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 APPLICATION FOR REHEARING OF THE OCTOBER 17, 2012 ENTRY ON REHEARING AND MEMORANDUM IN SUPPORT

Samuel C. Randazzo, Esq.
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, Suite 1700
Columbus, OH 43215-4228
Telephone: 614-469-8000
Telecopier: 614-469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

November 15, 2012

Attorneys for Industrial Energy Users-Ohio

TABLE OF CONTENTS

I. BACKGROUND 3

II. ARGUMENT 3

1. The Entry on Rehearing is unlawful and unreasonable because the Commission cannot lawfully or reasonably rely upon Section 4905.26, Revised Code, to invent and apply a cost-based ratemaking methodology and uniquely and substantially increase AEP-Ohio's compensation for generation-related capacity service. 3

2. The Entry on Rehearing is unlawful and unreasonable because any supervisory and regulatory authority that the Commission may possess under Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, extends to an electric light company only when it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state," and does not extend to the supervision or regulation of wholesale transactions such as the wholesale transactions between AEP-Ohio and CRES providers. 17

III. CONCLUSION 19

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 OCTOBER 17, 2012 ENTRY ON REHEARING

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 on Rehearing ("Entry on Rehearing") issued by the Public Utilities Commission of Ohio ("Commission") on October 17, 2012, which granted rehearing and then asserted an additional jurisdictional basis, Section 4905.26, Revised Code, to support the Commission's July 2, 2012 Opinion and Order ("Capacity Order") in this proceeding.[1] The Entry on Rehearing is unlawful and unreasonable in the following respects:

1. The Entry on Rehearing is unlawful and unreasonable because the Commission cannot lawfully or reasonably rely upon Section 4905.26, Revised Code, to invent and apply a cost-based ratemaking methodology and uniquely and substantially increase AEP-Ohio's compensation for generation-related capacity service.

[1] This Application for Rehearing is focused on the Commission's newly asserted claim that Section 4905.26, Revised Code, provides authority to invent and apply a cost-based ratemaking methodology to uniquely increase the compensation of Ohio Power Company ("AEP-Ohio") for generation-related capacity service supplied to a competitive retail electric service ("CRES") provider under Section 4905.26, Revised Code. Nothing herein alters IEU-Ohio's previous claims that the Commission's actions in this proceeding are unlawful and unreasonable.

2. The Entry on Rehearing is unlawful and unreasonable because any supervisory and regulatory authority that the Commission may possess under Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, extends to an electric light company only when it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state,"[2] and does not extend to the supervision or regulation of wholesale transactions such as the wholesale transactions between AEP-Ohio and CRES providers.

As discussed in the memorandum in support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

/s/ Matthew R. Pritchard

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

[2] Section 4905.03(C), Revised Code.

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.	)	

MEMORANDUM IN SUPPORT

I. BACKGROUND

On October 17, 2012, the Commission issued an Entry on Rehearing and generally denied the various Applications for Rehearing filed in this proceeding from: (1) its December 8, 2010 Entry; (2) its March 7, 2012 Entry; (3) its May 30, 2012 Entry; and (4) the Capacity Order. The Entry on Rehearing, however, granted rehearing and then asserted that an additional jurisdictional basis, Section 4905.26, Revised Code, supports the cost-based ratemaking methodology which the Commission invented and applied in this proceeding to uniquely increase the compensation AEP-Ohio receives for generation-related capacity service.[3] As discussed below, the Entry on Rehearing is unlawful and unreasonable because the Commission cannot regulate a retail electric service deemed competitive or a wholesale service under Chapter 4905, Revised Code, generally, or under Section 4905.26, Revised Code, in particular.

II. ARGUMENT

1. The Entry on Rehearing is unlawful and unreasonable because the Commission cannot lawfully or reasonably rely upon Section 4905.26, Revised Code, to invent and apply a cost-based ratemaking methodology and uniquely and substantially increase AEP-Ohio's compensation for generation-related capacity service.

[3] Entry on Rehearing at 9, 28-29, 54.

As IEU-Ohio's initial brief[4] and August 1, 2012 Application for Rehearing[5] demonstrate (among other pleadings before the Commission), Ohio law prohibits the Commission from regulating or supervising a competitive retail electric service under Chapter 4905, Revised Code.[6] Additionally, the Ohio Supreme Court has held that the Commission cannot, in any event, use its general supervisory powers to bypass the statutory ratemaking formulas the General Assembly has enacted.

The Entry on Rehearing, however, continued the unlawful assertion of authority under Sections 4905.04, 4905.05, and 4905.06, Revised Code, and without prompting from any party asserted that the investigation initiated by the Commission was also authorized under Section 4905.26, Revised Code. The Entry on Rehearing's belated and strained resort to Section 4905.26, Revised Code, does not make the Commission's Capacity Order lawful or reasonable; Section 4905.26, Revised Code, does not delegate authority to the Commission to invent and apply a cost-based ratemaking methodology for generation-related capacity service supplied to CRES providers for the purpose of substantially increasing AEP-Ohio's compensation for generation-related capacity service.

The Commission is a creature of statute and may exercise only that authority granted to the Commission by statute.[7] The definitions in Section 4928.01, Revised

---

[4] IEU-Ohio's Post-Hearing Brief at 26-33, 40-41 (May 23, 2012).

[5] IEU-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 22-25 (Aug. 1, 2012).

[6] Section 4928.05(A)(1), Revised Code; *see, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 20.

[7] *Lucas County Commissioners v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347 (1997) ("The commission may exercise only that jurisdiction conferred by statute.").

Code,[8] in combination with the declaration in Section 4928.03, Revised Code, make it 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 such service is declared competitive except in certain statutorily defined circumstances.[9] From these definitions, this conclusion holds 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.[10]

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

---

[8] "'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.

[9] Section 4928.05(A)(1), Revised Code, provides:

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

[10] Section 4928.01(A)(27), Revised Code (emphasis added).

function (generation, transmission, distribution) if the service component is declared competitive. As provided in Section 4928.03, Revised Code, the General Assembly has declared that generation service is a competitive service:

> 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[11] that the consumers may obtain subject to this chapter from any supplier or suppliers.

By operation of Section 4928.05, Revised Code, then, competitive retail electric 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 regulation or supervision except as may be specifically allowed in Sections 4928.141 to 4928.144, Revised Code [which relate exclusively to the establishment of a standard service offer ("SSO") for *retail* electric customers]. The record in this proceeding makes it clear that capacity service is a generation service; and the so-called cost of this service is tied directly, albeit illegally, to AEP-Ohio's generating plants.[12] Section 4928.05(A)(1), Revised Code, also specifically precludes the Commission from regulating or supervising such a service under Chapter 4909, Revised Code.

Additionally, the Ohio Supreme Court has held that the Commission cannot use its general supervisory powers in contravention of the specific ratemaking processes that the General Assembly has developed and which are contained elsewhere in Title 49 of the Revised Code. In reviewing whether the seemingly broad grant of authority

---

[11] 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.

[12] IEU-Ohio's Reply Brief at 5 (May 30, 2012).

contained in Section 4901.02, Revised Code, provided the Commission with independent authority to establish rates outside the Commission's traditional ratemaking process, the Court held:

> [t]he comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike. *Dayton Power & Light Co. v. Pub. Util. Comm., supra,* 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733. We cannot conclude that it was the General Assembly's intent under the above enabling statute, R.C. 4901.02(A), to permit the PUCO to disregard *that very formula* in instances in which it simply did not agree with the result. Cf. *Consumers' Counsel, supra,* 67 Ohio St.2d at 165, 21 O.O.3d at 104, 423 N.E.2d at 828 ("the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the PUCO may effortlessly abrogate that very formula").[13]

Although in this instance the Commission suggests it has authority under Sections 4905.04, 4905.05, and 4909.06, Revised Code, and now Section 4905.26, Revised Code, instead of the Section analyzed by the Court above, the same legal principles apply. The General Assembly has established specific statutory requirements that the Commission must follow to authorize rates and charges for competitive retail electric services. Based on the Court's decision in the *Columbus Southern Power Company*[14] case quoted above, the Commission does not have the authority to bypass these specific requirements.

Additionally, Section 4905.26, Revised Code, by its terms is a procedural statute that does not delegate substantive authority to the Commission to increase a utility's compensation for a competitive or non-competitive service. It provides a process by which a complainant may seek a hearing or the Commission may initiate a hearing to determine whether a rate is unjust, unreasonable, unjustly discriminatory, unjustly

---

[13] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d at 540 (emphasis in original).

[14] *Id*.

preferential, or in violation of law. If the Commission determines that there are reasonable grounds for hearing, the Commission shall fix a time for hearing and serve notice of the hearing. The Commission then shall conduct an evidentiary hearing.

The Commission's authority under Section 4905.26, Revised Code, to investigate rates that may be "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law," however, does not provide the Commission with the authority to invent and apply a ratemaking methodology to increase AEP-Ohio's compensation for generation-related capacity service. The determination as to whether a particular price or rate is unjust and unreasonable can be made only by reference to other provisions of Title 49, Revised Code, that describe the subject matter the Commission may address, the manner in which that subject matter may be addressed, and the criteria the Commission must apply to resolve the justness and reasonableness issues.

The Court addressed this issue in *Ohio Utilities Company v. Public Utilities Commission of Ohio*[15] and upheld the Commission's determination that the Ohio Utilities Company's existing rates were "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law" when measured against the statutory ratemaking formula contained in Section 4909.15, Revised Code. Despite the Commission's reliance on the *Ohio Utilities Case* in the Entry on Rehearing, the Court in that case did not find that Section 4905.26, Revised Code, provided the Commission any independent ratemaking authority. Rather, in that case, the Court held that the Commission could establish new rates in a complaint case context by joining its authority to investigate the reasonableness of existing rates under Section 4905.26,

[15] 58 Ohio St.2d 153 (1979) (hereinafter "*Ohio Utilities Case*").

Revised Code, with its ratemaking authority under Section 4905.15, Revised Code. In the *Ohio Utilities Case*, a complaint was initiated against the Ohio Utilities Company alleging that its existing rates (which were based upon the old statutory ratemaking formula referred to as reproduction cost new) were unjust and unreasonable when measured against the new statutory ratemaking formula (commonly referred to as rate-based, rate-of-return).[16] The Court upheld the Commission's investigation under Section 4905.26, Revised Code, and held that when its investigatory powers were coupled with substantive ratemaking authority the Commission could reduce a utility's rates that it found to be unjust and unreasonable.[17]

Similarly, in *Lucas County Commissioners v. Public Utilities Commission of Ohio,*[18] the Court upheld the Commission's determination that Section 4905.26, Revised Code, did not provide the Commission with independent authority to order a refund of previous rates that the complainant argued were unjust and unreasonable. Instead, the Court looked elsewhere in Title 49, Revised Code, to see if another grant of statutory authority could be coupled with the Commission's investigatory powers under Section 4905.26, Revised Code, to uphold the Commission-ordered refund.[19] Finding no grant of authority to order the refund, the Court affirmed the Commission's dismissal of the complaint.

Commission decisions have also recognized that Section 4905.26, Revised Code, is only procedural in nature and hold that a determination of whether a complaint

---

[16] *Id.* at 157-159.

[17] *Id.*

[18] 80 Ohio St.3d 344 (1997).

[19] *See id.* at 347-348.

under that Section sets out grounds for relief is determined by reference to the substantive provisions of the law which the Commission must follow when engaged in ratemaking.

For example, in a complaint case brought by the Office of the Ohio Consumers' Counsel ("OCC") against West Ohio Gas Company ("West Ohio"), OCC alleged that West Ohio's approved rates were excessive and therefore unjust and unreasonable because West Ohio was earning a return on equity well in excess of the level authorized to set the company's rates.[20] West Ohio moved to dismiss on the ground that OCC had failed to allege grounds on which relief could be granted.[21] The Commission dismissed the complaint, holding: "the complaint must, at minimum, contain allegations that, if true, would support a finding that the rates exceed those which would be determined under [the statutory rate setting formula set out in Section 4909.15, Revised Code.]"[22]

The precedent established by cases dealing with the nature and scope of the Commission's authority under Section 4905.26, Revised Code, is consistent with the Court's holding that the Commission may not invent penalties under the emergency statute, Section 4909.16, Revised Code. Like Section 4905.26, Revised Code, the emergency statute provides the Commission with authority to alter or amend rates when it determines that an emergency exists. The range of relief the Commission may order under that Section, however, is controlled by the substantive requirements that the Commission must follow to measure the amount of rate relief that it may lawfully

---

[20] *In the Matter of the Complaint of the Office of Consumers' Counsel, State of Ohio, on Behalf of the Residential Customers of West Ohio Gas Company v. West Ohio Gas Company*, Case No. 88-1743-GA-CSS, Entry at 1 (Jan. 31, 1988) (hereinafter "*West Ohio Case*").

[21] *Id*. at 3.

[22] *Id*. at 11.

entertain and grant. And, like Section 4905.26, Revised Code, Section 4909.16, Revised Code, does not permit the Commission to supervise or regulate in areas where it has not been given jurisdiction.

In *Ohio Manufacturers' Association v. Public Utilities Commission of Ohio,*[23] the Commission asserted authority under the emergency statute (Section 4909.16, Revised Code) to authorize a public utility to levy penalties against a consumer for natural gas consumption in excess of stated limitations. The Court reversed the Commission's order. Because Section 4905.04, Revised Code, limited the Commission's jurisdiction to the regulation of public utilities and railroads, the Court held, "[a]lthough the foregoing regulatory powers are broad, the General Assembly has granted no such power to the commission"[24] to enforce such penalties. Furthermore, the Commission could not justify its assertion of authority based on a federal order permitting the federally regulated pipeline providing natural gas to penalize the public utility if the public utility's consumers used more gas than the amount allocated. As the Court concluded, the Commission possessed no power or authority except that conferred and vested in it by statute, and no statute authorized the Commission to delegate to a public utility the power to penalize a consumer.[25]

Finally, the Commission itself has ruled that complaint cases initiated under Section 4905.26, Revised Code, are not the primary method for the Commission to modify or approve rates. Historically the Commission has only authorized rates pursuant to Section 4905.26, Revised Code, in very "limited circumstances" and has

---

[23] 46 Ohio St.2d 214 (1976) (hereinafter "*OMA Case*").

[24] *Id*. at 217.

[25] *Id*.

only done so in accordance with grants of authority found elsewhere in Title 49, Revised Code, *e.g.*, Chapter 4909, Revised Code.[26] For instance, in an Opinion and Order issued earlier this year in Suburban Natural Gas Company's self-complaint case, the Commission stated that such "limited circumstances" exist:

> only when the impact of the rate change has been directed to particular customer classes, has occurred during a rate proceeding, has been temporary in duration, or occurred in the context of an emergency rate proceeding, pursuant to Section 4909.16, Revised Code. Further, the Commission has, in prior cases, found that, if the proposed charges are not a general, across-the-board, rate increase, which would affect all of the company's customers and, if the self-complaint mechanism will protect the company's customers' interests, it is appropriate to consider the reasonableness of charges proposed by the utility. See, *In the Matter of the Self-Complaint of Akron Thermal Limited Partnership* Case No. 04-1298-HT-SLF, Finding and Order (November 3, 2004), where the Commission approved a fuel cost surcharge rider, subject to refund, and only pending the determination of a base rate case of the company; *In the Matter of the Self-Complaint of Paramount Natural Gas Company Concerning its Existing Tariff Provisions Regarding Charges for Installing a Positive Shut Off Drip*, Case No. 98-1590-GA-SLF, Finding and Order (January 14,1999), where the Commission approved a charge applicable solely to those customers requiring installation of a positive shut-off drip device; *In the Matter of the Self-Complaint of Columbia Gas of Ohio, Inc. Concerning Certain of its Existing Tariff Provisions*, Case No. 93-1569-GA-SLF, Entry (December 7,1995), where the Commission approved the transfer and exchange of certain facilities between Suburban and Columbia, but without any cost to customers; and *In the Matter of the Application of Ohio Gas Company to Establish a Charge for Bad Checks and a Charge for Reconnection of Service After Regular Business Hours*, Case No. 87-2068-GA-SLF, Entry (January 10, 1989), where the Commission approved a $10.00 charge to be applied to customers who issue checks or other instruments backed by insufficient funds.[27]

Thus, contrary to the Commission's assertions in the Entry on Rehearing, the Commission has found that Section 4905.26, Revised Code does ***<u>not</u>*** "provide[] the

---

[26] *In the Matter of the Self-Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order at 6 (Aug. 15, 2012). See also *Ohio Utilities Case,* 58 Ohio St.2d at 157-159.

[27] *In the Matter of the Self-Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order at 6 (Aug. 15, 2012).

Commission with considerable authority to initiate proceedings to investigate the reasonableness of any rate or charge rendered or proposed to be rendered by a public utility."[28] Instead, the Commission has held that "limited circumstances" exist that allow the Commission to alter rates based on Section 4905.26, Revised Code, and even then, the Commission's authority to do so was tied back to the substantive ratemaking criteria found elsewhere in Title 49, Revised Code.

Here, the Commission has not identified the criteria, *i.e.,* the ratemaking authority, by which to judge whether current rates are "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law."[29] Without reference to the statutory ratemaking authority, it is simply impossible for the Commission to conclude that an existing rate is unjust or unreasonable inasmuch as there is nothing to compare the current rates against. Thus, because there has never been an allegation that AEP-Ohio was not receiving what would otherwise be authorized by law, the Commission was required, based upon its own precedent, to dismiss the complaint.[30]

Of course, the Commission cannot point to any provision of Title 49, Revised Code, which authorizes the Commission to invent or apply a cost-based ratemaking methodology for the purpose of uniquely and significantly increasing the compensation of an electric distribution utility ("EDU") for the provision of generation-related capacity service because no such statute exists. Chapter 4909, Revised Code, is the only Chapter of Title 49, Revised Code, that provides for a cost-based methodology for increasing an EDU's compensation; however, that Chapter only applies to non-

[28] Entry on Rehearing at 9.

[29] Section 4905.26, Revised Code.

[30] *West Ohio Gas*, Entry at 1 (Jan. 31, 1988).

competitive retail electric services. By operation of law, generation-related capacity service has been deemed competitive,[31] and the Commission has held that generation-related capacity service is a wholesale service rather than retail.[32] Further, even if that Chapter could be made applicable, the Commission excluded any ability it might otherwise have to rely on that Chapter to support the Capacity Order by completely failing to comply with the statutorily mandated requirements contained in that Chapter.[33] Likewise, the Federal Energy Regulatory Commission ("FERC")-approved Reliability Assurance Agreement ("RAA"), just like the federal gas curtailment order the Commission relied upon in the *OMA Case*, cannot be used to expand the Commission's subject matter jurisdiction into areas either not provided for or explicitly prohibited by the General Assembly.

Furthermore, throughout the nearly two-year history of this case, the Commission has never alleged that the existing rates, set in accordance with PJM Interconnection, L.L.C.'s ("PJM") Reliability Pricing Model ("RPM"), are unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law. In fact, the Commission approved the use of RPM-Based Pricing in its initial order opening the investigation in this case,[34] authorized the use of RPM-Based Pricing from January 1, 2012 through May 30, 2012,[35] and the Commission has determined that public policy requires that

---

[31] Section 4928.03, Revised Code.

[32] Capacity Order at 13; Entry on Rehearing at 19-20.

[33] *See* Capacity Order at 13; IEU-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 25-30 (Aug. 1, 2012).

[34] Entry at 3 (Dec. 8, 2010).

[35] RPM-Based Pricing was the sole method of compensation for AEP-Ohio through December 31, 2012. Beginning January 1, 2012 and continuing through May 30, 2012, AEP-Ohio received compensation for generation-related capacity service based on two pricing tiers. The first tier, however, remained tied to RPM-Based Pricing. *See, e.g.*, Entry at 1-8 (May 30, 2012).

AEP-Ohio charge CRES providers the RPM-Based Price through the 2014-2015 PJM delivery year. Additionally, RPM-Based Pricing has been determined to be reasonable through FERC's approval of the RAA,[36] AEP-Ohio previously used 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, and all other EDUs in Ohio receive compensation for generation-related capacity service in accordance with RPM-Based Pricing. Thus, by all accounts, RPM-Based Pricing is just and reasonable and cannot be displaced by the Commission.

The Commission has concluded that RPM-Based Pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers.[37] However, at no time throughout this lengthy proceeding has the Commission identified how it is measuring just and reasonable compensation and this omission effectively bypasses the statutory obligations which the Commission must satisfy before it can increase utility bills. 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.[38] Neither AEP-Ohio nor the Commission demonstrated that continuation

---

[36] *See PJM Interconnection, L.L.C.,* 115 FERC ¶ 61,079 (2006) (finding preexisting pricing model to be unjust and unreasonable); *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331 (2006) (approving, with conditions, the RPM); *PJM Interconnection, L.L.C.,* 119 FERC ¶ 61,318 (2007) (clarifying nature and extent of order approving the RPM).

[37] Opinion and Order at 23; Entry on Rehearing at 36.

[38] *FPC v. Sierra Pacific Power Co*., 350 U.S. 348 (1956); *United Gas Co. v. Mobile Gas Corp*., 350 U.S. 332 (1956).

of RPM-Based Pricing is contrary to the public interest. And as mentioned above, the Commission found that the continuation of RPM-Based Pricing is in the public interest.[39]

The Commission must proactively respect and follow the law. Yet, throughout this proceeding the Commission has repeatedly strained to evade this most fundamental obligation for the purpose of increasing utility bills and depriving consumers of the full opportunity to benefit from lower generation supply prices available from CRES providers. What the Commission has done here is not just, it is not lawful, and it is not right.

In summary, the Commission is specifically barred by Section 4928.05(A)(1), Revised Code, from using its supervisory and regulatory investigatory authority in Chapter 4905, Revised Code, including Section 4905.26, Revised Code, to address pricing for any generation service from the point of generation to the point of consumption.[40] Additionally, even if the Commission was not specifically barred under Section 4928.05(A)(1), Revised Code, from invoking Section 4905.26, Revised Code, that statute does not provide the Commission with independent or unconditional authority to grant rate relief. Finally, the Commission has held that rates can only be established under Section 4905.26, Revised Code, in "limited circumstances" and then, only in accordance with other ratemaking statutes. The Commission has violated its own holdings regarding the nature and scope of any authority that the Commission may possess under Section 4905.26, Revised Code. For these reasons, the Entry on Rehearing is unlawful and unreasonable.

---

[39] Capacity Order at 23.

[40] Section 4928.05, Revised Code.

2. The Entry on Rehearing is unlawful and unreasonable because any supervisory and regulatory authority that the Commission may possess under Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, extends to an electric light company only when it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state,"[41] and does not extend to the supervision or regulation of wholesale transactions such as the wholesale transactions between AEP-Ohio and CRES providers.

In the Capacity Order, the Commission asserted that capacity service is not a retail service:

> [i]n this case, the electric service in question (*i.e.,* capacity service) is provided by AEP-Ohio for CRES providers, with CRES providers compensating the Company in return for its [Fixed Resource Requirement ("FRR")] capacity obligations. Such capacity service is not provided directly by AEP-Ohio to retail customers. Although the capacity service benefits shopping customers in due course, they are initially one step removed from the transaction, which is more appropriately characterized as an intrastate wholesale[42] matter between AEP-Ohio and each CRES provider operating in the Company's service territory.[43]

The Entry on Rehearing also confirms the Commission's assertion that "capacity service" is not a retail service:

> AEP-Ohio's provision of capacity to CRES providers ... is not a retail electric service ... . The capacity service in question is not provided directly by AEP-Ohio to retail customers, but is rather a whole transaction between the Company and CRES providers. Because AEP-Ohio's capacity costs are not directly assignable or allocable to retail electric generation service ... .[44]

---

[41] Section 4905.03(C), Revised Code.

[42] It is unclear what the Commission means by the use of the words "intrastate wholesale". The United States Supreme Court has held that electricity is inherently in interstate commerce. *See New York et al. v. FERC et al.*, 535 U.S. 1 (2002); *FPC v. Florida Power & Light Co*., 404 U.S. 453 at 454-455 (1972). And, the RAA itself specifies that the capacity responsibility discussed therein is a regional responsibility for the entire multistate footprint of PJM. IEU-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 45 (Aug. 1, 2012); FES Ex. 110A at 4, 21; Tr. Vol. VI. at 1346-1348. In plainer words, there is no such thing as "intrastate wholesale" electric service.

[43] Capacity Order at 13 (internal citations omitted).

[44] Entry on Rehearing at 19-20.

The Commission's determination that generation-related capacity service supplied to CRES providers is a wholesale service and not subject to Section 4928.05(A)(1), Revised Code, however, offers the Commission no advantage. The Commission's reliance on Chapter 4905, Revised Code, including Sections 4905.04, 4905.05, 4905.06, and now on rehearing Section 4905.26, Revised Code, to regulate capacity service is unlawful and unreasonable because those Sections apply to only retail services.

Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, all apply to public utilities as that term is defined in Sections 4905.02[45] and 4905.03,[46] Revised Code. Those Sections specify that a public utility subject to the Commission's jurisdiction must be a company engaged in the business of supplying electricity *to consumers*, *i.e.,* it must be supplying a retail service. The definition of a public utility also specifically exempts regional transmission organizations ("RTOs"), such as PJM, the entity that actually bills CRES providers for wholesale capacity service. As mentioned above, the Commission held that it was not regulating a service provided to consumers; rather, it held it was regulating a wholesale service provided to CRES providers. Thus, if the Commission's definition of capacity service as a wholesale service is correct, the Commission has no authority under Chapter 4905, Revised Code,

[45] "As used in this chapter, 'public utility' includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit ... ." Section 4905.02(A), Revised Code.

[46] Section 4905.03, Revised Code (Public utility company definitions) provides that the definition of a public utility includes "[a]n electric light company, *when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state*, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission." Section 4905.03(C), Revised Code (emphasis added).

to regulate the service or substantially increase the compensation available to AEP-Ohio for providing such service. Therefore, the Commission's assertion that it can regulate a wholesale rate under Chapter 4905, Revised Code, is unlawful and unreasonable.

III. CONCLUSION

As demonstrated herein, the Entry on Rehearing is unlawful and unreasonable because the Commissions lacks authority to regulate generation capacity service under Chapter 4905, Revised Code, regardless of whether that service is defined as retail or wholesale. Section 4905.26, Revised Code, does not expand the Commission's substantive authority to authorize rate relief beyond that which the General Assembly has granted and cannot, in any event, provide the Commission with authority the General Assembly has specifically denied the Commission. Because the Commission lacks the requisite authority to increase AEP-Ohio's compensation for generation capacity service supplied to CRES providers to $188.88/Megawatt-day ("MW-day"), the Commission must grant rehearing and terminate any authority AEP-Ohio has to collect (either currently or through deferral mechanisms) such increased compensation for generation-related capacity service.

Respectfully submitted,

/s/ Matthew R. Pritchard

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the October 17, 2012 Entry on Rehearing and Memorandum In Support* was served upon the following parties of record this 15th day of November 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Matthew R. Pritchard
Matthew R. Pritchard

Steven T. Nourse
Matthew J. Satterwhite
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com

Daniel R. Conway
Christen M. Moore
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com
cmoore@porterwright.com

Derek Shaffer
Quinn Emanuel Urquhart & Sullivan, LLP
1299 Pennsylvania Avenue, NW, Suite 825
Washington, DC 20004
derekshaffer@quinnemanuel.com

COUNSEL FOR COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

COUNSEL FOR THE OHIO ENERGY GROUP

Kyle L. Kern, Counsel of Record
Melissa R. Yost
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
kern@occ.state.oh.us
yost@occ.state.oh.us

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
tobrien@bricker.com

COUNSEL FOR THE OHIO MANUFACTURERS' ASSOCIATION

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
tobrien@bricker.com

COUNSEL FOR OHIO HOSPITAL ASSOCIATION

M. Howard Petricoff
Stephen M. Howard
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com
lkalepsclark@vorys.com

COUNSEL FOR DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC AND CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC., RETAIL ENERGY SUPPLY ASSOCIATION

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005
john.estes@skadden.com
paul.wight@skadden.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutick
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

COUNSEL FOR FIRSTENERGY SOLUTIONS CORP.

Dorothy Kim Corbett
Associate General Counsel
Duke Energy Business Services LLC
139 East Fourth Street
Cincinnati, OH 45202
Dorothy.Corbett@duke-energy.com

Jeanne W. Kingery
Associate General Counsel
155 East Broad Street, 21st Floor
Columbus, OH 43215
Jeanne.Kingery@duke-energy.com

COUNSEL FOR DUKE ENERGY RETAIL SALES, LLC

David M. Stahl
Eimer Stahl LLP
224 S. Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com

Sandy I-ru Grace
Assistant General Counsel
Exelon Business Services Company
101 Constitution Avenue N.W.
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

COUNSEL FOR EXELON GENERATION COMPANY, LLC

Mark A. Whitt
Andrew J. Campbell
Whitt Sturtevant LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, OH 43215
whitt@whitt-sturtevant.com
Campbell@whitt-sturtevant.com

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

COUNSEL FOR INTERSTATE GAS SUPPLY, INC.

Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215
dane.stinson@baileycavalieri.com

COUNSEL FOR THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO SCHOOLS COUNCIL AND THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS

Chad A. Endsley
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org

COUNSEL FOR THE OHIO FARM BUREAU FEDERATION

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

COUNSEL FOR THE KROGER CO.

Jeanne W. Kingery
Associate General Counsel
Amy B. Spiller
Deputy General Counsel
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Jeanne.Kingery@duke-energy.com
Amy.Spiller@duke-energy.com

COUNSEL FOR DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Gary A. Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@dom.com

COUNSEL FOR DOMINION RETAIL, INC.

Roger P. Sugarman
Kegler, Brown, Hill & Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
rsugarman@keglerbrown.com

COUNSEL FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

C. Todd Jones
Gregory H. Dunn
Christopher L. Miller
Ice Miller LLP
250 West Street
Columbus, OH 43215
Gregory.dunn@icemiller.com
christopher.miller@icemiller.com

COUNSEL FOR THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO AND THE CITY OF GROVE CITY, OHIO

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, OH 45839-1793
drinebolt@ohiopartners.org
cmooney2@columbus.rr.com

COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE ENERGY

Steven Beeler
Werner Margard
John Jones
Public Utilities Section
Ohio Attorney General's Office
180 East Broad Street, 6th Floor
Columbus, OH 43215
werner.margard@puc.state.oh.us
steven.beeler@puc.state.oh.us
john.jones@puc.state.oh.us

COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Sarah Parrot
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215
Greta.See@puc.state.oh.us
Sarah.Parrot@puc.state.oh.us

ATTORNEY EXAMINERS

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/15/2012 4:02:34 PM

in

Case No(s). 10-2929-EL-UNC

Summary: App for Rehearing of the October 17, 2012 Entry on REhearing and Memorandum in Support electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio