**Before**

**The Public Utilities Commission Of Ohio**

In the Matter of the Commission Review of )

the Capacity Charges of Ohio Power Company ) Case No. 10-2929-EL-UNC

and Columbus Southern Power Company. )

**Industrial Energy Users-Ohio’s Memorandum Contra the Application for Rehearing of Ohio Power Company**

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# INTRODUCTION

AEP-Ohio[[1]](#footnote-1) has been providing capacity to Competitive Retail Electric Service (“CRES”) providers since 2007 without adding a “shopping tax” to the price established by the Reliability Pricing Model (“RPM-Based Price”).[[2]](#footnote-2) On July 2, 2012, however, the Commission issued its Opinion and Order (“July 2 Order”) in this case and found that Sections 4905.04, 4905.05, and 4905.06, and Chapter 4909, Revised Code, provided it with the necessary jurisdiction to authorize a cost-based price for capacity that AEP-Ohio may bill CRES providers serving retail customers in the AEP-Ohio service territory.[[3]](#footnote-3) Based on the cost-based methodology the Commission adopted in the July 2 Order, the effective real price for capacity is $188.88/megawatt-day (“MW-day”), which is more than nine times higher than the RPM-Based Price for the delivery year June 2012 through May 2013 and close to three times the average RPM-Based Price during the three-year period beginning June 1, 2012.[[4]](#footnote-4) Although the Commission determined that a cost-based methodology yielded a price of $188.88/MW-day,[[5]](#footnote-5) the Commission found that AEP-Ohio, beginning on or before August 8, 2012, should bill CRES providers the RPM-Based Price resulting from the auction process managed by PJM Interconnection, Inc. (“PJM”). (The effective date depended on the Commission’s resolution of a pending AEP-Ohio electric security plan case (“ESP II”).[[6]](#footnote-6)) The Commission also indicated that AEP-Ohio could defer an amount equal to the difference between the RPM-Based Price and $188.88/MW-day. The details regarding the amortization of the amount deferred plus interest would be addressed in ESP II.[[7]](#footnote-7)

On July 20, 2012, AEP-Ohio responded by filing two pleadings attacking the Commission’s July 2 Order. In an Application for Rehearing filed with the Commission, AEP-Ohio alleged that the Commission erred in the manner it determined AEP-Ohio’s cost of capacity at $188.88/MW-day by adopting the Commission Staff’s (“Staff”) methodology to compute an energy credit.[[8]](#footnote-8) As part of its attack on the energy credit computation, AEP-Ohio further argued that a failure to adjust the energy credit will result in confiscation.[[9]](#footnote-9) Additionally, AEP-Ohio alleges that the Commission erred when it failed to authorize AEP-Ohio to collect the cost-based capacity price immediately.[[10]](#footnote-10) While claiming that the Commission erred by not authorizing a much higher generation service capacity price, AEP-Ohio also argued that the Commission erred by failing to address the merits of AEP-Ohio’s January 7, 2011 Application for Rehearing which the Commission granted on February 2, 2011.[[11]](#footnote-11) Although AEP-Ohio did not include the details of its January 7, 2011 Application for Rehearing in its July 20, 2012 Application for Rehearing, it had previously claimed that the Commission had erred in adopting the State Compensation Mechanism because the Commission did not have jurisdiction to do so.[[12]](#footnote-12) Thus, AEP-Ohio’s July 20, 2012 Application for Rehearing nonsensically claims that the Commission erred by rejecting AEP-Ohio’s preferred wholesale capacity price and, at the same time, that the Commission erred because the Commission does not have subject matter jurisdiction to authorize a wholesale capacity price.

While it is arguing in this proceeding that the Commission should not set a capacity price, but if it does the price should be higher, AEP-Ohio moved to have FERC intervene, preempt the Commission’s decision, and authorize an even higher capacity price to go into effect August 1, 2012. In a July 20, 2012 filing with FERC, American Electric Power Service Corporation (“AEPSC”) on AEP-Ohio’s behalf argued that the FERC should permit AEP-Ohio’s proposed formula rates (which would be nearly double the $188.88 price of capacity billed to CRES providers) to become effective or, in the alternative, reform the Reliability Assurance Agreement (“RAA”) to the same end.[[13]](#footnote-13)

AEP-Ohio’s two July 20, 2012 pleadings show why the Commission must finally put an end to AEP-Ohio’s illegal and unreasonable campaign to insulate its above-market rates and charges for generation service from the discipline of “customer choice.” The Commission’s July 2, 2012 Order indulged AEP-Ohio’s claim that it could switch from a RPM-Based Pricing method to a cost-based methodology while AEP-Ohio was contemporaneously claiming that the Commission does not have subject matter jurisdiction over wholesale capacity service. Once AEP-Ohio managed to get the Commission locked into a “cost-based” legal theory, AEP-Ohio proceeded directly to FERC to leverage the Commission’s holding regarding the legitimacy of “cost-based” compensation into a claim for an even higher capacity price. AEP-Ohio has made it clear that it will not quit until it is forced to do so.

Moreover, AEP-Ohio’s efforts in this case to substitute a cost-based methodology for market pricing is a step backward. The RPM-Based Pricing methodology was and should be adopted as the appropriate means of establishing AEP-Ohio’s compensation for capacity available to CRES providers serving customers in AEP-Ohio’s distribution service area. The RPM-Based Pricing method is the default method under PJM’s RAA, it is the method that AEP-Ohio agreed to as part of its support of the settlement that caused FERC to approve the RAA, and it is the method adopted by the Commission as part of AEP-Ohio’s current standard service offer (“SSO”) rates. Furthermore, the RPM-Based Price is “a reasonable means of promoting shopping in AEP-Ohio’s service territory and advancing the state policy objectives.”[[14]](#footnote-14) Because AEP-Ohio is seeking through rehearing to have the Commission reinforce an unlawful claim for a cost-based capacity price methodology, the Commission must reject AEP-Ohio’s July 20, 2012 Application for Rehearing.

# ARGUMENT

## The Commission Should Reject AEP-Ohio’s Energy Credit Adjustments and Claim to Recover its Full “Cost” of Capacity (Assignments of Error I and II) Because the Commission Lacks Jurisdiction to Establish a Cost-Based Capacity Charge in this Proceeding

In its first assignment of error, AEP-Ohio challenges the energy credit the Commission adopted to compute the $188.88 capacity price, alleging that the Commission used the wrong shopping levels and that Staff’s methodology for calculating the credit was error-filled. In its second assignment of error, AEP-Ohio argues that it is entitled to recover a cost-based rate now and that the deferral the Commission ordered (but left to the pending ESP II case to explain) is unlawful and unreasonable. Each of these alleged errors is premised on the assumption that the Commission has jurisdiction in this proceeding to authorize AEP-Ohio to bill and collect a cost-based price for capacity available to CRES providers. The applicable law and record in this proceeding demonstrate that AEP-Ohio’s statement of errors is incorrect. Since the Commission lacks authority to use a cost-based methodology to authorize compensation for generation service capacity, AEP-Ohio’s claim that it is entitled to an even higher capacity price based on its preferred application of a cost-based methodology must be rejected.

### AEP-Ohio’s First and Second Assignments of Error Assume that the Commission May Act Beyond its Statutory Jurisdiction to Set Generation Rates

As the Commission correctly found, its decision in this matter must be governed by Ohio law.[[15]](#footnote-15) Although the Commission acknowledged that it must operate within the legislative structure provided by the General Assembly, it nonetheless also held that it may set a wholesale capacity price based on its general supervisory powers and Chapter 4909, Revised Code.[[16]](#footnote-16) The definitions in Section 4928.01, Revised Code,[[17]](#footnote-17) in combination with the declarations and limitations in Sections 4928.03 and 4928.05, Revised Code, however, make clear that the Commission may not lawfully supervise or regulate any service involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio, from the point of generation to the point of consumption, once that service is declared competitive, except under very narrowly defined circumstances. From these definitions and limitations, this conclusion holds irrespective of the force of federal preemption regarding sales for resale transactions[[18]](#footnote-18) and regardless of whether the service is called wholesale or retail.

The definition of “retail electric service” includes *any service* from the point of generation to the point of consumption.[[19]](#footnote-19)

Section 4928.03, Revised Code, states:

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services[[20]](#footnote-20) that the consumers may obtain subject to this chapter from any supplier or suppliers.

Section 4928.05(A)(1), Revised Code, makes it clear that the removal of the Commission’s supervisory and regulatory powers extends to the service component or function (generation, transmission, distribution) once the service component is declared competitive. That section states that retail generation service (which by definition includes any generation service from the point of generation to the point of consumption) is not subject to the Commission’s supervision or regulation except as may be specifically allowed in Sections 4928.141 to 4928.143, Revised Code (which relate exclusively to the establishment of a SSO for *retail* electric customers) and Section 4905.06, Revised Code, as it relates to service and reliability. Additionally, Section 4928.05(A), Revised Code, specifically precludes the Commission from regulating such a service under Chapter 4909, Revised Code. Thus, the Commission is barred from using its supervisory powers or the regulatory authority in Chapters 4905 and 4909, Revised Code, except as specifically noted, to address pricing for any generation service from the point of generation to the point of consumption.

While AEP-Ohio’s Application for Rehearing seeks to have the Commission authorize it to bill CRES providers AEP-Ohio’s preferred cost-based capacity price, it does not address the authority that the Commission may rely on to grant that result. The Commission itself only claimed jurisdiction to order a cost-based capacity price based on its general supervisory powers under 4905.04, 4905.05, and 4905.06, Revised Code, and Chapter 4909, Revised Code.[[21]](#footnote-21) As noted above, however, the Commission has no authority to regulate any generation service (and no one disputes that provision of capacity service to CRES providers is a generation service) except within some narrowly defined areas. Of the three general supervisory sections on which the Commission relied, only Section 4905.06, Revised Code, may be used to regulate a competitive service and only regarding service and reliability. The Commission cannot reasonably claim that it is seeking to establish reliability or service standards in this case.

Under its other claimed basis of jurisdiction, Chapter 4909, Revised Code, the Commission cannot regulate generation capacity service at all and none of the procedural or substantive ratemaking requirements of Chapter 4909, Revised Code, as they might apply to a non-competitive service has been satisfied, even if there were some authority to set a cost-based capacity price under that Chapter.[[22]](#footnote-22)

The only authority available to the Commission to authorize a price for a generation-related service arises in the context of a SSO case under Sections 4928.141 to 4928.143, Revised Code, but the Commission held that Chapter 4928, Revised Code, does not apply in this case,[[23]](#footnote-23) and, even if it did, this case is clearly not a SSO case. Further, none of the procedural or substantive requirements to support a SSO has been presented or addressed by AEP-Ohio or the Commission in this case.[[24]](#footnote-24)

The Commission, therefore, is without jurisdiction in this proceeding to authorize AEP-Ohio to bill and collect a capacity price based on a cost-based methodology. Because the Commission does not have jurisdiction to establish prices for generation-related services using a cost-based methodology, there is no jurisdictional basis for the Commission to address or sustain AEP-Ohio’s first and second assignment of errors. The jurisdictional bar on the Commission’s authority precludes AEP-Ohio’s attempt in rehearing to further increase the price of capacity and immediately bill and collect any price other than the RPM-Based Price for capacity available to CRES providers serving customers in AEP-Ohio’s distribution service area.

### AEP-O***h***io’s First and Second Assignments of Error Assume that the Commission May Unlawfully Authorize Transition Revenue

As was apparent throughout the hearing and in the Commission’s July 2 Order, AEP-Ohio is seeking Commission authorization to bill and collect for generation capacity service at levels far in excess of the market price of capacity.[[25]](#footnote-25) Through its first two assignments of error, AEP-Ohio seeks to increase the amount it can charge CRES providers (Assignment I) beyond that which the Commission unlawfully authorized and to collect the full amount immediately (Assignment II). To reach that result, AEP-Ohio ignores, as the Commission did in its July 2 Order,[[26]](#footnote-26) the statutory and contractual bar to the recovery of transition revenue.[[27]](#footnote-27)

While the form of AEP-Ohio’s “cost-based” formula proposed in this proceeding may be different in name than the transition revenue claim previously advanced by OP and CSP in the Electric Transition Plan (“ETP”) proceedings, it is undisputed that the “cost-based” formula proposal in this proceeding is, in substance, another claim for generation plant-related transition revenue.[[28]](#footnote-28) The proposal which AEP-Ohio has put forward in this proceeding is designed to provide AEP-Ohio with revenue it says it will lose if customers shop and CRES suppliers pay a market-based capacity price.[[29]](#footnote-29)

This new transition revenue claim comes well after the time period specified by Amended Substitute Senate Bill 3 (“SB 3”) for bringing a transition revenue claim.[[30]](#footnote-30) Pursuant to SB 3, an electric distribution utility’s (“EDU”) ability to seek recovery of above-market generation transition charges terminated with the end of its Market Development Period (“MDP”).[[31]](#footnote-31) Additionally, as conceded by several AEP-Ohio witnesses during their cross-examination, CSP and OP are parties to a binding settlement agreement resolving their respective ETP cases in which they voluntarily agreed to forego recovery of any generation transition revenues.[[32]](#footnote-32)

Although it does not address the bar on transition revenue recovery in its Application for Rehearing, AEP-Ohio has had as much trouble keeping its story straight on the status of the statutory and contractual bar as it has had with regard to the Commission’s jurisdiction to set a cost-based wholesale capacity charge. In several instances, it has acknowledged that Ohio law bars it from recovering transition revenue. In representations to the federal regulators, it noted in 2001 that its settlement in the ETP proceedings limited it to recovery of generation-related regulatory assets[[33]](#footnote-33) and that it had discontinued regulatory accounting for the generation portion of AEP-Ohio’s business.[[34]](#footnote-34) In 2004, it submitted a Rate Stabilization Plan that incorporated the ETP settlement, including its promise to forgo generation transition revenue.[[35]](#footnote-35) In a March 2012 filing, it stated without condition that it was precluded from recovering stranded generation investments after the transition period afforded by SB 3.[[36]](#footnote-36) In a July 21, 2012 filing, it again repeated its view that

under SB 3, all of these generation assets were subjected to market and EDUs therefore were given a temporary opportunity to recover stranded generation investments during a transition period. That transition period is over. EDUs can no longer recover stranded generation investments, and transferring the generation assets based on an arbitrary determination of their current fair market value rather than net book value would be inappropriate.[[37]](#footnote-37)

Yet in this case, AEP-Ohio has claimed that it may secure compensation for generation capacity service based on a cost-based ratemaking methodology that yields a price that is several times higher than annual prices established by the competitive bidding process that yields the RPM-Based Price. Further, in ESP II, it has argued that there is no bar to an above-market two-tiered pricing scheme (combined with a proposal for an illegal non-bypassable rider to recover additional lost revenue) because of changes brought about by Amended Substitute Senate Bill 221 (“SB 221”) and a supposed “breach” of the ETP settlement.[[38]](#footnote-38) In its Application for Rehearing, it now seeks Commission authorization of even higher capacity compensation than the Commission authorized on July 2, 2012 (the $188.88 price) and to collect the above-market price for generation capacity service immediately.[[39]](#footnote-39)

Because AEP-Ohio seeks nothing more than a means to recover transition revenue that Ohio law and its ETP settlement do not allow, the Commission should deny AEP-Ohio’s first and second assignments of error. The first, seeking to increase an unlawful cost-based capacity price, would result in further violation of the statutory provisions precluding transition revenue recovery and AEP-Ohio’s agreement to forgo generation-related transition revenue. The second, seeking rehearing of the Commission’s order requiring AEP-Ohio to defer amounts in excess of the RPM-Based Price, would permit AEP-Ohio to recover the generation-related transition revenue sooner rather than later, and would accelerate the impact of the Commission’s decision to permit illegal transition revenue. There is no lawful reason to grant either assignment of error.

## AEP-Ohio’s First Assignment of Error Is Predicated on the Flawed Assumption that AEP-Ohio Identified and Proved the Cost of Satisfying the Fixed Resource Requirement (“FRR”) Entity’s Capacity Obligation

Additionally, AEP-Ohio’s first assignment of error seeking to adjust the energy credit is premised on the flawed assumption that it could and did identify the incurred cost of satisfying the FRR Entity’s Capacity Obligation. In fact, AEP-Ohio’s own witnesses demonstrated that the operation of PJM bore no relation to the claims on which AEP-Ohio based its cost of capacity claim. As a result, AEP-Ohio’s claim that the Commission must further adjust a meaningless number, its alleged incurred cost of capacity as an FRR Entity, by decreasing the energy credit is meritless.

Although the methodology, inputs, and outputs were seriously contested,[[40]](#footnote-40) the Commission used the cost-based ratemaking methodology proposed by AEP-Ohio with modifications proposed by Staff[[41]](#footnote-41) including adjustments to account for margins from off-system sales (“OSS”) to reflect the compensation provided through OSS margins[[42]](#footnote-42) to calculate the cost-based price. Although AEP-Ohio focuses on only the amount of the energy credit and does not challenge the Commission’s adjustments to its embedded cost of capacity in the July 2 Order in its first assignment of error,[[43]](#footnote-43) the calculation of the incurred cost of capacity is critical because it establishes the basis on which the energy credit adjustment is made.

To justify its cost-based methodology, AEP-Ohio asserted that its methodology was designed to capture the cost it incurred to meet the FRR obligation. The Commission accepted that assumption and found that RPM-based prices “would be insufficient to yield reasonable compensation for AEP-Ohio’s provision of capacity to CRES providers in fulfillment of its FRR capacity obligations.”[[44]](#footnote-44) Thus, the compensation for generation capacity service addressed in the July 2 Order is supposed to be tied to the cost incurred by AEP-Ohio to satisfy its FRR obligation to shopping and non-shopping customers under the Commission’s theory.

The record, however, does not support AEP-Ohio’s claim. AEP-Ohio supported its cost-based ratemaking methodology through the testimony of AEP-Ohio witness Dr. Pearce. Dr. Pearce made clear at page 5 of his direct testimony that he relied upon AEP-Ohio witnesses Munczinski and Horton for his statement that AEP-Ohio elected to utilize the FRR option as the foundation for his claim that “[AEP-Ohio] is self-supplying its own generation resources to satisfy these load obligations” and that “the cost to provide this capacity is the *actual embedded capacity cost* of CSP’s and OPCO’s generation.”[[45]](#footnote-45) The uncontested record evidence including the admissions by Mr. Horton and Mr. Nelson, however, showed that: (1) AEP-Ohio did not make an FRR election for its distribution service area;[[46]](#footnote-46) (2) no FRR election is associated uniquely with AEP-Ohio’s distribution service area;[[47]](#footnote-47) and, (3) AEP-Ohio’s owned and controlled generating assets are *not* the source of capacity available to a CRES provider serving retail customers in AEP-Ohio’s distribution service territory.[[48]](#footnote-48) Thus, Dr. Pierce’s threshold assumption was false. The embedded costs associated with AEP-Ohio’s owned and controlled generating assets are not the costs incurred by AEP-Ohio to satisfy an FRR obligation and such costs cannot be relied upon to identify the costs incurred to satisfy such obligation.

The RAA itself dispels the notion that capacity anywhere in PJM, regardless of FRR or RPM status, is dedicated to specific customers or load. The RAA is a mutual assistance agreement through which Capacity Resources are shared on a region-wide basis within PJM.[[49]](#footnote-49)

Schedule 8.1.B.2 of the RAA does permit a Party to elect the FRR Alternative for a portion of its load within the PJM Region, and a partial FRR Alternative election triggers specific requirements.[[50]](#footnote-50) AEP-Ohio, however, has not claimed that a partial FRR Alternative election was made and did not offer any evidence showing that it or AEPSC elected the FRR Alternative for only the AEP-Ohio distribution service area.[[51]](#footnote-51)

The fact that PJM treats Capacity Resources as a PJM Region resource was acknowledged by several AEP-Ohio witnesses. During his cross-examination, Mr. Horton agreed that PJM has a call on AEP-Ohio’s owned and controlled generating assets and will dispatch them as necessary to serve load anywhere in PJM’s footprint.[[52]](#footnote-52) 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.[[53]](#footnote-53) On a system-wide basis, PJM then determines which resources are actually dispatched to serve load in the PJM Region.[[54]](#footnote-54)

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.[[55]](#footnote-55) The operation of AEP-Ohio’s “deregulated”[[56]](#footnote-56) generating assets cannot be separated from the operation of the combined generation fleet of the AEP East operating companies.[[57]](#footnote-57) On an after-the-fact basis, allocations are performed to attribute generation output to off-system sales.[[58]](#footnote-58) It is impossible to simulate a dispatch of the AEP-Ohio owned or controlled generating assets without performing a dispatch for the entire AEP system.[[59]](#footnote-59)

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.[[60]](#footnote-60) So, Dr. Pearce’s exclusive reliance on costs he attributed to AEP-Ohio’s generating plants is not consistent with reality or the definition of Capacity Resources in the RAA. Even if Dr. Pearce would have offered a ratemaking method that looked to the entire fleet of the AEP East operating companies’ generating assets, it would still be out of touch with reality because PJM relies upon Capacity Resources for the entire PJM Region and Capacity Resources include both demand and supply side Capacity Resources, not just generating plants.

Thus, Dr. Pearce’s threshold assumptions―that AEP-Ohio is an FRR Entity and that AEP-Ohio’s owned and controlled generating assets are the source of capacity provided to a CRES provider serving retail customers in AEP-Ohio’s distribution service territory―are wrong. Because these threshold assumptions are wrong, the mathematical computations embedded in Dr. Pearce’s proposed formula rate cannot identify any type of cost of capacity provided to a CRES provider serving retail customers in AEP-Ohio’s distribution service territory. Without a proper calculation of cost of capacity, the Staff’s recommended energy credit adjustment is likewise a victim of Dr. Pearce’s flawed assumptions and math.

AEP-Ohio’s first assignment of error begins with the faulty assumption that the Commission’s determination of a cost-based capacity price bore some relationship to AEP-Ohio’s cost to fulfill its FRR obligation. As the testimony of AEP-Ohio’s own witnesses demonstrates, it does not. Making adjustments to the already fatally flawed cost-based capacity price approved by the Commission will not result in a more accurate calculation of the cost incurred by AEP-Ohio to provide generation capacity to serve CRES providers. It only increases significantly the amount that the Commission unreasonably and unlawfully attributed to AEP-Ohio’s cost of capacity.

## The Commission Should Reject AEP-Ohio’s Allegation that Adoption of the Staff’s Methodology to Establish an Energy Credit Would Result in Confiscation

As part of its first assignment of error, AEP-Ohio also argues that the Commission should grant rehearing because the July 2 Order is confiscatory or results in partial regulatory taking if the Commission does not reduce the energy credit.[[61]](#footnote-61) AEP-Ohio, however, bases this argument on testimony that a taking will occur if the capacity price is set at RPM-Based Prices.[[62]](#footnote-62) Further, it resorts to references to the record in the ESP II case and non-record materials to support its takings argument. Obviously, AEP-Ohio lacks any record to support its claim that variations in the energy credit will effect a taking. In fact, neither the applicable law nor the record in this case (or the non-record material AEP-Ohio seeks to improperly incorporate through its Application for Rehearing) warrants any Commission action to increase the already unreasonable and unlawful $188.88 capacity price.

To support a claim of confiscation, AEP-Ohio must demonstrate that the ratemaking result is “so ‘unjust’ as to be confiscatory,”[[63]](#footnote-63) but a review of a rate, standing alone, is not a basis for determining if a confiscation has occurred. Before the Commission may find that rates are confiscatory, it must assess “all relevant costs and expenditures made by [the electric distribution utility].”[[64]](#footnote-64) “It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry … is at an end.”[[65]](#footnote-65) Relying on this well-understood test for determining if utility rates are confiscatory, the Commission has held that it must “consider the total effect of the [EDU’s] rates.”[[66]](#footnote-66) Moreover, there is no legal assurance that the EDU must have an opportunity to earn a profit for its competitive generation function.[[67]](#footnote-67) “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.”[[68]](#footnote-68)

Before discussing the specific compensation that the Commission authorized in the July 2 Order, it is important to put AEP-Ohio’s confiscation claim in the proper context. But for the significant increase in capacity compensation called for by the Commission’s order, the RAA would compel the use of RPM-Based Pricing. RPM-Based Pricing arises from the RAA and the RAA is a contract which AEP-Ohio, through AEPSC, urged FERC to approve and to which AEP-Ohio is bound. In effect, then, AEP-Ohio is claiming that the July 2 Order causes confiscation by providing AEP-Ohio with more compensation than AEP-Ohio agreed would be just and reasonable.

Also, since the source of RPM-Based Pricing is a contract binding on AEP-Ohio and approved by FERC, demonstrating that RPM-Based Pricing yields unjust and unreasonableness compensation requires AEP-Ohio to satisfy a *Mobile-Sierra* review standard that the pricing under the RAA is not in the public interest.[[69]](#footnote-69) AEP-Ohio made no effort to demonstrate that continuation of RPM-Based Pricing is contrary to the public interest, has not asserted the same in its Application for Rehearing, and the July 2 Order does not find that continuation of RPM-Based Pricing is contrary to the public interest.

In this case, the Commission (wrongly) authorized AEP-Ohio to collect a substantially higher price than the RPM-Based Price. That substantially higher price includes an 11.15% return on equity.[[70]](#footnote-70) Admittedly, the price is recovered in two parts: the RPM-Based Price beginning no later than August 8, 2012 for CRES providers and the balance deferred and collected at some later time. As to the deferred balance, however, the Commission authorized AEP-Ohio to collect a carrying charge at the weighted average cost of capital.[[71]](#footnote-71) AEP-Ohio’s allegation that it suffers any sort of taking when it would be receiving compensation at a substantially higher level than the just and reasonable RPM-Based Price would provide and be recovering all of its claimed investment and operating cost, plus interest on the deferred amounts, is simply nonsense. The Commission’s July 2 Order would go well beyond what the Due Process Clause requires.

AEP-Ohio, however, argues that it must have an adjustment to the energy credit or it will suffer confiscation.[[72]](#footnote-72) Even if AEP-Ohio’s confiscation claim did not require AEP-Ohio to satisfy the *Mobile-Sierra* review standard, the holding of *Hope* precludes the sort of one-issue review AEP-Ohio is seeking due to an unfavorable result affecting one part of one rate. “It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry … is at an end.”[[73]](#footnote-73) AEP-Ohio did not and cannot demonstrate that it will suffer any confiscation of its property due to adjustments in the energy credit as there was simply no record to support such a claim.

Moreover, the recovery of a cost-based price far exceeds the investment expectations of AEP-Ohio. AEP-Ohio understood and told its investors and regulators that it was moving its generation facilities in Ohio to an unregulated structure in 2001 and was discontinuing specialized regulatory accounting.[[74]](#footnote-74) In the related context of its SSO rates, it argued to the Commission and the Commission has agreed that earnings are irrelevant.[[75]](#footnote-75) Yet, AEP-Ohio now claims an amount of compensation substantially in excess of compensation resulting from RPM-Based Prices will result in a taking unless the Commission adjusts the energy credit.[[76]](#footnote-76) Plainly, investment expectations based on market-based prices would be more than satisfied by the substantially above-market cost-based price the Commission authorized, even if the Commission refused to make a single adjustment to the energy credit.

The specious nature of its takings claim is borne out by the evidence AEP-Ohio produced in this case to support its claim that it faced confiscation. Relying on the testimony of Mr. Allen, AEP-Ohio’s takings claim, taken at face value, would result in AEP-Ohio earning positive returns in 2012 and 2013 if capacity prices were set at RPM-Based Prices. These positive returns assume that AEP-Ohio would make no changes in expenses despite significantly reduced SSO load and an assumption that shopping would increase to levels that bear no relationship to current levels or the pace of switching to CRES providers in the AEP-Ohio service territory.[[77]](#footnote-77) AEP-Ohio could operate without a single additional lay-off and would not suffer any loss as a result of billing CRES providers for capacity at the RPM-Based Price.[[78]](#footnote-78)

Moreover, if it is appropriate to import the record of the ESP II proceeding as AEP-Ohio did in its Application for Rehearing, then the Commission will find even less justification for a claim that AEP-Ohio will suffer a confiscation. The one-year snapshot provided by Mr. Allen in the ESP II case ignored the eleven years of double-digit earnings that AEP-Ohio has generated since generation service was deemed competitive.[[79]](#footnote-79) Further, an AEP internal analysis that is part of the record in this proceeding showed a $22 billion positive cash flow associated with the AEP East generating assets based on actual and forecasted RPM-based prices.[[80]](#footnote-80)

AEP-Ohio’s confiscation claim fares no better if the Commission examines the effect of RPM-Based Prices on AEP-Ohio under a “partial regulatory takings” analysis. Under the *Penn Central* standard of regulatory takings, the Commission or a court would consider (1) the economic impact of the regulation on the utility; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental action.[[81]](#footnote-81) AEP-Ohio cannot demonstrate that it can meet any of the factors under the three part test.

First, the Commission’s decision permitting AEP-Ohio a total recovery of $188.88/MW-day with interest would substantially increase the price it bills for capacity compared to RPM-Based Prices. Additionally, AEP-Ohio’s confiscation claim is entirely focused on the compensation available from CRES providers serving customers in AEP-Ohio’s distribution service territory. AEP-Ohio completely ignores the compensation it receives for other services including the compensation associated with generation capacity service provided as part of the SSO to non-shopping customers which, according to AEP-Ohio, is significantly above the compensation it would obtain at RPM-Based Pricing and the $188.88 price in the July 2 Order. Thus, under the first factor, AEP-Ohio has no basis to complain that it is suffering an adverse economic impact resulting from the Commission’s July 2 Order.

Second, as noted previously, investor-backed expectations are not interfered with by the Commission’s decision on the energy credit. AEP-Ohio and its sole shareholder, American Electric Power, were and are well aware that AEP-Ohio has not been subject to cost-based, rate of return regulation of its generation assets since 2001 and have reported that fact to FERC and securities regulators for years. AEP has no investor-backed expectation of receiving anything other than the market price for capacity. Thus, the Commission could have (and should have) left capacity prices at RPM-Based Prices without damaging investor-backed expectations.

Third, there can be no legitimate complaint that the regulator has undertaken some “unusual action” that “implicates principles of fairness.”[[82]](#footnote-82) The debate over the proper capacity price has been a common theme at the Commission for years. AEP-Ohio itself has advocated to this Commission that RPM-Based Prices were appropriate in setting its ESP I rates[[83]](#footnote-83) and advocated strongly for RPM-Based Pricing when it was to its advantage to do so.[[84]](#footnote-84) It also presented the Commission with the cost-based methodology the Commission used to calculate the $188.88 price. When the Commission authorized a cost-based rate, but did not accept the particular calculations offered by AEP-Ohio concerning the energy credit, the Commission may have been wrong, but it provided no basis for AEP-Ohio to claim that the character of the Commission’s actions was unusual or unfair. In fact, the Commission’s repeated unlawful failures to rein in AEP-Ohio’s program to protect its earnings and stifle shopping demonstrate that the intervenors, not AEP-Ohio, have a claim that the Commission violated their due process rights.[[85]](#footnote-85)

## AEP-Ohio’s Second Assignment of Error Seeks Authorization to Illegally Bill and Collect at Rates Not Approved by the Commission

In sub-point D of its second assignment of error, AEP-Ohio argues it would be unlawful for the Commission to extend RPM-Based Prices to customers that previously switched to CRES providers based on a capacity price of $255/MW-day. In support of this claimed error, AEP-Ohio notes that some customers switched when capacity would have been charged at the $255/MW-day level and claims that charging CRES providers the RPM-Based Price would result in a windfall to the CRES provider.[[86]](#footnote-86) The Commission must reject this assignment of error for the simple reason that AEP-Ohio cannot bill for an unauthorized rate, higher or lower, than what the Commission has legally ordered.

If the Commission may set a cost-based capacity price (obviously a contested issue), then a public utility subject to the Commission’s regulatory jurisdiction must charge that price. The public utility must file with the Commission its rates and charges for every service provided by the public utility.[[87]](#footnote-87) “No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.”[[88]](#footnote-88) Thus, there is no basis for AEP-Ohio to bill a CRES provider for any amount other than that authorized by the Commission.

Additionally, AEP-Ohio has not demonstrated that it has any legitimate basis to bill $255/MW-day for capacity provided to CRES providers in the AEP-Ohio service territory. Based on the July 2 Order, it does not have authorization to charge that rate after August 8, 2012, and the $255/MW-day price was the product of a now-rejected settlement.

Finally, the $255/MW-day price was part of a temporary compensation mechanism that the Commission approved over objections that are presently before the Commission as a result of, among other things, the rehearing applications granted by the Commission on April 11 and July 11, 2012. The other part of the temporary compensation mechanism was RPM-Based Pricing or, more recently, $146/MW-day. During the time when the two-tiered compensation mechanism was in place, the Commission repeatedly held that RPM-Based Pricing would be fully restored.[[89]](#footnote-89) Given the prior role of RPM-Based Pricing and the Commission’s representations that RPM-Based Pricing would be fully restored, there is no rational basis to conclude CRES providers will receive a windfall as a result of the application of RPM-Based Pricing.

## Customer Choice Will Be Frustrated if the Commission Grants AEP-Ohio’s Second Assignment of Error

A larger problem for customers, however, looms if the Commission grants AEP-Ohio’s second assignment of error and permits it to bill a capacity price computed based on AEP-Ohio’s preferred version of a cost-based ratemaking methodology. To the extent that the Commission asserts jurisdiction over capacity pricing, it must also assure that the value of contracts already entered into when RPM-Based Pricing applied or based on a reasonable expectation that RPM-Based Pricing would be restored are not unreasonably diminished.[[90]](#footnote-90)

Most customers that moved to a CRES provider have contracted with the CRES provider on the assumption that the CRES provider would be billed based on the RPM-Based Price.[[91]](#footnote-91) If the Commission grants the relief requested in AEP-Ohio’s Application for Rehearing, however, the CRES provider will be billed at a much higher rate. Such a change in the billed capacity price will cause losses that could not be anticipated or may trigger “regulatory out” clauses that could result in the termination of the contract.[[92]](#footnote-92) Further, CRES providers may be more reluctant to enter the market covered by the AEP-Ohio service territory if the price of capacity is based on a significantly above-market price.[[93]](#footnote-93) Thus, granting the relief requested in AEP-Ohio’s second assignment of error and ordering that CRES providers be billed a much higher price computed on a cost-based ratemaking methodology would result in an unlawful and unreasonable constraint on CRES providers and customers already under contract, and frustrate the customer choice goals the Commission is required to effectuate.[[94]](#footnote-94)

## AEP-Ohio’s Second Assignment of Error Is Without Merit Because It Seeks a Finding that the Commission Can Ignore State Policies Regarding Customer Choice

The importance of the last point concerning AEP-Ohio’s attempt to interfere with contract expectations is reinforced by AEP-Ohio’s argument that the Commission should authorize it to bill and collect AEP-Ohio’s preferred capacity price immediately because the Commission may not consider the State Energy Policy in this case.[[95]](#footnote-95) It bases this conclusion on the Commission’s contested finding that Chapter 4928, Revised Code, does not apply because the provision of capacity to CRES providers is a wholesale transaction.[[96]](#footnote-96)

Like so many positions AEP-Ohio has taken in this and other proceedings, AEP-Ohio’s objection to the Commission’s consideration of Section 4928.02, Revised Code, ignores the fact that AEP-Ohio has urged the Commission to consider the State Energy Policy. In its prefiled testimony, for example, AEP-Ohio itself invoked the State Energy Policy’s focus on choice, arguing that a cost-based ratemaking methodology would provide “for a more equal and fair competitive market in Ohio for generation services.”[[97]](#footnote-97) AEP-Ohio’s claim that the Commission erred by considering the State Energy Policy is nothing more than an indication that AEP-Ohio is unhappy with the Commission’s conclusions about how the State Energy Policy militates against AEP-Ohio’s desired outcome.

AEP-Ohio’s argument is also inconsistent with the Commission’s initial determination in this proceeding to adopt the RPM-Based Price as the State Compensation Mechanism and its decision to determine the terms of the deferral recovery in the ESP II case. In its December 8, 2010 Entry initiating this proceeding, the Commission noted that its adoption of RPM-Based Price as the State Compensation Mechanism was a result of the manner in which it reviewed and approved AEP-Ohio’s first ESP.[[98]](#footnote-98) In addition to relying on the State Energy Policy to support its decision to authorize AEP-Ohio to bill and collect only RPM-Based Prices immediately, the Commission in its July 2 Order stated that it would address the deferred amount in the ESP II proceeding.[[99]](#footnote-99) In each instance, the Commission looked to the application of Chapter 4928, Revised Code, to formulate its decision.

In contrast to the Commission’s reliance on Chapter 4928, Revised Code, to support its decisions in this proceeding, AEP-Ohio does not explain what statutory basis the Commission may use to support AEP-Ohio’s cost-based methodology or the additional changes it is seeking in its Application for Rehearing. It cannot do so because there is no legal basis for the Commission to ignore the explicit legislative directive to apply the State Energy Policy to its decisions governing generation capacity service.

# CONCLUSION

AEP-Ohio’s first and second assignments of error are directed at having this Commission increase the price of capacity by adopting and further modifying a cost-based ratemaking methodology identified in the July 2 Order. The first and second assignments of error, however, seek relief that is beyond the jurisdiction of the Commission in this case. Because the relief AEP-Ohio seeks also produces above-market charges for generation-related services or transition revenue, the relief is barred by the statute of limitations on transition revenue claims and AEP-Ohio’s agreement to forgo generation-related transition revenue. Even if there were some legal basis to use a cost-based methodology, the relief AEP-Ohio seeks also is based on a fundamentally wrong assumption that AEP-Ohio’s owned and controlled generation assets are the source of capacity available to CRES providers serving customers in AEP-Ohio’s distribution service area. As a result, the first two assignments of error in AEP-Ohio’s Application for Rehearing are without merit.

In its third assignment of error and July 20 FERC filing, AEP-Ohio persists in prosecuting an unreasonable and unlawful claim that it is entitled to substantially more compensation than that authorized by the July 2 Order. In particular, the July 20, 2012 FERC filing by AEPSC highlights the risk the Commission has created by indulging AEP-Ohio’s bankrupt legal theory that the Commission can substantially increase generation service capacity prices through adoption of a cost-based ratemaking methodology. To eliminate the risk of further abuse by AEP-Ohio or its agent, AEPSC, and for the reasons advanced by IEU-Ohio, IEU-Ohio urges the Commission to immediately restore the “just and reasonable” RPM-Based Pricing to its rightful place. Nothing less is in the public interest.

Respectfully submitted,

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#### Certificate of Service

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio’s Memorandum Contra the Application for Rehearing of Ohio Power Company* was served upon the following parties of record this 30th day of July 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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1. “AEP-Ohio” is used throughout this Memorandum to designate the surviving entity of the merger of Ohio Power Company (“OP”) and Columbus Southern Power Company (“CSP”). [↑](#footnote-ref-1)
2. The Public Utilities Commission of Ohio (“Commission”) approved a two-tiered capacity pricing scheme that became effective on January 1, 2012 in December 2011. Opinion and Order (Dec. 14, 2011). Approval of the underlying stipulation was reversed on rehearing based on the Commission’s finding that the stipulation was not in the public interest. Entry on Rehearing (Feb. 23, 2012). AEP-Ohio, however, has been permitted to maintain a two-tiered capacity pricing scheme on an interim basis. Entry (Mar. 7, 2012) & Entry (May 30, 2012). [↑](#footnote-ref-2)
3. July 2 Order at 12-13. [↑](#footnote-ref-3)
4. The July 2 Order does not find that RPM-Based Price or the market-based methodology that sets the RPM-Based Price to be unjust or unreasonable or that AEP-Ohio demonstrated such. Thus, the Commission failed to make the findings required to authorize AEP-Ohio to deviate from the RPM-Based Pricing method previously approved by the Commission and the Federal Energy Regulatory Commission (“FERC”). [↑](#footnote-ref-4)
5. July 2 Order at 35. [↑](#footnote-ref-5)
6. *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, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-UNC, *et al*. (“ESP II”). [↑](#footnote-ref-6)
7. July 2 Order at 36. The carrying charge was initially set at the weighted average cost of capital. *Id*. at 23. [↑](#footnote-ref-7)
8. Application for Rehearing of Ohio Power Company at 1-2 (July 20, 2012) (“AEP-Ohio Application for Rehearing”). [↑](#footnote-ref-8)
9. *Id*. at 43-56. [↑](#footnote-ref-9)
10. *Id*. at 2-3. [↑](#footnote-ref-10)
11. *Id*. at 3. [↑](#footnote-ref-11)
12. Ohio Power Company’s and Columbus Southern Power Company’s Application for Rehearing at 3 (Jan. 7, 2011). In its first Application for Rehearing, AEP-Ohio argued, “It … would be unlawful as a matter of both federal and state law for the Commission to now adopt any mechanism to determine the Companies’ FRR capacity charge.” *Id*. at 8. It further stated, “No provision of Title 49, Ohio Rev. Code, authorizes the Commission to establish wholesale prices for the Companies [*sic*] provision of capacity that CRES providers require in order to serve their retail generation service customers.” *Id*. at 20. [↑](#footnote-ref-12)
13. *American Electric Power Service Corporation*, FERC Docket No. 11-2183-001 *et al*., Renewed Motion of American Electric Service Corporation for Expedited Ruling (July 20, 2012) (“Renewed Motion”) (copy attached as Attachment A). Notably, AEPSC failed to mention in its FERC filing that FERC has already suspended a similar formula rate proposal for Indiana and Michigan Power Company, an affiliate of AEP-Ohio, because of FERC’s preliminary determination that the proposed formula rate was not just and reasonable.  *PJM Interconnection, LLC*, FERC Docket No. ER12-1173-000, Order Accepting Formula Rate Proposal and Establishing Hearing and Settlement Judge Procedures ¶ 21 (Apr. 30, 2012) (“Preliminary analysis indicates that I&M’s filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.”) [↑](#footnote-ref-13)
14. July 2 Order at 23. [↑](#footnote-ref-14)
15. *Id*. at 12. [↑](#footnote-ref-15)
16. *Id*. at 12-13 & 22. The Commission has failed to address one additional problem with its position: the general supervisory authority contained in Chapter 4905, Revised Code, cannot be used to expand the Commission’s rate setting authority. *Columbus S. Power Co. v. Pub. Util. Comm’n of Ohio,* 67 Ohio St.3d 535 (1993). [↑](#footnote-ref-16)
17. “‘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.” Section 4928.01(A)(27), Revised Code.

    “Competitive retail electric service” means a component of retail electric service that is competitive as provided under division (B) of this section.“ Section 4928.01(A)(4), Revised Code. [↑](#footnote-ref-17)
18. Of course, the Commission can exercise no authority except that authority that has been delegated to it by the General Assembly. To have any jurisdiction over wholesale services, the Commission would thus have to find some specific grant of authority by the General Assembly and this fundamental principle is true irrespective of the powers reserved to the federal government. But the General Assembly could not lawfully delegate authority to the Commission to regulate or supervise wholesale electric transactions because the authority to regulate commerce among the states is reserved to the federal government. U.S. Const., Art. I, § 8, cl. 3. [↑](#footnote-ref-18)
19. Section 4928.01(A)(27), Revised Code. [↑](#footnote-ref-19)
20. The definition of “retail electric service” (in combination with the balance of Chapter 4928) also makes it clear that a service component or function is either competitive or non-competitive. Because non-competitive service components are defined to be everything except competitive service components or functions, a service component must either be competitive or non-competitive. [↑](#footnote-ref-20)
21. July 2 Order at 12. [↑](#footnote-ref-21)
22. IEU-Ohio Post-Hearing Brief at 33-37 (May 23, 2012). [↑](#footnote-ref-22)
23. July 2 Order at 13. [↑](#footnote-ref-23)
24. *Id*. at 32-33. [↑](#footnote-ref-24)
25. *Id*. at 10. [↑](#footnote-ref-25)
26. The Commission acknowledged but failed to address the bar on transition revenue recovery. *Id*. at 30. [↑](#footnote-ref-26)
27. Sections 4928.141(A) & 4928.38, Revised Code. [↑](#footnote-ref-27)
28. *See* Tr. Vol. I at 137. [↑](#footnote-ref-28)
29. *See* AEP-Ohio Ex. 101 at 4-12. [↑](#footnote-ref-29)
30. Section 4928.32, Revised Code (an ETP, including requests for transition revenues, had to be filed within 90 days of October 5, 1999). [↑](#footnote-ref-30)
31. Section 4928.38, Revised Code. [↑](#footnote-ref-31)
32. Tr. Vol. I at 49-56; *see also* Tr. Vol. I at 146-47 and Tr. Vol. V at 883. [↑](#footnote-ref-32)
33. Regulatory assets were separately identified and recovered under SB 3. Section 4928.39, Revised Code. [↑](#footnote-ref-33)
34. *See, e.g.,* IEU-Ohio Ex. 114 (2001 FERC Form 1). [↑](#footnote-ref-34)
35. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 9 (2005) (“RSP Order”). [↑](#footnote-ref-35)
36. IEU-Ohio Ex. 101 at 13-14 (*quoting* *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126 EL UNC, Application at 7 (Mar. 30, 2012)). [↑](#footnote-ref-36)
37. *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC,Ohio Power Company’s Memorandum Contra Joint Motion to Extend Comment Deadline and Request for Expedited Ruling and Memorandum in Support at 3 (July 21, 2012). [↑](#footnote-ref-37)
38. ESP II, Ohio Power Company’s Initial Post-Hearing Brief at 71-78 (June 29, 2012). [↑](#footnote-ref-38)
39. The Commission erred by failing to find on the record presented to it that above-market capacity prices are not permitted by Ohio law. This issue has been squarely presented to the Commission as part of this investigation. Had the Commission properly found that the Commission could not authorize above-market rates that would result in illegal transition revenue under the ETP Settlement and Sections 4928.141 and 4928.38, Revised Code, the Commission would have avoided the endless and ultimately fruitless debate about the methodology of energy credits and deferrals raised by AEP-Ohio’s first two assignments of error. IEU-Ohio Post-Hearing Brief at 47-50 (May 23, 2012).

    [↑](#footnote-ref-39)
40. Contrary to the Commission’s finding that no one seriously challenged the cost calculations, IEU-Ohio noted no party provided a reliable cost-based method for establishing a just and reasonable price for capacity available to CRES providers. IEU-Ohio Reply Brief at 25 (May 30, 2012). [↑](#footnote-ref-40)
41. July 2 Order at 33-34. The Commission rejected some of the Staff adjustments which increased the embedded costs derived from the formula. *Id*. at 34. [↑](#footnote-ref-41)
42. *Id*. at 34. The Commission adjusted the energy offset to account for AEP-Ohio’s obligation to serve Wheeling Power Company, which reduced the energy credit and increased the capacity price. *Id*. at 35. [↑](#footnote-ref-42)
43. *See, e.g*., AEP-Ohio Application for Rehearing at 9. [↑](#footnote-ref-43)
44. July 2 Order at 23. [↑](#footnote-ref-44)
45. AEP-Ohio Initial Brief at 36 (emphasis in original). [↑](#footnote-ref-45)
46. Tr. Vol. II at 429, 475; Tr. Vol. XI at 2530-34. As the signature page of the RAA clearly shows, AEPSC signed the RAA jointly on behalf of AEP-Ohio and affiliated operating companies in the region known as AEP East. At no time during this proceeding has any party demonstrated that AEP-Ohio is an FRR entity by the terms of the RAA. AEP-Ohio is not a stand-alone party to the RAA. [↑](#footnote-ref-46)
47. *Id*. [↑](#footnote-ref-47)
48. Tr. Vol. XI at 2530-31, 2533; *see also* Tr. Vol. XI at 2543-47. [↑](#footnote-ref-48)
49. Schedule 8.1.A of the RAA dealing with the FRR Alternative makes this clear as well: “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. [↑](#footnote-ref-49)
50. *Id*. at 107:

    A Party eligible under B.1 above may select the FRR Alternative only as to all of its load in the PJM Region; provided however, that a Party may select the FRR Alternative for only part of its load in the PJM Region if (a) the Party elects the FRR Alternative for all load (including all expected load growth) in one or more FRR Service Areas; (b) the Party complies with the rules and procedures of the Office of the Interconnection and all relevant Electric Distributors related to the metering and reporting of load data and settlement of accounts for separate FRR Service Areas; and (c) the Party separately allocates its Capacity Resources to and among FRR Service Areas in accordance with rules specified in the PJM Manuals. [↑](#footnote-ref-50)
51. Tr. Vol. II at 476. [↑](#footnote-ref-51)
52. *Id*. at 484-85. [↑](#footnote-ref-52)
53. Tr. Vol. XI at 2544-45. [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. *Id*. at 2546-47. [↑](#footnote-ref-55)
56. *Id*. at 2536-37. [↑](#footnote-ref-56)
57. *Id*. at 2545-47. [↑](#footnote-ref-57)
58. *Id*. at 2547-50. [↑](#footnote-ref-58)
59. *Id*. at 2545-47. [↑](#footnote-ref-59)
60. *See, e.g.*, Tr. Vol. XI at 2531. Because AEP-Ohio did not introduce the FRR Capacity Plan, the specific Capacity Resources to satisfy the FRR obligation are not known. [↑](#footnote-ref-60)
61. AEP-Ohio Application for Rehearing at 44. [↑](#footnote-ref-61)
62. *Id*. at 45-56. [↑](#footnote-ref-62)
63. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). [↑](#footnote-ref-63)
64. *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 924 (S.D. Ohio 2004). [↑](#footnote-ref-64)
65. *Id*. at 921. [↑](#footnote-ref-65)
66. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for Monongahela Power Company*, Case No. 04-880-EL-UNC, Opinion and Order at 16 (Dec. 8, 2004). [↑](#footnote-ref-66)
67. *FPC v. Hope Natural Gas Co*., 320 U.S. 592, 603 (1944). [↑](#footnote-ref-67)
68. *Market Street Railway Co. v. Railroad Comm’n of California*, 324 U.S. 548, 567 (1945). [↑](#footnote-ref-68)
69. FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Co. v. Mobile Gas Corp., 350 U.S. 332 (1956). [↑](#footnote-ref-69)
70. July 2 Order at 34. [↑](#footnote-ref-70)
71. *Id*. at 23-24. [↑](#footnote-ref-71)
72. AEP-Ohio Application for Rehearing at 50 (“The Company is confident that, unless rehearing is granted and the Commission addresses the serious flaws in Staff’s energy credit, the Supreme Court (or another forum with appropriate jurisdiction over the Company’s constitutional claims) will agree that the Commission has unlawfully confiscated AEP Ohio’s property in violation of the Fifth and Fourteenth Amendments.”). [↑](#footnote-ref-72)
73. *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d at 921. [↑](#footnote-ref-73)
74. IEU-Ohio Exs. 112 & 114. [↑](#footnote-ref-74)
75. RSP Order at 18. [↑](#footnote-ref-75)
76. AEP-Ohio Application for Rehearing at 50. [↑](#footnote-ref-76)
77. AEP-Ohio Ex. 104 at 4 and WAA-2 (earnings impact assumes residential switched load goes from 9.45% to 65% at end of 2012; commercial switched load goes from 48% to 80% by end of 2012; and industrial switched load goes from 49.7% to 90% by end of 2012). [↑](#footnote-ref-77)
78. The Commission noted that AEP-Ohio “may earn an unusually low return on equity … with a loss of $240 million between 2012 and 2013.” July 2 Order at 23. Mr. Allen did not identify a loss; rather, he noted that earnings would decrease by about $240 million from 2012 to 2013 if AEP-Ohio charged RPM-Based Prices. Tr. Vol. III at 701. At no time has AEP-Ohio indicated that it is facing a situation in which its total earnings are not positive, even under the over-stated switching assumptions used by Mr. Allen. See AEP-Ohio Ex. 104 at WAA-1 (positive returns in 2012 and 2013). [↑](#footnote-ref-78)
79. ESP II, IEU-Ohio Ex. 129 at Ex. JGB-5. [↑](#footnote-ref-79)
80. IEU-Ohio Ex. 124. [↑](#footnote-ref-80)
81. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). [↑](#footnote-ref-81)
82. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998). [↑](#footnote-ref-82)
83. IEU-Ohio Ex. 103 at 14. [↑](#footnote-ref-83)
84. IEU-Ohio Ex. 105. [↑](#footnote-ref-84)
85. Industrial Energy Users-Ohio’s Application for Rehearing of the May 30, 2012 Entry and Memorandum in Support at 12 (June 19, 2012). [↑](#footnote-ref-85)
86. AEP-Ohio Application for Rehearing at 61-62. [↑](#footnote-ref-86)
87. Section 4905.30, Revised Code. [↑](#footnote-ref-87)
88. Section 4905.32, Revised Code. [↑](#footnote-ref-88)
89. Entry on Rehearing at 12 (Feb. 23, 2012); Entry at 17 (Mar. 7, 2012). [↑](#footnote-ref-89)
90. *Utility Serv. Partners, Inc. v. Pub. Util. Comm’n of Ohio,*124 Ohio St.3d 284 (2009). [↑](#footnote-ref-90)
91. Tr. Vol. VIII at 1696-97 (cross examination of FES witness Banks). [↑](#footnote-ref-91)
92. Tr. Vol. VIII at 1688-89 & 1694. [↑](#footnote-ref-92)
93. FES Ex. 102 at 6. [↑](#footnote-ref-93)
94. Section 4928.06(A), Revised Code. [↑](#footnote-ref-94)
95. AEP-Ohio Application for Rehearing at 62-64. [↑](#footnote-ref-95)
96. *Id*. at 63. [↑](#footnote-ref-96)
97. AEP-Ohio Ex. 101 at 14. [↑](#footnote-ref-97)
98. Entry at 2-3 (Dec. 8, 2010). [↑](#footnote-ref-98)
99. July 2 Order at 23. [↑](#footnote-ref-99)