BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE MAY 30, 2012 ENTRY AND MEMORANDUM IN SUPPORT

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2. In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "… at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission,* 294 U.S. 63 (1935). 12

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry issued by the Public Utilities Commission of Ohio ("Commission") on May 30, 2012 authorizing Ohio Power Company ("OP") (now merged with Columbus Southern Power Company or "CSP" as "AEP-Ohio") to continue and increase its two-tiered generation capacity service pricing scheme ("Pricing Scheme") until July 2, 2012 ("May 30, 2012 Entry"). The Commission's May 30, 2012 Entry is unlawful and unreasonable in the following respects:

1. **As identified in IEU-Ohio's March 27, 2012 Application for Rehearing, IEU-Ohio's May 23, 2012 Initial Brief, and IEU-Ohio's May 30, 2012 Reply Brief, the Commission failed to comply with the law by not returning customers to the rates under AEP-Ohio's prior electric security plan ("ESP"); the Commission is without jurisdiction to approve the Pricing Scheme; AEP-Ohio failed to meet its applicable burden of proof; the Pricing Scheme is discriminatory and is not comparable; the Pricing Scheme allows AEP-Ohio to collect transition revenue in violation of the law; the Pricing Scheme is not supported by the evidence; and the Commission authorized AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme in response to an untimely application for rehearing.**

2. **In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "… at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).**

3. **The Commission must restore the customer protections that have been ignored and eroded through the unlawful and unreasonable Pricing Scheme and, to this end, must direct AEP-Ohio to refund the above-market portion of the Pricing Scheme or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.**

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing; forthwith terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the Pricing Scheme; and, "issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer…"[1]

[1] Section 4928.143(C)(2)(b), Revised Code.

which, in this case, includes the establishment of generation service capacity prices by means of RPM-Based Pricing.[2]

Respectfully submitted,

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[2] The wholesale generation capacity service pricing method that is the default method under PJM Interconnection, L.L.C.'s ("PJM") Reliability Pricing Model ("RPM") is referred to as "RPM-Based Pricing".

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's May 30, 2012 Entry permitted AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme. This Pricing Scheme illegally displaced RPM-Based Pricing, the capacity pricing mechanism in place since 2007. The Pricing Scheme was designed by AEP-Ohio to illegally abridge the ability of customers to reduce their electric bills by obtaining generation supply service from a Competitive Retail Electric Service ("CRES") provider.[3] As with prior actions by the Commission in this proceeding, the May 30, 2012 Entry is unlawful and unreasonable for several fundamental reasons that have been previously identified by IEU-Ohio in its prior Application for Rehearing, Initial Brief and Reply Brief which are incorporated herein by reference.

Among other things, the Commission's authorization of the extension of the anticompetitive, discriminatory and non-comparable Pricing Scheme and an increase in the revenue collected by AEP-Ohio by means of such Pricing Scheme exceeded the

[3] FES Ex. 102 at Ex. TCB-4.

Commission's statutory authority which is confined to retail ratemaking and is differentiated based on whether the service is a competitive or non-competitive service.

Even if the Commission had authority to establish a compensation mechanism for the provision of generation capacity service to a CRES provider (a wholesale rather than a retail transaction), the Pricing Scheme which was extended and expanded in the May 30, 2012 Entry violates state law because it results in unduly discriminatory and non-comparable rates and the collection of illegal transition costs.

Assuming that the Commission has subject matter jurisdiction over the establishment of a compensation mechanism for the provision of generation capacity service to a CRES provider, the Commission's May 30, 2012 Entry authorized an increase in the level of such compensation without a proper record and in violation of the statutory requirements that must be satisfied before the Commission may lawfully authorize an increase or change in compensation for utility service.

The Commission initiated this proceeding on December 7, 2010. In the course of this proceeding, the Commission has issued orders and entries that increase rates and charges paid by shopping customers and has allowed AEP-Ohio to erect economic barriers to "customer choice," all in contravention of the Commission's affirmative obligations to encourage and advance the policy set forth in Section 4928.02, Revised Code.

Because the Commission's May 30, 2012 Entry is unlawful and unreasonable, the Commission should grant rehearing, immediately terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the Pricing Scheme and "issue such order as is necessary to continue the provisions, terms, and conditions of

the utility's most recent standard service offer…"[4] which, in this case, includes the establishment of generation service capacity prices by means of RPM-Based Pricing. By granting rehearing and providing the relief requested herein, the Commission will return customers to the *status quo* required when the Commission rejected the Stipulation and Recommendation ("Stipulation")[5] on February 23, 2012.

II. BACKGROUND

Beginning in June of 2007, OP and CSP (now merged as "AEP-Ohio") began using RPM-Based Pricing as authorized by the Federal Energy Regulatory Commission ("FERC").[6] AEP-Ohio used RPM-Based Pricing to secure "just and reasonable" compensation for all generation capacity service available from AEP-Ohio for CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area. The applicability of RPM-Based Pricing to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area is dictated as the default pricing method under PJM's controlling Reliability Assurance Agreement ("RAA"). This view of the role of the RAA and RPM-Based Pricing is not contested.

AEP-Ohio has also continuously supported the use of RPM-Based Pricing for ratemaking purposes in Ohio. Indeed, AEP-Ohio relied upon RPM-Based Pricing to develop the capacity component of the competitive benchmark prices that AEP-Ohio used to compare the results under Section 4928.142, Revised Code (the market rate offer or "MRO" option), and Section 4928.143, Revised Code (the electric security plan

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[4] Section 4928.143(C)(2)(b), Revised Code.

[5] Stipulation and Recommendation (Sept. 7, 2011) (hereinafter "*Stipulation*").

[6] Tr. Vol. II at 401.

or "ESP" option), in the ESP proceeding that produced the standard service offer ("SSO") that is presently in effect.[7]

The RPM-Based Pricing capacity compensation method remained in effect until the Commission approved, over objections, the ESP recommended by the Stipulation.[8] RPM-Based Pricing or competitive bid-based pricing also controls for purposes of establishing compensation available to electric distribution utilities ("EDU") in other areas of Ohio, including areas where AEP-Ohio's affiliated CRES provider is actively seeking and presently serving retail customers.[9]

On November 1, 2010, American Electric Power Service Corporation ("AEPSC"), acting in the agent role it frequently plays within American Electric Power Company ("AEP", AEP-Ohio's parent), filed an application with FERC in Docket No. ER11-1995-000.[10] The application claimed that there was no state compensation mechanism in place and was filed under Section 205 of the Federal Power Act ("FPA"). The application requested that FERC approve certain formula rates as the basis for capacity charges that AEP-Ohio would uniquely levy upon CRES providers serving retail customers in AEP-Ohio's certified electric distribution service area. This formula

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[7] IEU-Ohio Ex. 103 at 11, 13-14.

[8] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al*., Opinion and Order at 54-55 (Dec. 14, 2011) (hereinafter "*Stipulation Order*").

[9] IEU-Ohio Ex. 102A at 23-24. Although FirstEnergy Corporation's ("FirstEnergy") EDUs (The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company) are not compensated for capacity at RPM-Based Pricing, the FirstEnergy EDUs conducted an auction to procure capacity until it could sync up with PJM's base residual action ("BRA"). *Id.* at 22-23. The price that resulted from these auctions was very close to the capacity prices that resulted from PJM's BRA for the same delivery years. *Id.* at 23.

[10] As a result of a deficient filing and a related directive from FERC, AEPSC refiled its application in FERC Docket No. ER11-2183 on November 24, 2010. See *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Application (Nov. 24, 2010) (hereinafter "*the Section 205 Filing*").

rate approach would have significantly increased capacity charges to CRES providers – on the order of 49% to 98% as compared to RPM-Based Prices that were in effect at the time.

On December 10, 2010, the Commission filed comments in FERC Docket No. ER11-2183-000 dealing with AEPSC's Section 205 application. In the comments, the Commission stated:

> On December 8, 2010, the Ohio Commission issued an entry (attached) in Case No. 10-2929-EL-UNC inviting comments from interested persons concerning the AEP Ohio Companies' capacity charges to Ohio's CRES providers. The Ohio Commission's entry notes that currently the PUCO-approved rates for the AEP Ohio Companies include recovery of capacity costs through provider-of-last-resort charges to certain retail shopping customers. These rates are based on the continuation of the current FRR mechanism and the continued use of PJM's reliability pricing model's three-year auction results. The AEP Ohio Companies' filing for formula rates could impact this current mechanism. Consequently, the Ohio Commission's investigation invites comments from interested persons concerning the following issues: (1) what changes to the current Ohio Commission mechanism are appropriate to determine the AEP Ohio Companies' Fixed Resource Requirement (FRR) capacity charges to the State of Ohio's CRES providers; (2) the degree to which the AEP Ohio Companies' capacity charges are currently being recovered through retail rates approved by the Ohio Commission or other capacity charges; and (3) the impact the AEP Ohio Companies' capacity charges will have on CRES providers and retail competition in the State of Ohio. **Although the state compensation mechanism has implicitly been in place since the inception of AEP-Ohio's current Standard Service Offer, the Ohio Commission expressly adopted as its state compensation mechanism the AEP Ohio Companies' charges established by the reliability pricing model's three-year capacity auction conducted by PJM. Currently, the 2010/2011 clearing price is equal to $174.29 per MW-day**.
>
> Consistent with Section D.8 of Schedule 8.1 of the RAA, which dictates that state imposed compensation mechanisms prevail in those instances where the state jurisdiction requires the load serving entity (LSE) (or switching customers) to compensate the FRR entity, the Ohio Commission maintains that there is no current need for FERC to advance its proceeding regarding this matter because the Ohio Commission has a rate for capacity charges to CRES providers. Consequently, the Ohio

> Commission respectfully requests that FERC dismiss the application and close this investigation, or, in the alternative, suspend its final decision in this proceeding until the Ohio Commission has concluded its state proceeding. If FERC elects to hold the case in abeyance, the Ohio Commission will inform FERC, in the above-captioned proceeding, as to the outcome of its investigation.[11]

On January 20, 2011, FERC issued an order interpreting Section D.8. of the RAA to find that an FRR Entity's Section 205 rights to request an alternative FRR capacity charge apply only in the absence of a "state compensation mechanism." Because of the Commission's December 8, 2010 Entry in this proceeding, FERC rejected AEPSC's request to adopt a rate formula for calculating its capacity charge.

On February 22, 2011, AEP requested rehearing of FERC's January 20, 2011 Order in Docket No. ER11-2183-001. AEP's request for rehearing is still pending before the Commission. [12]

In response to AEPSC's application the Commission initiated this docket "in order to determine the impact of the proposed change to AEP-Ohio's capacity charges" and sought comments on:

> (1) what changes to the current state mechanism are appropriate to determine the Companies' FRR capacity charges to Ohio competitive retail electric service (CRES) providers; (2) the degree to which AEP-Ohio's capacity charges are currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charges upon CRES providers and retail competition in Ohio.[13]

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[11] *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 2 of 5 thru 4 of 5 (Dec. 10, 2010) (internal citations omitted) (emphasis added).

[12] *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Request for Rehearing of American Electric Power Service Corporation (Feb. 22, 2011).

[13] Entry at 2 (Dec. 8, 2010).

The Commission also granted AEP-Ohio's request to take evidence in addition to comments and stated it would hold an evidentiary hearing to receive additional evidence beyond the comments.[14] The evidentiary hearing is now over and the record evidence demonstrates that AEP-Ohio's proposed formula rate capacity pricing proposal has no basis in law or fact. There is no legal basis for the Commission to set any capacity charge to assess against CRES providers of shopping customers and there is no factual basis to approve anything but RPM-Based Pricing if the Commission did have jurisdiction. The Commission must grant rehearing and put an end to the unlawful Pricing Scheme, restore RPM-Based Pricing, and refund to or credit to the benefit of retail customers all amounts charged above RPM-Based Pricing.

III. ARGUMENT

1. As identified in IEU-Ohio's March 27, 2012 Application for Rehearing, IEU-Ohio's May 23, 2012 Initial Brief, and IEU-Ohio's May 30, 2012 Reply Brief, the Commission failed to comply with the law by not returning customers to the rates under AEP-Ohio's prior ESP; the Commission is without jurisdiction to approve the Pricing Scheme; AEP-Ohio failed to meet its applicable burden of proof; the Pricing Scheme is discriminatory and is not comparable; the Pricing Scheme allows AEP-Ohio to collect transition revenue in violation of the law; the Pricing Scheme is not supported by the evidence; and the Commission authorized AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme in response to an untimely application for rehearing.

Without rehashing all of IEU-Ohio's arguments made in IEU-Ohio's March 27, 2012 Application for Rehearing, May 23, 2012 Initial Brief, and May 30, 2012 Reply Brief filed in this proceeding, IEU-Ohio hereby incorporates them by reference. As the Commission itself recognized, at least temporarily, once it rejected the Stipulation it was

[14] Entry at 2 (Jan. 21, 2011); Entry on Rehearing at 13 (Feb. 23, 2012).

bound by Section 4928.143(C)(2)(b), Revised Code, to issue such orders as necessary to return customers to the rates charged under AEP-Ohio's previous ESP. The Commission has failed to return customers and CRES providers to RPM-Based Pricing that the Commission and AEP-Ohio have both acknowledged[15] controlled and should continue to control during AEP-Ohio's current ESP (commonly referred to as "*ESP I*").[16]

Also, as IEU-Ohio has previously demonstrated,[17] and AEP-Ohio has also argued,[18] the Commission is without jurisdiction in this proceeding to approve either AEP-Ohio's proposed formula rate proposal or the Pricing Scheme. Because the Commission is without jurisdiction to change the price at which CRES providers compensate AEP-Ohio for capacity, the Commission must reject the Pricing Scheme.

Additionally, even if the Commission had jurisdiction to modify the rate at which CRES providers compensate AEP-Ohio for capacity, AEP-Ohio has failed to meet its burden of proof demonstrating that RPM-Based Pricing is unreasonable and that the Pricing Scheme is just and reasonable.[19] AEP-Ohio must show that RPM-Based Pricing is unreasonable before it can replace RPM-Based Pricing with another method of compensation. Further, the capacity rates under the Pricing Scheme are not

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[15] *March 7, 2012 Entry* at 16; Entry at 2 (Dec. 8, 2010); *American Electric Power Service Corporation*, Docket No. ER11-2183-001, Motion of American Electric Power Service Corporation for Expedited Rulings at 7 (Feb. 29, 2012) (available at: http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20120229-5250).

[16] *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*").

[17] Industrial Energy Users-Ohio's Post-Hearing Brief at 26-41 (May 23, 2012); Industrial Energy Users-Ohio's Reply Brief at 30-33 (May 30, 2012); IEU-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 10-15 (Mar. 27, 2012).

[18] AEP-Ohio's Application for Rehearing at 18-21 (Jan. 7, 2011) ("Thus, even if FERC had delegated authority to establish wholesale capacity charges (which it has not), the Commission lacks subject matter jurisdiction under Ohio law to do so.").

[19] Industrial Energy Users-Ohio's Post-Hearing Brief at 41-45 (May 23, 2012).

comparable to the capacity charged under AEP-Ohio's ESP and the Pricing Scheme unlawfully discriminates between customers receiving the same service under similar circumstances depending on whether they are in tier one or tier two.[20] The Pricing Scheme, an above-market charge for capacity, also violates state law prohibiting the collection of transition revenue following the end of AEP-Ohio's Market Development Period ("MDP")",[21] and violates the commitment made by AEP-Ohio in its Electric Transition Plan ("ETP") Commission-approved settlement agreement (in which AEP-Ohio agreed not to impose lost generation revenue charges on shopping customers.[22]

Finally, as the record demonstrates, there is no factual basis to approve AEP-Ohio's formula rate proposal and therefore no legitimate reason to find that the Pricing Scheme is lawful, just or reasonable.[23] As IEU-Ohio's March 27, 2012 Application for Rehearing, May 23, 2012 Initial Brief, and May 30, 2012 Reply Brief demonstrate, and as briefly described above, the Commission must grant rehearing and strike down the Pricing Scheme.

2. In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "… at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment

[20] Industrial Energy Users-Ohio's Post-Hearing Brief at 59-61 (May 23, 2012); Industrial Energy Users-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 15-18 (Mar. 27, 2012).

[21] Industrial Energy Users-Ohio's Post-Hearing Brief at 47-50 (May 23, 2012); IEU-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 18-20 (Mar. 27, 2012).

[22] Industrial Energy Users-Ohio's Post-Hearing Brief at 49-50 (May 23, 2012); *see also* Tr. Vol. I at 49-56, 146-147; Tr. Vol. V at 883.

[23] Industrial Energy Users-Ohio's Reply Brief at 10-25 (May 30, 2012); *see* Industrial Energy Users-Ohio's Post-Hearing Brief at 45-47 (May 23, 2012).

condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission,* 294 U.S. 63 (1935).

In recognition of the shopping-blocking implications of the Section 205 Filing, the Commission issued an Entry in this proceeding on December 8, 2010. In case the Commission's prior ESP determinations left room for doubt, the Commission issued the December 8, 2010 Entry explicitly adopting, pursuant to Schedule 8.1, Section D.8 of the RAA, RPM-Based Pricing as the state compensation mechanism for AEP-Ohio. The December 8, 2010 Entry also opened this proceeding and solicited comments from interested parties.

Subsequent to the December 8, 2010 Entry, the Commission notified FERC of its action and urged FERC to dismiss the Section 205 Filing. In response to the Commission's request that FERC dismiss the Section 205 Filing, AEPSC again argued that the Commission did not have subject matter jurisdiction to establish a capacity price applicable to CRES providers.

On January 20, 2011, FERC issued an order rejecting the Section 205 Filing, finding that the Commission had adopted a state compensation mechanism pursuant to Schedule 8.1, Section D.8 of the RAA. More specifically, FERC found that AEPSC had waived any right to make a Section 205 Filing to establish a price for generation capacity service and did so as part of the settlement agreement which was associated with FERC's approval of the RAA to which AEPSC was bound.[24]

AEPSC sought rehearing of FERC's January 20, 2011 order, again asserting that the Commission lacked subject matter jurisdiction to establish the method of

[24] *The Section 205 Filing*, FERC Order at 4-5 (Jan. 20, 2011).

compensation for capacity available to a CRES provider.[25] Thereafter, AEPSC also filed a complaint[26] at FERC pursuant to Section 206 of the FPA generally seeking to amend Section 8.1, Section D.8 of the RAA to displace and subordinate the role of any state compensation mechanism and RPM-Based Pricing.[27] In its complaint, AEPSC alleged, among other things, that the state compensation mechanism contained in Section 8.1, Section D.8 of the RAA was not just and reasonable because it would allow the Commission to establish a wholesale rate for capacity and circumvent AEPSC's ability to flip-flop between capacity compensation methodologies as and when AEPSC may elect to do so. This flip-flop is a common element of all of AEP-Ohio's SSO rate and capacity charge-related proposals. Its implementation depends on the Commission's lawful approval and it is designed to decouple AEP-Ohio's excessively profitable, above-market SSO generation revenue from the discipline of competition.[28] FERC has not addressed AEPSC's Section 206 Filing.

On January 7, 2011, AEP-Ohio filed an Application for Rehearing contesting the December 8, 2010 Entry on several grounds. Among other things, AEP-Ohio asserted that the Commission lacked subject matter jurisdiction to address the level of compensation that may be obtained for generation capacity service provided to a CRES provider and that the Entry "… was issued in a manner that denied AEP Ohio due process and violated statutes within Title 49 of the Revised Code, including Sections

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[25] AEPSC's request for rehearing is still pending. On March 24, 2011, FERC tolled AEPSC's request for rehearing to allow itself additional time to consider the merits of AEPSC's rehearing request.

[26] *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.,* FERC Docket No. EL11-32-000, Complaint (April 4, 2011) (hereinafter "*the Section 206 Filing*").

[27] Section 16.4 of the RAA states that only the PJM Board may amend the RAA. Thus, AEPSC's effort to amend the RAA through its Section 206 Filing is barred by the RAA.

[28] *The Section 206 Filing* at 2-4.

4903.09, 4905.26, and 4909.16, Revised Code."[29] On February 2, 2011, the Commission granted AEP-Ohio's Application for Rehearing saying (emphasis added):

> The Commission grants AEP-Ohio's application for rehearing. We believe that sufficient reason has been set forth by AEP-Ohio to warrant further consideration of the matters specified in the application for rehearing. **However, the Commission notes that the state compensation mechanism adopted in our December 8, 2010, Finding and Order will remain in effect during the pendency of our review.**[30]

Since granting AEP-Ohio's Application for Rehearing on February 2, 2011, the Commission has not taken up or addressed the substantive and procedural issues which the Commission found, based on AEP-Ohio's rehearing request, were worthy of further consideration. The Commission has not identified, as required by Section 4903.10, Revised Code, the scope of any additional evidence which will be taken.

Beginning in early January 2011, parties filed comments requested by the Commission in the December 8, 2010 Entry. The written comments highlighted the contested issues that have since churned confusingly in various Commission proceedings and remain unresolved except to the extent that the Commission has granted "temporary" relief. In its written comments at page 3, AEP-Ohio acknowledged that: "… the PJM capacity auction price in section 8.1 of the RAA is … a backstop mechanism … if no others exist."[31] Of course, on December 8, 2010, the Commission made it clearer that it had adopted RPM-Based Pricing.

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[29] Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 2 (Jan. 7, 2012).

[30] Entry on Rehearing at 2 (Feb. 2, 2011).

[31] Ohio Power Company's and Columbus Southern Power Company's Initial Comments at 3 (Jan. 7, 2011).

On January 20, 2011, AEP-Ohio filed a motion seeking a stay in the reply comment period, a procedural schedule for a hearing and an expedited ruling. In the January 20, 2011 pleading supporting memorandum at page 2,[32] AEP-Ohio stated:

> In the absence of a pending FERC process to establish a just and reasonable mechanism for AEP Ohio to recover its actual costs, the Commission will need to commence an evidentiary hearing process in order to adjudicate a more permanent rate. Without an evidentiary hearing on this matter the Commission will not have the requisite evidentiary record to make its ultimate decision in this case. The evidentiary hearing process will allow interested parties the opportunity to develop the issues and provide the Commission with evidentiary support.

The next day (January 21, 2011), an Entry was issued to extend the reply comment period. The Entry stated:

> The attorney examiner finds that AEP-Ohio's motion to extend the deadline to file reply comments is reasonable and should be granted. Accordingly, the January 24, 2011 deadline to file reply comments shall be extended to February 7, 2011. The extension of the deadline applies to all interested stakeholders. In addition, AEP-Ohio's motion for the Commission to establish a procedural schedule for hearing shall be considered after the reply comment period has concluded.[33]

In its February 7, 2011 reply comments at pages 1 and 2, AEP-Ohio stated:

> Review of the Initial Comments shows that there are material differences in how the parties view the facts underlying this case. The Companies do not believe that Initial Comments and Reply Comments alone will provide an adequate evidential record in this case for the Commission to make a fully informed decision to establish an ongoing state compensation mechanism for the cost of capacity. The outcome of this case will have significant ramifications for the Companies, our customers, competitive retail electric service ("CRES") providers and investment in the State of Ohio. As such, the Companies believe that it would be more appropriate for the Commission to move forward with an evidentiary hearing process.[34]

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[32] Columbus Southern Power Company's and Ohio Power Company's Motion to Stay the Reply Comment Period and Establish a Procedural Schedule for Hearing and Expedited Ruling at 2 (Jan. 20, 2011).

[33] Entry at 2 (Jan. 21, 2011).

[34] Ohio Power Company's and Columbus Southern Power Company's Reply Comments at 1-2 (Feb. 7, 2011) (citation omitted).

In any event and in 18 plus months since this proceeding was initiated, the Commission has not responded to the comments it received beginning in early January 2011.

As AEP-Ohio has acknowledged, the RAA specifies that absent a lawful state compensation mechanism, RPM-Based Pricing controls unless and until FERC approves an alternative. Thus, if the Commission acted outside its authority by issuing the December 8, 2010 Entry as AEP-Ohio has repeatedly claimed, the RAA obligated AEP-Ohio to apply RPM-Based Pricing unless and until FERC approved otherwise. AEP-Ohio first began using RPM-Based Pricing in 2007 and only discontinued the use of RPM-Based Pricing when the Commission paved the way for AEP-Ohio to implement its shopping-blocking Pricing Scheme.

On February 29, 2012, AEPSC, acting in its capacity as agent for Indiana Michigan Power ("I&M") and relative to I&M's Michigan service area, filed an application with FERC in Docket No. ER12-1173-000.[35] In its application, AEPSC requested authorization to establish a "cost-based" capacity compensation mechanism pursuant to Schedule 8.1, Section D.8 of PJM's RAA. As in the Section 205 Filing related to Ohio, AEPSC claimed that there was no state compensation mechanism in place in Michigan and that AEPSC was entitled to prosecute its claim based on Section 205 of the FPA (hereinafter referred to as the "Michigan Filing"). On April 30, 2012, FERC suspended the Michigan Filing for the maximum period allowed under the FPA, finding that the Michigan Filing may be ***unjust and unlawful***.[36] If the AEPSC formula rate proposal

[35] *American Electric Power Service Corporation,* FERC Docket No. ER12-1173-000, Application (Feb. 29, 2012) (hereinafter "*I&M Case*").

[36] *I&M Case*, FERC Order at 7-8 (April 30, 2012).

goes into effect for I&M, it will only become effective after the suspension period and then subject to refund once FERC addresses the contested issues set for hearing.

On January 27, 2011, AEP-Ohio filed an application to replace its current ESP ("ESP I") with a new ESP ("ESP II").[37] Under Ohio law, ESP I remains in effect until the Commission lawfully approves ESP II under Sections 4928.141 and 4928.143, Revised Code, or an MRO under Sections 4928.141 and 4928.142, Revised Code.

On August 11, 2011, more than nine months after this proceeding was initiated, the Commission issued an entry establishing a procedural schedule to conduct an evidentiary hearing.[38] In accordance with the procedural schedule and on August 31, 2011, AEP-Ohio filed direct testimony of five witnesses. The pre-filed direct testimony of Richard E. Munczinski repeated (at page 3) AEP-Ohio's assertion that FERC, not the Commission, had jurisdiction over the wholesale capacity charge applicable to CRES providers. AEP-Ohio's pre-filed testimony did ***not*** contain detailed information on the financial impact of maintaining RPM-Based Pricing. Rather, the AEP-Ohio direct testimony asserted that displacing RPM-Based Pricing with AEP-Ohio's proposed formula rate method of compensation would facilitate generation-related investment.

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[37] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case Nos. 11-346-EL-SSO, *et al*., Application (Jan. 27, 2011).

[38] Among other things, the Attorney Examiner's entry (Finding No. 6) stated:

> Having fully reviewed the comments and reply comments, the attomey examiner now determines that a procedural schedule for hearing should be adopted in order to establish an evidentiary record on a state compensation mechanism. Interested parties should develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism.

Entry at 2 (Aug. 11, 2011).

On September 7, 2011, AEP-Ohio, along with number of other parties, submitted the Stipulation to resolve issues in AEP-Ohio's pending ESP proceeding and several other pending cases, including this proceeding.

On September 8, 2011, a number of parties that had signed the Stipulation filed a Joint Motion to Consolidate ***for purposes of considering the adoption of the Stipulation***. At page 6 of the Joint Motion's Memorandum in Support, the movants stated (emphasis added):

> This motion for consolidation for hearing purposes differs from the February 18, 2011 motion filed by the Industrial Energy Users-Ohio in three important ways. First, consolidation here is needed because the Stipulation, as opposed to the respective Applications are broader in its impact on the merger, energy curtailment, capacity charge and fuel deferral. ***Second, the request is only to consolidate the matter for hearing of the Stipulation.*** That is of smaller scope than the motion filed by the Industrial Energy Users-Ohio for consolidation of the cases in their entirety and ***should the Attorney Examiners reject the Stipulation, the cases would return for individual process on their own with no further consolidation***. Finally, the consolidation request here involves less cases than the IEU request and is fully warranted as described herein.[39]

On September 14, 2011, IEU-Ohio filed a memorandum in support of the proposed consolidation ***for the purpose of considering the Stipulation***. On September 16, 2011, an Attorney Examiner issued an Entry granting the September 8, 2011 Motion to Consolidate ***for the purpose of considering the Stipulation*** and staying the procedural schedule in this proceeding. The Attorney Examiner's September 16, 2011 Entry was ***not*** issued or filed in this proceeding.

[39] Joint Motion to Consolidate at 6 (Sept. 8, 2011).

The Stipulation recommended that the Commission approve prospectively a two-tiered Pricing Scheme for generation capacity service available to CRES providers as the state compensation mechanism. In other words, the Stipulation recommended that the Commission approve a wholesale capacity compensation mechanism that AEPSC and AEP-Ohio were (and are) claiming the Commission is powerless to approve.

The first tier of the Stipulation's recommended CRES capacity price was tied to RPM-Based Pricing and was available for the first 21% of AEP-Ohio's shopping load by customer class. The second tier, applicable to all capacity available to CRES providers not subject to RPM-Based Pricing, was set at $255/megawatt-day ("MW-day"); an arbitrary amount and a substantial increase to the RPM-Based Price. The $255/MW-day price was simultaneously disconnected from RPM-Based Pricing or market-based pricing and cost-based pricing.[40]

On the afternoon of September 7, 2011, AEP-Ohio hosted a conference call with the investment community to discuss the Stipulation filed with the Commission earlier in the day. During the call, AEP-Ohio acknowledged that the Stipulation was designed to block the ability of retail customers to enjoy the full benefits of the "customer choice" rights provided by Ohio law.[41] Based on AEP-Ohio's own public descriptions of the purpose of the Stipulation's recommended capacity pricing proposal and irrespective of

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[40] Market prices, as established under RPM, were $116/MW-day for the 2011/2012 delivery year ($16.73/MW-day for 2012/2013). FES Ex. 103 at 35. Cost-based prices have been recommended by AEP-Ohio at $355/MW-day (AEP-Ohio Ex. 102 at 21), by Staff at $146/MW-day (Staff Ex. 105 at Ex. ESM-4) and by FES at $78.53/MW-day (FES Ex. 103 at 35).

[41] FES Ex. 102 at Ex. TCB-4:

> What happens is those customers that get the discount as Brian mention are allowed - are priced out at the RPM prices. So the $100, the $16, and I think the $26 going forward. Over those percentages, if you want to shop, you pay the full cost of $255 per megawatt day. So the thought and the theory is that the shopping will be constrained to the discounted RPM price,

whatever authority the Commission may have to authorize a capacity charge applicable to CRES providers, the Commission has known for many months that the capacity charge provision in the Stipulation violated Ohio law and the policy set forth in Section 4928.02, Revised Code.

After hearings on the Stipulation, on December 14, 2011, the Commission issued the Stipulation Order approving the Stipulation with modifications including modifications to expand the availability of RPM-Based Pricing.[42] The Commission rejected most of the objections to the capacity pricing provision in the Stipulation saying:

> Thus, the evidence presented at hearing demonstrates that the $255/MW-day interim capacity charge is within the range of reasonableness, ***particularly in light of the fact that it is one component of an extensive settlement package that includes components which benefit the public and could not otherwise be achieved in a fully litigated proceeding***.[43]

Following the Stipulation Order, applications for rehearing were submitted on January 13, 2012 by various parties including IEU-Ohio. Among other things, the applications for rehearing claimed that the Commission had erred in concluding that the package presented by the Stipulation was just and reasonable and in the public interest. By Entry dated February 1, 2012, the Commission granted rehearing for further

[42] On January 23, 2012, the Commission issued an entry ("Clarification Entry") that provided a number of clarifications regarding its Stipulation Order. On February 10, 2012, AEP-Ohio filed an Application for Rehearing of the Commission's Clarification Entry arguing, among other things, that the Clarification Entry exceeds the Commission's jurisdiction and violates the statutory rehearing process by expanding the Opinion and Order outside the statutory rehearing process. Further, AEP-Ohio argued that the Clarification Entry was not supported by the record, forced AEP-Ohio to ***involuntarily*** provide a below-cost subsidy, and unreasonably retreated from the RPM-priced capacity set-aside limitations without an explanation. In addition, AEP-Ohio asserted that the Clarification Entry unreasonably imposed long-term obligations on AEP-Ohio while preserving the option to further modify the RPM set-aside levels in the future. On February 17, 2012, IEU-Ohio filed an Application for Rehearing of the Clarification Entry, arguing the entry was unreasonable because it did not allow all governmental aggregation programs that complete the necessary process by December 31, 2012, to have access to RPM-priced capacity. IEU-Ohio also asserted that the December 31, 2012 deadline to complete the governmental aggregation process was unreasonable.

[43] Stipulation Order at 55 (Dec. 14, 2011) (emphasis added).

consideration of the matters specified in the applications for rehearing of the Stipulation Order.

By the time the applications for rehearing were submitted in response to the Stipulation Order, the rate shock and shopping-blocking consequences of the Stipulation (which AEP-Ohio had masked in its on-average mumbo jumbo and untimely reporting of shopping data) began to materialize in relentless proportions. As AEP-Ohio's customers opened the electric bills that arrived after the Stipulation Order, customers' outrage overtook AEP-Ohio's managed message. Also, the results of the bill-reducing competitive bidding process ("CBP") used to set the generation supply price for SSO customers of Duke Energy Ohio ("Duke") sharpened the contrast between the arbitrary and excessive SSO prices authorized by the Stipulation Order and the lower prices established through the CBP used for Duke's SSO.[44] Additionally, the Commission had access to filings that AEP-Ohio, or its agent AEPSC, made at FERC to implement the unlawful corporate separation provisions of the Stipulation and the glaring inconsistencies between the content of such filings and the expectations created by the Stipulation.

On February 23, 2012, the Commission granted, in part, IEU-Ohio's and FirstEnergy Solutions Corp.'s ("FES") applications for rehearing, and rejected the Stipulation, ultimately finding, for multiple reasons, that the package contained in the Stipulation was not in the public interest.

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[44] PUCO Press Release, *Duke Energy auction leads to lower electric prices in 2012* (Dec. 15, 2011) (accessible *via* the internet at: http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/duke-energy-auction-leads-to-lower-electric-prices-in-2012/?border=off; last visited June 18, 2012).

> As discussed below, upon review of the applications for rehearing, the Commission has determined that the Stipulation, ***as a package***, does not benefit ratepayers and the public interest and, thus, does not satisfy our three-part test for the consideration of stipulations. Accordingly, the Commission will reject the Stipulation.[45]

The rejection of the Stipulation on rehearing occurred because the Commission eventually agreed that the signatory parties to the Stipulation had not met their burden of demonstrating that the Stipulation, as a package, benefited ratepayers and the public interest as required by the Commission's three-part test for the consideration of settlements.

Because the Commission's Stipulation Rehearing Entry rejected the proposed ESP contained in the Stipulation and in accordance with the requirements of Section 4928.143(C)(2)(b), Revised Code,[46] the Stipulation Rehearing Entry directed AEP-Ohio to file tariffs to provide SSO pursuant to its previously-authorized ESP:

> Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and ***an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.***[47]

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[45] Entry on Rehearing at 4 (Feb. 23, 2012) (hereinafter "*Stipulation Rehearing Entry*") (emphasis added).

[46] Section 4928.143(C)(2)(b), Revised Code, states (emphasis added):

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission ***shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively***.

[47] *Stipulation Rehearing Entry* at 12 (emphasis added).

The Stipulation Rehearing Entry also directed the Attorney Examiners assigned to this case to establish a new procedural schedule.

On February 27, 2012 and for the benefit of its sole shareholder, AEP, AEP-Ohio filed a motion seeking to delete RPM-Based Pricing and insert AEP-Ohio's interpretation of the Stipulation's capacity Pricing Scheme. In other words, AEP-Ohio extracted the capacity pricing provision from the Stipulation's package and once again asked the Commission to approve a wholesale capacity price applicable to CRES providers while AEP-Ohio was simultaneously asserting that the Commission lacked subject matter jurisdiction to do so.

In its memorandum in support attached to the February 27, 2012 motion, AEP-Ohio alleged that:

(1) "If the Commission implements full RPM pricing pending the outcome in this proceeding, AEP Ohio will suffer immediate and irreparable harm. … Using the same two-tiered capacity pricing proposed in the Stipulation offers the most stability and represents a reasonable middle ground;"[48]

(2) "As an FRR entity, AEP Ohio reasonably relied upon its expected ability to establish cost-based rates should the RPM-based rates become unjust and unreasonable;"[49] and

(3) "The reasonableness of the interim capacity pricing is demonstrated by comparing it to the pricing that AEP Ohio is advocating and that Dr. Pearce's prefiled testimony supports in Case No. 10-2929-EL-UNC'"[50]

(4) "A ***perfect compromise*** in this situation where a temporary solution is needed until a more permanent decision is made is to 'split the baby' by (i) allowing RPM pricing for customers being served by CRES providers or having provided a switch request as of the February 23 Entry on Rehearing, and (ii)

[48] Motion for Relief and Request for Expedited Ruling at 4 (Feb. 27, 2011)

[49] *Id*. at 5.

[50] *Id*. at 10.

> charging $255/MW-Day for all other customers (including additional aggregation load) for customers who shop before the case is decided."[51]

For the first time, AEP-Ohio's February 27, 2011 motion alleged that following the law and restoring RPM-Based Pricing to its rightful position as the Commission had directed would cause financial harm to AEP-Ohio's generation business, the business that is supposed to be on its own in the competitive market.[52]

While numerous parties (including many that previously supported the Stipulation's package) opposed AEP-Ohio's unlawful and unjust request to bypass RPM-Based Pricing, the Commission granted the requested relief in its March 7, 2012 Entry.[53] At page 15 of the March 7, 2012 Entry, the Commission stated:

> We reject claims that the interim relief is not based upon record evidence. The instant proceeding was consolidated with 11-346 and the cases enumerated in footnote three of this entry for purposes of considering the ESP 2 Stipulation. All of the testimony and exhibits admitted into the record for purposes of considering the ESP 2 Stipulation are part of the record in this proceeding. Our subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief. [54]

The above Commission statement is irreconcilable with the purpose of the consolidation as approved by the Commission on September 16, 2011. That consolidation specifically limited the consolidation to consideration of the Stipulation ***as a package***. Once the Commission rejected the Stipulation, no evidence from the consolidated

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[51] *Id*. at 15 (citation omitted).

[52] AEP-Ohio's Motion for Relief and Request for Expedited Treatment at 1, 3-5 (Feb. 27, 2012). Also, Section 4928.39, Revised Code states:

> With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

[53] Entry at 17 (March 7, 2012) (hereinafter "*March 7, 2012 Entry*").

[54] *Id.* at 15.

proceeding was available to the Commission to address contested issues in this proceeding.

Nonetheless, the Commission's approval came before parties had an opportunity to test the merit of AEP-Ohio's claims and the Commission ignored requests that the Commission only grant AEP-Ohio's motion subject to reconciliation and refund.

The Commission imported evidence from other proceedings into this proceeding even though the imported evidence was presented ***only*** to determine if the signatory parties to the Stipulation had met their burden of demonstrating that the Stipulation, as a package, benefited ratepayers and the public interest as required by the Commission's three-part test for the consideration of settlements. Thus, the capacity charge provision the Commission ultimately concluded was contrary to the public interest when presented in the Stipulation, as a package, was extracted from the package submitted in different cases and made available in this proceeding to AEP-Ohio so that AEP-Ohio could continue the shopping-blocking Pricing Scheme that became void when the Commission rejected the Stipulation. As if lawless acts are less lawless when their tenure is limited, the Commission made AEP-Ohio's "shopping tax" temporary and held that it would end on May 31, 2012 with the restoration of RPM-Based Pricing effective June 1, 2012.[55]

In response to the Commission's unlawful and unreasonable flip-flop, various applications for rehearing were filed contesting the March 7, 2012 Entry on procedural and substantive grounds. No application for rehearing was filed by AEP-Ohio

[55] *March 7, 2012 Entry* at 17.

(AEP-Ohio did not contest the Commission's determination that RPM-Based Pricing be restored effective June 1, 2012).

On April 11, 2012, some 16 months after this proceeding was initiated, the Commission again granted rehearing for the purpose of giving itself more time to consider the rehearing requests filed in response to the March 7, 2012 Entry. Like the written comments submitted by interested parties beginning in early January 2011 and AEP-Ohio's granted Application for Rehearing filed on January 7, 2011, the granted applications for rehearing related to the Commission's March 7, 2012 Entry have not been further acted upon by the Commission.

The evidentiary hearing phase of this proceeding subsequently commenced on April 17, 2012 and concluded on May 15, 2012. At the conclusion of the evidentiary hearing, parties were given a very short amount of time to submit initial and reply briefs addressing many of the same issues that have been before the Commission since the December 8, 2010 Entry. Initial briefs were due and filed on May 23, 2012 and reply briefs were filed on May 30, 2012.

Based on the evidence that is before the Commission in this proceeding, it is repetitively clear that the allegations in AEP-Ohio's February 27, 2012 motion for relief were and are false.

For example, the evidence shows that AEP-Ohio is not an FRR Entity[56] and that there was never any analysis done to identify if the FRR Alternative was the best option for AEP-Ohio.[57]

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[56] Tr. Vol. II at 455-476, 436; Tr. Vol. XI at 2533-2534; *see also* Industrial Energy Users-Ohio's Post-Hearing Brief at 52-55 and Industrial Energy Users-Ohio's Reply Brief at 18-29. FRR Entity is a defined term under the RAA. FES Ex. 110A at 10.

[57] Tr. Vol. II at 493-494.

Unlike when the two-tiered capacity pricing proposal was presented as part of the Stipulation's package, no other party supports AEP-Ohio's Pricing Scheme. Indeed, all parties except AEP-Ohio have urged the Commission to issue a merit-based decision restoring RPM-Based Pricing.

The evidence shows that AEP-Ohio previously committed to not impose any lost generation-related revenue charges on shopping customers as part of a Commission-approved settlement agreement which is final and binding.[58]

Additionally, the methodology advanced by AEP-Ohio witness Dr. Pearce has now been shown to be defective because it is based on the false assumption that the generation assets owned or controlled by AEP-Ohio are the source of capacity available to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area.[59] Likewise, AEP-Ohio's claim (a threshold assumption by Dr. Pearce) that AEP-Ohio's owned and controlled generation assets are dedicated to its Ohio load is, as AEP-Ohio's witnesses agreed, untrue. And even if the core defects in Dr. Pearce's methodology are ignored, his application of the methodology has now been shown to produce significantly excessive capacity prices because it fails to take into account generation-related revenue that must be offset against his capacity-related revenue requirement.[60]

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[58] FES Ex. 106 at 3; *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 16 (Sept. 28, 2000); *see also* Tr. Vol. I at 49-56, 146-147; Tr. Vol. V. at 883.

[59] Tr. Vol. II at 429; Tr. Vol. XI at 2530-2534.

[60] FES Ex. 101 at 405; *see e.g.* Staff Ex. 101 at 4.

On April 30, 2012, while the evidentiary hearings[61] were in progress, and after AEP-Ohio had concluded its case-in-chief, AEP-Ohio filed a motion seeking to undo the "***perfect compromise***" it previously advanced to displace the RPM-Based Pricing method previously adopted by the Commission. More specifically, AEP-Ohio asked the Commission to: (1) extend the Commission-specified life of the Pricing Scheme; and, (2) increase the revenue collected by AEP-Ohio by means of such Pricing Scheme. In other words, AEP-Ohio once again asked the Commission to engage in ratemaking that AEP-Ohio has repeatedly asserted was beyond the Commission's subject matter jurisdiction. AEP-Ohio's motion was essentially an untimely application for rehearing regarding the Commission's March 7, 2012 Entry, which specifically held that the unlawful shopping-blocking Pricing Scheme that AEP-Ohio proposed in its February 27, 2012 motion for interim relief would end on May 31, 2012.

AEP-Ohio's April 30, 2012 motion was strongly opposed by numerous parties who have actively participated in this proceeding.

Without citing evidence or addressing dispositive motions or the pending applications for rehearing that had previously been granted by the Commission, the Commission granted AEP-Ohio's April 30, 2012 motion to extend the life of the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing

[61] Prior to the commencement of the evidentiary hearing in this proceeding, IEU-Ohio filed a motion to dismiss, asserting that the Commission lacked the statutory authority to authorize a cost-based or formula-based charge applicable to generation capacity service available to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area. At the close of AEP-Ohio's case-in-chief, IEU-Ohio again moved to dismiss the proceeding, this time orally. In its oral motion to dismiss, IEU-Ohio asserted that AEP-Ohio had failed to meet its burden of proof necessary for the Commission to authorize the proposed wholesale capacity compensation mechanism. The Attorney Examiners deferred ruling on both of IEU-Ohio's motions to dismiss, which are still pending. Tr. Vol. I at 21-22; Tr. Vol. V at 1056-1059. IEU-Ohio's motions to dismiss are also discussed in IEU-Ohio's briefs in this proceeding which are incorporated herein by reference.

Scheme. By this action on the day reply briefs were filed, the Commission flip-flopped again for the benefit of AEP-Ohio and modified the March 7, 2012 Entry.[62]

The Commission's action on May 30, 2012, coming more than 17 months after this proceeding was initiated, extended the life of the Pricing Scheme and increased the revenue that AEP-Ohio collects through the Pricing Scheme. In doing so, the Commission set AEP-Ohio free to collect more revenue than permitted under the "***perfect compromise***" that AEP-Ohio identified in the February 27, 2012 motion seeking interim relief.

The May 30, 2012 Entry shows that two Commissioners (Chairman Snitchler and Commissioner Lesser) signed the Entry without qualification, two Commissioners (Commissioners Roberto and Slaby) concurred in the result only and that Commissioner Porter, the lone Commissioner who attended the evidentiary hearings, dissented. In his dissent, Commissioner Porter stated:

> [The] Commission's March 7, 2012, entry and order made clear that the interim rate adopted in that order "will be in effect until May 31, 2012, at which point the rate for capacity under the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year." If this Commission is to adopt anything else other than RPM based rates for 100% of shopping load, in which case I would have significant reservations, then a record of evidence must be cited in support of the decision. At most, I believe that a case record could be cited to support an extension of the interim capacity price to be "RPM-based" for tier-one customers, *i.e.* approximately $20/Mw day as of June 1, 2012, with tier-two customers remaining at the previously approved $255 Mw day.
>
> On December 8, 2010, the Commission approved a state compensation mechanism based upon PJM Inc.'s annual base residual auction. That auction establishes annual capacity rates, effective during the PJM delivery calendar year, *i.e.* from June 1 to May 31 of the following year, which competitive suppliers are to pay AEP-Ohio for their capacity. Thus,

[62] *May 30, 2012 Entry* at 7-8.

pursuant to this Commission's decision on December 8, 2010, and based upon the applicable base residual auctions, it is my understanding that AEP-Ohio charged $174.29/Mw day for capacity as of the date of that entry through May 31, 2011, and charged $110/Mw day as of June 1, 2011. No party, nor does the majority in its entry today, contends that the change in the state compensation mechanism as of June 1, 2011, was an unjustified interpretation of the Commission's adoption of the "capacity charges established by the three-year [base residual auction] conducted by PJM, Inc."

On December [14], 2011, this Commission modified and approved a Stipulation that was executed by AEP-Ohio and numerous other parties, many if not all of whom are currently participating in this proceeding. That Stipulation provided for a tiered capacity rate mechanism with 21% of AEP-Ohio load qualifying for tier-one rates — rates that would be based upon the clearing prices of PJM's base residual auction and would, therefore, change annually to match the published PJM capacity clearing price effective on June 1; those not coming under the percentage cap would receive tier-two rates of $255/Mw day. It should be noted here that, similar to the December 8, 2010, entry, no party, nor does the majority in its entry today, contends that the annual change to match the published PJM capacity clearing price is an unjustified interpretation of the Commission's December 7, 2011, entry. The Commission later rejected all components of the Stipulation, including the tiered capacity mechanism.

However, on March 7, 2012, *following a request from AEP-Ohio*, the Commission approved, as an interim state compensation mechanism that was to last only until May 31, 2012, a tiered approach that is virtually identical in terms of its RPM-based components to each the December 8, 2010; December 7, 2011; and March 7, 2012, entries. That is, this Commission left no doubt that 21% of shopping customers would qualify for tier-one capacity at RPM-based prices, with other shopping customers permitted to shop at the tier-two rate of $255/Mw day; after this interim mechanism expired on May 31, 2012, capacity rates for all competitive suppliers would be the RPM-based rate.

In sum, by approving the March 7, 2012, entry, which was itself based upon a review of the record that began with the December 8, 2010, entry, and developed to support the Stipulation as per AEP Ohio's request to maintain the *status quo*, the Commission made a decision to approve a two-tier mechanism, with tier-one pricing based upon RPM prices with the RPM prices changing to match current prices as of each new PJM delivery year. In light of the history and record of this case, I cannot support … today's entry, and the request of AEP Ohio.[63]

[63] *May 30, 2012 Entry,* Dissenting Opinion of Commissioner Andre T. Porter at 1-2 (internal citation omitted).

Again disregarding the requests by parties, the Commission's May 30, 2012 Entry made no provision for reconciliation and refund.

When this proceeding began in late 2010, RPM-Based Pricing controlled for all shopping in AEP-Ohio's service area either as a result of the Commission's adoption of a state compensation mechanism or as a result of the RAA which requires RPM-Based Pricing when there is no state compensation mechanism. RPM-Based Pricing was the *status quo*.

Yet, beginning with bills rendered in January 2012, AEP-Ohio has not used RPM-Based Pricing to set all capacity prices for CRES providers. Instead and over objections, the Commission has permitted AEP-Ohio to implement its anticompetitive Pricing Scheme through a Commission-approved-then-rejected Stipulation. When the Stipulation fell under its own weight, the Commission then allowed AEP-Ohio to ignore the required restoration of RPM-Based Pricing without making any provision for reconciliation and refund. Just as the Commission-ordered restoration of RPM-Based Pricing was about to occur on June 1, 2012, the Commission intervened again to allow AEP-Ohio to continue to stiff-arm the market discipline of RPM-Based Pricing and, adding insult to injury, gave AEP-Ohio the opportunity to increase its capacity-related revenue.

When parties injured by the Commission's stunning indulgence of AEP-Ohio's illegal demands have objected, the Commission has turned a deaf ear and not addressed the merits of the objections. Instead, the Commission has repeatedly maneuvered the can down the road while granting rehearing to give itself and AEP-Ohio more time to operate outside the law. The practical effect of the Commission grants of

rehearing is to block the ability of the injured parties to pursue an unobstructed appeal to the Ohio Supreme Court.

When the Commission has engaged in ratemaking based on evidence not in the record or failed to allow parties to refute evidence, the United States Supreme Court has held that the Commission violated the due process rights of parties: "[t]his is not the fair hearing essential to due process. It is condemnation without trial."[64] The United States Supreme Court has also held that regulation by a public utilities commission in accordance with the jurisdiction's applicable law "meets the requirements both of substantive and procedural due process ***when it is not arbitrarily and capriciously exercised.***"[65]

Similarly, the Ohio Supreme Court has held due process in a Commission proceeding occurs ***when*** parties are given: (1) "ample notice;" (2) "permitted to present evidence through the calling of its own witnesses;" (3) permitted to "cross-examin[e] the other parties' witnesses;" (4) introduce exhibits; (5) "argue its position through the filing of posthearing briefs;" and (6) "challenge the PUCO's findings through an application for rehearing."[66] Further, the Ohio Supreme Court has held that the Commission must, in order to comply with the law, provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[67]

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[64] *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937).

[65] *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 465 (1952) (emphasis added).

[66] *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2006-Ohio-1386 at ¶ 53.

[67] *Tongren v. Pub. Util. Comm.* 85 Ohio St.3d 87, 89 (1999).

> The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom. Its decision must be based on a record containing "sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty."[68]

The Commission abuses its discretion if it renders an opinion without record support.[69] Ruling on an issue without record support is an abuse of discretion and reversible error.[70]

The capacity service available to CRES providers is undisputedly a generation service. This service is undisputedly a wholesale service. Yet, the Commission has indulged AEP-Ohio's claim that it is entitled to use cost-based ratemaking to establish compensation for a competitive service even while AEP-Ohio has been simultaneously claiming the Commission lacks subject matter jurisdiction to address the question of capacity compensation.

This proceeding is not an ESP or MRO proceeding and it is not a traditional rate case proceeding.

Despite the fact that the Commission has been asked repeatedly to do so, the Commission has yet to identify the source of its authority to regulate generation-related services or to establish prices for wholesale services. Similarly, neither the Commission nor any other party has identified the source of the Commission's authority to simultaneously bypass both cost-based ratemaking requirements that apply to non-

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[68] *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 406 (1991) *dissenting opinion of Justice Herbert Brown* (*quoting Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 104).

[69] *Tongren v. Pub. Util. Comm.* 85 Ohio St. 3d 87 (1999), quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.,* 76 Ohio St.3d 163 (1996).

[70] *See, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486 (2008).

competitive services and the requirements that attach to establishing prices for the competitive services that are part of an SSO.

The Ohio Supreme Court has held on several occasions that the generation component of retail electric service is not subject to commission regulation:

> It is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 2, we stated that S.B. 3 'provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service.' R.C. 4928.03 specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation.[71]

The Ohio Supreme Court has held that concerns about the future do not empower the Commission to create remedies beyond those permitted by the law.[72]

When the Commission issues a lawful order, it must provide acceptable justification and follow the required statutory process before the Commission can modify such order.[73]

The law and evidence did not permit the Commission to approve the Stipulation and the Commission eventually relented. Once the Stipulation was rejected, the Commission was obligated to restore RPM-Based Pricing. This is a duty placed on the Commission (not AEP-Ohio) by Section 4928.143, Revised Code, as the Commission held in its February 23, 2012 order rejecting the Stipulation. The record shows that the Commission did not comply with its obligation to restore RPM-Based Pricing.

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[71] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, ¶20, 2008-Ohio-990.

[72] *Id.*

[73] *See Cleveland Elec. Illum. Co. v Pub. Util. Comm.,* 42 Ohio St.2d 403 (1975).

Soon after the Stipulation was rejected, AEP-Ohio inspired the Commission to embrace a stand-alone version of the shopping-blocking, two-tiered Pricing Scheme that had been previously considered and addressed only as part of the Stipulation's larger package. No evidence had been taken in this proceeding when the Commission granted the temporary and illegal relief requested by AEP-Ohio. The Commission also ignored requests to set up a refund and reconciliation mechanism. The Commission held that its lawless fling with the stand-alone version of the Pricing Scheme would end on May 31, 2012 and that RPM-Based Pricing would be restored on June 1, 2012. Rehearing applications were filed by parties other than AEP-Ohio and the Commission granted rehearing thereby delaying its accountability for addressing the merits of the granted rehearing applications.

A day before the lawless fling with the stand-alone version of the shopping-blocking, two-tiered Pricing Scheme was scheduled to end by the force of the Commission's prior holding, the Commission extended the fling and authorized AEP-Ohio to move even further away from the RPM-Based Pricing. The Commission permitted AEP-Ohio to increase generation-related rates for shopping customers and elevate the hurdle that non-shopping customers must clear to reduce their electric bills by shopping.

The Commission's conduct throughout this proceeding has subjected the positions of parties objecting to AEP-Ohio's demands to condemnation without trial. Throughout this proceeding, the Commission has taken it upon itself to rewrite the law and claim authority it does not have. Repeatedly the Commission has acceded to AEP-Ohio demands, granting rehearing and then doing nothing to put things right. The

Commission has repeatedly refused to make its AEP-Ohio friendly decisions subject to reconciliation and refund so as to protect the interests of parties injured by the Commission's AEP-Ohio-inspired rush to judgment. The totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "… at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U.S. 168) long known to our law". "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).

3. The Commission must restore the customer protections that have been ignored and eroded through the unlawful and unreasonable Pricing Scheme and, to this end, must direct AEP-Ohio to refund the above-market portion of the Pricing Scheme or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.

For the reasons expressed above, the Commission must immediately issue an order restoring RPM-Based Pricing and requiring AEP-Ohio to refund all revenue collected above RPM-Based Pricing. In the event the Commission refuses to put things fully right by means of a refund, it must nonetheless require AEP-Ohio to refund all revenue collected above RPM-Based Pricing for bills rendered on and after June 1, 2012. If the Commission is unwilling to require AEP-Ohio to refund the compensation billed and collected in excess of RPM-Based Pricing, it should direct AEP-Ohio to apply such excess as a credit to regulatory asset balances otherwise eligible for amortization through retail rates.

IV. CONCLUSION

As a result of the Commission's decision, customer choice has been and will be further frustrated, and customers will lose an effective means of reducing their electric bills. The Commission, however, can serve customer interests by reversing another of its unfortunate decisions to authorize the continuation of the unlawful and unreasonable Pricing Scheme. Granting IEU-Ohio's Application for Rehearing and eliminating the illegal Pricing Scheme will finally restore the customer choice options presented by Amended Substitute Senate Bill 3 and Amended Substitute Senate Bill 221 and will remove the unreasonable and unlawful Pricing Scheme AEP-Ohio has advanced to shield its generation business from competitive pressure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the May 30, 2012 Entry and Memorandum in Support* was served upon the following parties of record this 19th day of June 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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