public utilities, while R.C. Chapter 4909 governs the commission's power to set utility rates and charges.").

Thus, the Commission's claim that it has unconstrained authority to ignore the statutory requirements of R.C. Chapter 4909 because it is acting under R.C. 4905.26 has no legal support. *Consumers' Counsel*, when read in context with the cases cited by that Court and other opinions from the Court, indicates that R.C. 4905.26 provides the Commission with the process to review whether existing retail rates are unjust and unreasonable and provides the Commission with a process to establish new retail rates that are just and reasonable, without waiting for the utility to file its own application to alter rates under R.C. 4909.18. The *Consumers' Counsel* Court did not hold that the Commission had independent ratemaking authority under R.C. 4905.26. This Court

has long held that the Commission's authority under R.C. 4905.26 is constrained by the requirements of R.C. Chapter 4909. The Court's opinion in *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535 and *Indus. Energy Users-Ohio*, 2008-Ohio-990 further confirm that the Commission's ratemaking authority for noncompetitive services is found in R.C. Chapter 4909. Thus, the Commission's attempt to invent and apply a cost-based ratemaking methodology to establish a rate for wholesale generation capacity service under the authority of R.C. 4905.26 violates the express holdings of this Court that require the Commission to follow the specific ratemaking formulas contained elsewhere in Ohio law.

C. The Commission did not follow Ohio's ratemaking statutes

Even if the Commission's assertion that wholesale generation capacity service is a noncompetitive service is accepted, it is clear that the Commission failed to follow the requirements of R.C. Chapter 4909 when it increased AEP-Ohio's compensation for wholesale generation capacity service. IEU-Ohio Merit Brief at 32-35.

In response to IEU-Ohio's Proposition of Law II, the Commission incorrectly claims that it did not need to comply with the cost-based ratemaking methodology in R.C. Chapter 4909, but adds that even if that Chapter applied, the Commission's actions were lawful and reasonable for several reasons. First, the Commission claims that since it recently (in December 2011) approved distribution rates for AEP-Ohio, "[i]t 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." Commission Merit Brief at 13. Second, the Commission claims that this is not a case involving a rate increase and by implication is asserting that the more stringent requirements in R.C. Chapter 4909 applicable to increases in existing rates need not be followed. *Id.* at 13, 30. Third, the Commission claims

that even if it were required to comply with R.C. Chapter 4909, it has in fact done so. *Id.* at 27-28. Fourth, the Commission claims (for the first time on appeal) that its invented and applied cost-based ratemaking methodology is a provider of last resort ("POLR") charge that the Commission may establish without limitation. *Id.* at 23-26. As discussed below, these arguments are wildly inconsistent with the facts and law and should be rejected.

If the Commission is correct that it has the authority to establish a price for wholesale generation capacity service, the Commission's claim that it was pointless to conduct a review of AEP-Ohio's request for an increase in rates provides no lawful basis for failing to address the requirements of R.C. Chapter 4909 and is also factually incorrect. The Commission argues that it addressed the ratemaking issues presented by AEP-Ohio's request for an increase in compensation for wholesale generation capacity service when it reviewed AEP-Ohio's distribution rates. *Id.* at 13.[29] AEP-Ohio's distribution rate case, however, involved AEP-Ohio's distribution plant that was used and useful in providing distribution service. In the distribution case, the Commission did not review AEP-Ohio's generation plant that was used and useful in providing any generation-related service to customers. In this case, the factual inputs relied upon by the Commission's invented cost-based ratemaking methodology relate to its generation plant and expenses and not the distribution plant and expenses. The Commission's review in the distribution case, therefore, was irrelevant to the issues addressed in this case.

Further, the Commission could not have legally addressed generation plant cost and expense issues in the distribution case. By law, generation service is competitive, and the Commission no longer has authority to address generation rates under its authority to address

[29] This argument is being raised by the first time by the Commission in its Merit Brief and was not raised by any party below. Accordingly, the Court will not find any citations to the record on this point.

noncompetitive services, such as distribution service. R.C. 4928.05(A) (Appx. at 506). Its new-found claim that it did not need to address generation-related issues because it conducted a distribution rate case defies reason.

The Commission's next claim that AEP-Ohio was not seeking an increase in its existing compensation is also factually incorrect. *See* Commission Merit Brief at 13, 30. AEP-Ohio was seeking to increase its total compensation for the provision of wholesale generation capacity service, a service for which it already received the RPM-Based Price. Before this proceeding began, RPM-Based Pricing was the existing rate AEP-Ohio charged for wholesale generation capacity service; when this proceeding began, the Commission again confirmed that RPM-Based Pricing should continue. As part of the ESP Stipulation[30] the Commission first approved two-tiered rates for wholesale generation capacity service; then after it rejected the ESP Stipulation, the Commission extracted the two-tiered capacity charges from the ESP Stipulation and held that they would continue. The Commission followed this increase in AEP-Ohio's total compensation with another when it granted AEP-Ohio's request to increase the two-tiered charges. Finally, when the Commission issued the Capacity Order, it granted AEP-Ohio a rate increase over the existing prior rates.[31] The Commission's and AEP-Ohio's claim that the Capacity Order did not provide AEP-Ohio with an increase in an existing rate but rather the establishment of a new rate is without merit and contradicted by the history of AEP-Ohio's capacity charges recited throughout their Merit Briefs.

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[30] As used herein, ESP Stipulation refers to the stipulation and recommendation presented to the Commission to resolve the proceeding below, AEP-Ohio's pending ESP proceeding, and several other cases. *See* IEU-Ohio Merit Brief at 12-13.

[31] IEU-Ohio's Merit Brief and IEU-Ohio's Response to the Commission's and AEP-Ohio's August 14, 2013 Joint Motion to Dismiss provide a more detailed summary of various levels of wholesale capacity compensation that the Commission endorsed in this proceeding.

The Commission's claim that it complied with R.C. Chapter 4909 is a total reverse of direction from its claim that it need not comply with that Chapter. *See* Commission Merit Brief at 13 ("Even if the Commission were required to comply with R.C. 4909.15(D) . . . the Commission has done so."). In all cases involving an increase in rates subject to R.C. Chapter 4909, specific requirements must be met. For example, R.C. 4909.43 requires that a notice of intent to file an application for a rate increase must be filed and properly served. R.C. 4909.18 requires the actual application for a rate increase to include: (1) a complete operating statement of its last fiscal year; (2) an income statement; (3) a statement of financial condition; and, most importantly, (4) detailed information regarding the valuation of property *used and useful in rendering service to the public*. As discussed in Section IV.A above, there is no evidence in the record that AEP-Ohio's generating facilities are used and useful in providing wholesale generation capacity service. R.C. 4909.18 also requires the vice-president or treasurer to verify the accuracy of this information. Once this information is submitted, R.C. 4909.19(C) requires the Staff at the Commission to investigate the facts contained in the application for a rate increase. None of these steps was completed. As a result, there is no basis to conclude that the Commission's invented and applied cost-based ratemaking methodology conformed to the requirements of R.C. Chapter 4909.

Finally, the Commission claims that its authority to authorize a POLR charge is "[a]nother example demonstrating Commission authority to regulate a cost-based capacity rate." Commission Merit Brief at 23. The Commission's invented and applied cost-based ratemaking methodology was not authorized on the basis that it was a POLR charge; this argument is being advanced for the first time on appeal. However, the Court has held that the Commission may only establish a POLR charge designed to collect non-competitive costs if the Commission

complies with the requirements in R.C. Chapter 4909. *Industrial Energy Users-Ohio v. Pub. Util. Comm.* 117 Ohio St.3d 486, 2008-Ohio-990, ¶¶28-32. Thus, even if AEP-Ohio's compensation for wholesale capacity service could be classified as a POLR charge (and it cannot), the Commission still acted unlawfully and unreasonably when it failed to follow the requirements in R.C. Chapter 4909.

Accordingly, the Capacity Case Decisions are unlawful and unreasonable.

D. The Commission cannot authorize a deferral associated with a competitive retail electric service under R.C. 4905.13

As demonstrated in IEU-Ohio's Proposition of Law V.3, R.C. 4928.05(A)(1) prohibits the Commission from invoking R.C. 4905.13 to regulate competitive generation services. IEU-Ohio Merit Brief at 39-40. The Commission responds that it has broad supervisory authority under R.C. 4905.13 and notes that the Court "has often afforded broad deference to the Commission's expertise in interpretation and application of statutes that deal with utility rate matters." Commission Merit Brief at 38. However, the Court has repeatedly held that where the meaning of a statute is plain, there is no need for interpretation; *i.e.* there is no need to defer to the Commission's interpretation. *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553 (2000) (*citing Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190 (1980); *Sears v. Weimer*, 143 Ohio St. 312 (1944)).

The meaning of R.C. 4928.05(A)(1) is plain: the Commission cannot regulate competitive generation services, such as capacity, except under the listed statutory provisions. R.C. 4905.13 is not a listed provision under R.C. 4928.05(A)(1) and, therefore, the Commission cannot invoke R.C. 4905.13 to regulate wholesale generation capacity service.

E. The Commission is prohibited from authorizing anticompetitive subsidies

As discussed in IEU-Ohio's Proposition of Law V.2, the Commission is prohibited from authorizing anticompetitive subsidies under R.C. 4928.02(H). IEU-Ohio Merit Brief at 38-39; *see also Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶¶ 47-58. In the case below, the Commission authorized AEP-Ohio to bill and collect an amount substantially in excess of the RPM-Based Price from shopping and non-shopping customers, effectively allowing AEP-Ohio to subsidize its competitive generation business segment.

The Commission responds that R.C. 4928.02(H) and the Court's holding in *Elyria Foundry* are inapplicable because: (1) the wholesale generation capacity service at issue in this case is a noncompetitive service, which is not governed by R.C. Chapter 4928; (2) the Commission satisfied other state policies in R.C. 4928.02; (3) the Commission's invented and applied cost-based ratemaking methodology benefits all customers; and (4) review of an anticompetitive subsidy claim is not ripe. Commission Merit Brief at 36-44. The Commission's claims are without merit.

As discussed in detail above, if the Commission has any authority to establish rates for wholesale generation capacity service (which it does not), its authority over capacity is confined to R.C. Chapter 4928. Clearly the policy of the state is to encourage customer choice. R.C. 4928.02(A) & (B) (Appx. at 502). To further that goal, state policy prohibits the recovery of generation-related costs through distribution or transmission rates. R.C. 4928.02(H) (Appx. at 502); *Elyria Foundry*, 2007-Ohio-4164, ¶¶ 47-58; *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19

(Jan. 11, 2012).[32] The Commission's order frustrates customer choice by saddling customers with above-market prices and accomplishes that result through a nonbypassable charge. The very policies the Commission invokes to justify its unlawful and unreasonable actions in the case below require a far different result.

The Commission also claims that its invented and applied cost-based ratemaking methodology is not an anticompetitive subsidy because its decision benefits all customers. Commission Merit Brief at 39. The Commission's claim comes devoid of any cite to the record or its orders for this conclusion. In fact, in the Capacity Order, the Commission found that market-based *RPM-Based Pricing* benefitted customers by promoting competition and placing all competitors on a level playing field. Capacity Order at 23 (Appx. at 67). The logic supporting these findings leads to the conclusion that above-market charges do not promote competition and do not level the competitive playing field and therefore do not benefit customers. The Commission's invented and applied cost-based ratemaking methodology simply props up AEP-Ohio's bottom line at the expense of ratepayers.

Finally, as discussed below, the anticompetitive subsidy claim is ripe because the above-market charges for wholesale generation capacity service have already gone into effect. Customers are being harmed by the results of the Commission's orders in this case.

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[32] Available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12A11B35831F43601 (last visited Oct. 22, 2013).

V. IEU-OHIO'S APPEAL IS RIPE

A. IEU-Ohio's appeal as to the above-market portion of the $188.88/MW-day charge is ripe because the harm inflicted from the above-market charges for wholesale generation capacity service is not speculative; the above-market charges have been in place since August 2012

The Commission asserts that OCC's Proposition of Law II (which asserts that the $188.88/MW-day price provides AEP-Ohio with an anticompetitive subsidy) is "not subject to review in this appeal because the Commission did not establish the deferral recovery mechanism here." Commission Merit Brief at 37; *see also* Commission Merit Brief at 42-44. AEP-Ohio also asserts that IEU-Ohio's Proposition of Law V addressing the above-market portion of the $188.88/MW-day rate is not ripe for reasons similar to the Commission. As discussed below, the Commission and AEP-Ohio are incorrect; IEU-Ohio's propositions of law challenging the above-market portion of the $188.88/MW-day price are ripe for review.

The Commission and AEP-Ohio argue that challenges to the above-market portion of the $188.88/MW-day price should be made in the appeal of AEP-Ohio's ESP proceeding in which the Commission decided how the above-market portion of the $188.88/MW-day rate would be collected. Commission Merit Brief at 42-44; AEP-Ohio Merit Brief at 29-32. The Commission and AEP-Ohio further assert that because the Commission did not authorize collection of the deferred charges in the proceeding below the challenges to the above-market portion of the price are not ripe in this appeal. The Commission and AEP-Ohio misconstrue the doctrine of ripeness and their position, practically speaking, would impair this Court's ability to review the lawfulness of the above-market portion of the charge and would deprive IEU-Ohio its due process rights.

The doctrine of ripeness requires a showing of a concrete injury by the appellant. *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 89 (1988) (*quoting Abbott*

Laboratories v. Gardner, 387 U.S. 136, 148 (1967)). In *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 57, the Court held that an appeal challenging a deferral was ripe where the accounting order was conclusive for ratemaking purposes. IEU-Ohio has a real concrete injury because the Commission has already authorized the collection of the deferred above-market compensation. Because the ratemaking order has already been issued and IEU-Ohio's members are currently paying the unlawful and unreasonable charges, IEU-Ohio's injury is even less speculative than what the Court found ripe in *Elyria Foundry*, 2007-Ohio-4164, ¶ 57.

Additionally, the factual findings and record support (if there is any) for the Commission's invented and applied cost-based ratemaking methodology are in this proceeding. The hearing had concluded and the record was closed in AEP-Ohio's ESP proceeding when the Commission issued the Capacity Order and held it would resolve the deferred above-market portion of the $188.88/MW-day rate in AEP-Ohio's ESP proceeding. The damage to customers was initiated in this case. The lawfulness of the deferral is clearly presented in this case.

Further, the Commission's Merit Brief concedes IEU-Ohio's appeal is ripe: "FERC recently reviewed and approved the [RPM-Based Pricing] wholesale component" of the Commission's invented and applied cost-based ratemaking methodology; "[t]he remaining piece to be reviewed in this appeal is the retail component." Commission Merit Brief at 21.

Finally, in its merit brief in the appeal of AEP-Ohio's ESP proceeding, the Commission argues that the lawfulness and reasonableness of the $188.88/MW-day price, including the above-market portion of that price, may not be reviewed in that appeal. "The issue of whether the Commission had authority to determine AEP-Ohio's capacity costs is the subject of another case ... [t]hat issue is not properly before the Court here." *The Kroger Co. v. Pub. Util. Comm.*,

Case No. 2013-521, Commission Merit Brief at 22 (Oct. 21, 2013). Thus, the Commission has essentially asked this Court to prohibit the review of lawfulness and reasonableness of the Commission's actions altogether.

Accordingly, IEU-Ohio's Proposition of Law V is ripe for review in this appeal. The Commission's claim that the issue should be addressed in another appeal is contradicted by its assertion in that appeal where the Commission claims that the Court cannot address the issue in that appeal either. The review of the above-market portion of the Commission's invented and applied cost-based ratemaking methodology will require a review of the record and findings in this case and, therefore, this appeal is the proper place for that review to occur.

B. IEU-Ohio's appeal as to the two-tiered capacity charges and request that the Court direct the Commission to make certain accounting adjustments to outstanding deferral balances are not moot

As explained in more detail in IEU-Ohio's Response to the Commission's and AEP-Ohio's August 14, 2013 Joint Motion to Dismiss, IEU-Ohio's Propositions of Law VI, VII, and VIII are ripe for review. Propositions of Law VI and VII challenge the unlawful and unreasonable two-tiered shopping tax approved by the Commission on March 7, 2012, and increased and extended on May 30, 2012. Proposition of Law VIII requests the Court to direct the Commission to make certain prospective accounting adjustments to prevent customers from significantly overcompensating AEP-Ohio for the provision of wholesale generation capacity service. The practical effect of the August 14, 2013 Joint Motion to Dismiss and the similar arguments raised in the Commission's and AEP-Ohio's Merit Brief is to block customers from seeking and obtaining relief from unlawful and unreasonable charges for wholesale generation capacity service.

The Commission and AEP-Ohio argue that IEU-Ohio's Propositions of Law VI, VII, and VIII are moot because these propositions of law challenged interim rates that are no longer in effect and assert that the remedy IEU-Ohio seeks would have the Court engage in retroactive ratemaking. Commission Merit Brief at 44-47; AEP-Ohio Merit Brief at 39-41. The Commission's and AEP-Ohio's argument is without merit.

IEU-Ohio's appeal is the first opportunity IEU-Ohio has had to present the Court with arguments raised in Propositions of Law VI, VII, and VIII. There was not a final appealable order in the proceeding below until the Commission issued its January 30, 2013 Entry on Rehearing; the two-tiered capacity charges had ended by this point in time. IEU-Ohio had filed a Complaint for Writs of Prohibition and Mandamus with the Court, but the Commission and AEP-Ohio moved to dismiss that complaint, and alleged among others things that the Court could address IEU-Ohio's arguments through the appellate process. IEU-Ohio could not have sought a stay of the two-tiered capacity charges because R.C. 4903.16 only applies to "[a] proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission." That is, the availability to seek a stay under R.C. 4903.16 does not arise until an appeal has been taken from a final appealable order.

Furthermore, the issues raised in IEU-Ohio's Propositions of Law VI and VII are crucial to the Court granting IEU-Ohio an effective remedy. If the Court grants IEU-Ohio's appeal and finds that the Commission acted unlawfully and unreasonably when it invented and applied a cost-based ratemaking methodology to significantly increase AEP-Ohio's compensation for generation capacity service, then the question remains as to what rates should be reinstated. As demonstrated in Propositions of Law VI and VII, the Commission's two Entries approving the two-tiered capacity charges were unlawful and unreasonable. Accordingly, if the Court grants

IEU-Ohio's other propositions of law and finds the Capacity Case Decisions are unlawful and unreasonable, the Court should also reach the merits of Propositions of Law VI and VII to hold that on remand the Commission cannot re-implement the unlawful and unreasonable two-tiered capacity charges that were in effect prior to the Capacity Order. Additionally, as discussed below, the determination of whether the two interim orders approving the two-tiered capacity charges are unlawful and unreasonable directly impact the accounting adjustment IEU-Ohio seeks through Proposition of Law VIII.

Finally, the harm complained of in Propositions of Law VI and VII is capable of repetition yet evading review. The temporary nature of the two-tiered capacity charges, approved without a hearing and only for the pendency of the Commission's review, prevented parties from taking an appeal until the Commission had terminated the two Entries approving the two-tiered capacity charges. Thus, under the Commission's and AEP-Ohio's theory, parties would never be able to challenge an interim rate.

IEU-Ohio also faces a reasonable expectation that the harm could occur again. In the proceeding below, the Commission rejected the two-tiered capacity charges when they were presented as part of a stipulation; then, at AEP-Ohio's request, extracted the authorized two-tiered capacity charges from the rejected stipulation, and authorized them on a stand-alone basis. Then as the charges were about to expire, the Commission authorized AEP-Ohio to extend and increase the two-tiered capacity charges. This unfortunate result is not unique to this case. IEU-Ohio successfully challenged AEP-Ohio's ESP I Order,[33] and the Court remanded the decision

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[33] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, (hereinafter "*ESP I*"), Opinion and Order (Mar. 18, 2009) (hereinafter "ESP I Order"), available at:

to the Commission. The Commission initially ordered AEP-Ohio to file revised tariffs to remove the effects of the ESP I Order that the Court reversed, but then permitted AEP-Ohio to continue to collect the unlawful portions of the ESP I rates until the Commission completed its hearing on the remanded issues.[34] The Commission effectively turned a consumer victory into a short-term defeat. The Commission's willingness to protect AEP-Ohio from even a temporary rate reduction when the Commission's orders are found illegal leads to the need for this Court to reverse the Commission's otherwise unreviewable order and to direct the Commission to implement the appropriate remedy to protect customers.

Accordingly, IEU-Ohio's appeal is not moot.

VI. NEITHER THE AUTHORIZATION OF RPM-BASED PRICING NOR THE $188.88/MW-DAY PRICE APPROVED BY THE COMMISSION AMOUNTS TO A CONSTITUTIONAL TAKING

In its cross-appeal, AEP-Ohio claims that a constitutional taking will occur if it is not allowed to collect "the difference between its cost of capacity" and RPM-Based Pricing. AEP-Ohio Merit Brief at 47. AEP-Ohio's constitutional takings claim fails on multiple fronts.

Even if the Court found the Commission had some jurisdiction to provide AEP-Ohio an increase in its compensation for wholesale generation capacity service, the Takings Clause of the United States Constitutions does not guarantee AEP-Ohio will receive any above-market compensation. The pinnacle case on this issue is *Fed. Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *Hope* holds that in reviewing a constitutional confiscation claim "[i]t is not

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http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A09C18B42525F08513 (last visited Oct. 22, 2013).

[34] *ESP I*, Entry at 4 (May 25, 2011), available at: http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11E25B55432B67532 (last visited Oct. 22, 2013).

theory but the impact of the rate order which counts" and "[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Id.* at 602. AEP-Ohio has failed to demonstrate that there has been a constitutional taking of any investor property under *Hope*.

Moreover, the United States Supreme Court subsequently confirmed that *Hope* does not entitle a regulated utility to an increase in compensation due to losses from market forces: "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces." *Market Street Ry. v. Railroad Comm'n of Cal.,* 324 U.S. 548, 567 (1945). The Court of Appeals for the District of Columbia has further held that a regulated utility is not entitled to a profit and a utility "that is unable to survive without charging exploitative rates has no entitlement to such rates." *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1181 (D.C. Cir. 1987) (*citing FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 590 (1942) & *Market Street Ry. V. Railroad Comm'n of Cal,* 324 U.S. 548).

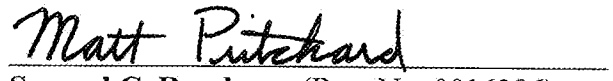
Finally, FERC has also recognized that since it has moved to a market-based compensation approach for wholesale services, a traditional confiscation claim is no longer applicable. *ISO New England, Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n*, 138 FERC ¶ 61027 at ¶ 138-39 (Jan. 19, 2012).

In sum, AEP-Ohio has failed to demonstrate that being compensated at the RPM-Based Price amounts to a violation of the Constitution.

VII. CONCLUSION

As demonstrated herein, the Court should grant IEU-Ohio's appeal and should direct the Commission to restore the lawful market-based pricing that was in place prior to the Commission's unlawful and unreasonable actions. Additionally, the Court should direct the Commission to issue such orders as necessary to eliminate AEP-Ohio's deferred above-market compensation for wholesale generation capacity service and reverse AEP-Ohio's authorization of accounting authority that allows AEP-Ohio to defer such above-market compensation for future collection. Finally, the Court should direct the Commission to order AEP-Ohio to refund the unlawful above-market charges for wholesale generation capacity service that have been in place since January 2013 or credit the excess collection against regulatory asset balances otherwise eligible for amortization and collection through retail rates and charges.

Respectfully submitted,



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4901:1-21-01 Definitions.

As used in chapter:

(A) "Aggregation" means combining the electric load of multiple retail customers via an agreement with the customers or formation of a governmental aggregation pursuant to section 4928.20 of the Revised Code for the purpose of purchasing retail electric generation service on an aggregated basis.

(B) "Aggregator" means a person, certified by the commission, who contracts with customers to combine the customers' electric load for the purpose of purchasing retail electric generation service on an aggregated basis.

(C) "Billing and collection agent" shall have the meaning set forth in division

(2) of section 4928.01 of the Revised Code.

(D) "Biomass power" means a renewable generation resource that is primarily derived from the combustion of organic matter. Biomass fuels may be solid, liquid, or gas and are derived from feedstocks. Examples of such feedstocks include, but are not limited to: agricultural crops and residues, industrial wood and logging residues, farm animal wastes, the organic portion of municipal solid waste, and methane gas from landfills.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Competitive retail electric service" (CRES) shall have the meaning set forth in division (A)(4) of section 4928.01 of the Revised Code, and includes the services provided by an electric services company, retail electric generation providers, power marketers, power brokers, aggregators, and governmental aggregators.

(G) "Complaint" means any customer/consumer contact when such contact necessitates follow-up by or with the supplier of electric service or electric utility to resolve a point of contention.

(H) "Consumer" means a person who uses CRES.

(I) "Contract" means an agreement between a customer and an electric services company that specifies the terms and conditions for provision of CRES or services.

(J) "Certified electric services company" means a person or entity, under certification by the commission, who supplies or offers to supply CRES. This term does not apply to an electric distribution utility in its provision of standard offer generation service.

(K) "Customer" means a person who contracts with or is solicited by a CRES provider for the provision of CRES.

(L) "Deposit" means a sum of money a CRES provider collects from a customer as a precondition for initiating service.

(M) "Direct solicitation" means face-to-face solicitation of a customer initiated by a certified electric services company at the home of a customer or at a place other than the normal place of business of the provider, and includes door-to-door solicitations.

(N) "Distribution service" means the physical delivery of electricity to consumers through facilities provided by an electric distribution utility.

(O) "Electric cooperative" shall have the meaning set forth in division (A)(5) of section 4928.01 of the Revised Code.

(P) "Electric distribution utility" shall have the meaning set forth in division (A)(6) of section 4928.01 of the Revised Code.

(Q) "Electric generation service" means retail electric generation service.

(R) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(S) "Environmental disclosure data" means both generation resource mix and environmental characteristics.

(T) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.

(U) "Governmental aggregator" shall have the meaning set forth in division (A)(13) of section 4928.01 of the Revised Code.

(V) "Market development period" shall have the meaning set forth in division (A)(17) of section 4928.01 of the Revised Code.

(W) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(X) "Net metering" shall have the meaning set forth in division (A)(31) of section 4928.01 of the Revised Code.

(Y) "OCC" means the Ohio consumers' counsel.

(Z) "Other sources" means known electric energy generation resources that cannot reasonably be included within any of the specific fuel categories.

(AA) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(BB) "Power broker" means a person certified by the commission, who provides power brokerage.

(CC) "Power brokerage" means assuming the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electric generation service to a retail customer in this state without taking title to the electric power supplied.

(DD) "Power marketer" means a person, certified by the commission, who provides power marketing services.

(EE) "Power marketing" means assuming the contractual and legal responsibility for the sale and provision of retail electric generation service to a retail customer in this state and having title to electric power at some point during the transaction.

(FF) "Residential customer" means a customer of a competitive retail electric service for residential purposes.

(GG) "Retail electric service" shall have the meaning set forth in division (A)(27) of section 4928.01 of the Revised Code.

(HH) "Retail electric generation service" means the provision of electric power to a retail customer in this state through facilities provided by an electric distribution utility and/or a transmission entity in this state. The term encompasses the services performed by retail electric generation providers, power marketers, and power brokers, but does not encompass the service provided by an electric utility pursuant to section 4928.14 or division (D) of section 4928.35 of the Revised Code.

(II) "Small commercial customer" means a commercial customer that is not a mercantile commercial customer.

(JJ) "Solicitation" means any communication intended to elicit a customer's agreement to purchase or contract for a CRES.

(KK) "Staff" means the commission staff or its authorized representative.

(LL) "Toll-free" means telephone access provided to a customer without toll charges to the customer.

(MM) "Unknown purchased resources" means electric energy generation resources neither owned nor operated by a competitive retail generation supplier where the electric energy generation source(s) or process cannot be identified after making all reasonable efforts to identify the source or process used to produce the power.

Effective: 06/29/2009
R.C. 119.032 review dates: 11/26/2008 and 09/30/2012
Promulgated Under: 111.15
Statutory Authority: 4928.06, 4928.10
Rule Amplifies: 4905.261, 4928.10
Prior Effective Dates: 9/18/00, 1/1/04, 4/6/06, 10/22/07

4909.01 Public utilities commission - fixation of rates definitions.

As used in this chapter:

(A) "Public utility" has the same meaning as in section 4905.02 of the Revised Code.

(B) "Electric light company," "gas company," "natural gas company," "pipeline company," "water-works company," "sewage disposal system company," and "street railway company" have the same meanings as in section 4905.03 of the Revised Code.

(C) "Railroad" has the same meaning as in section 4907.02 of the Revised Code.

(D) " For-hire motor carrier" has the same meaning as in section 4921.01 of the Revised Code.

Amended by 129th General AssemblyFile No.127,HB 487, §101.01, eff. 6/11/2012.

Amended by 128th General AssemblyFile No.43,SB 162, §1, eff. 9/13/2010.

Effective Date: 01-01-2001

4928.40 Establishing transition charge for each customer class.

(A) Upon determining under section 4928.39 of the Revised Code the allowable transition costs of an electric utility authorized for collection as 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 establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section 4928.37 of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility's recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010. The commission shall not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and shall not increase the charge recovering such revenue requirements associated with regulatory assets. Factors the commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to, the total allowable amount of transition costs of the electric utility as determined under section 4928.39 of the Revised Code; the relevant market price for the delivered supply of electricity to customers in that customer class and, to the extent possible, in each rate schedule as determined by the commission; and such shopping incentives by customer class as are considered necessary to induce, at the minimum, a twenty per cent load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case shall the commission establish a shopping incentive in an amount exceeding the unbundled component for retail electric generation service set in the utility's approved transition plan under section 4928.33 of the Revised Code, and in no case shall the commission establish a transition charge in an amount less than zero.

(B)

(1) The commission may conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established under division (A) of this section or subsequently adjusted under this division. Any such adjustment shall be in accordance with division (A) of this section and may reflect changes in the relevant market.

(2) For purposes of this chapter, the market development period shall not end earlier than December 31, 2005, unless, upon application by an electric utility, the commission issues an order authorizing such earlier date for one or more customer classes as is specified in the order, upon a demonstration by the utility and a finding by the commission of either of the following:

(a) There is a twenty per cent switching rate of the utility's load by the customer class.

(b) Effective competition exists in the utility's certified territory.

(C) Notwithstanding any provision of this chapter, the commission shall issue an order under section 4928.33 of the Revised Code approving a transition plan for an electric utility that contains a rate reduction for residential customers of that utility, provided that the rate reduction shall not increase the rates or transition cost responsibility of any other customer class of the utility. The rate reduction shall be in effect only for such portion of the utility's market development period as the commission shall

specify and shall be applied to the unbundled generation component for retail electric generation service as set in the utility's approved transition plan under section 4928.33 of the Revised Code subject to the price cap for residential customers required under division (A)(6) of section 4928.34 of the Revised Code. The amount of the rate reduction shall be five per cent of the amount of that unbundled generation component, but shall not unduly discourage market entry by alternative suppliers seeking to serve the residential market in this state. The commission, after reasonable notice and opportunity for hearing, may terminate the rate reduction by order upon a finding that the rate reduction is unduly discouraging market entry by such alternative suppliers. No such termination of the rate reduction shall take effect prior to the midpoint of the utility's market development period.

(D) Beginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.

(E) Notwithstanding any provision of Title XLIX [49] of the Revised Code to the contrary, any customer that receives a noncompetitive retail electric service from an electric distribution utility shall be a retail electric distribution service customer, irrespective of the voltage level at which service is taken.

Effective Date: 10-05-1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Third Merit Brief and Second Appendix of Appellant/Cross-Appellee, Industrial Energy Users-Ohio* was served upon the parties of record this 23rd day of October 2013 *via* electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.

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