**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of )

Ohio Power Company to Adopt a ) Case No. 14-1186-EL-RDR

Final Implementation Plan for the )

Retail Stability Rider )

**Industrial Energy Users-Ohio’s**

**Reply to the Memorandum in Opposition to the Motion to Dismiss of Ohio Power Company**

Samuel C. Randazzo (Counsel of Record)

 (Reg. No. 0016386)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

**September 10, 2014 Attorneys for Industrial Energy Users-Ohio**

TABLE OF CONTENTS

Page

I. Introduction 1

II. The Commission lacks subject matter jurisdiction to authorize the Capacity Shopping Tax 3

III. Res judicata and collateral estoppel do not bar the Commission from dismissing the Application 5

IV. The Commission lacks subject matter jurisdiction to authorize the relief requested by AEP-Ohio 7

A. The Commission has no authority under R.C. Chapters 4905, 4909, or 4928 to increase AEP-Ohio’s total compensation for wholesale generation-related service 7

B. R.C. 4928.142(B)(2)(d) and R.C. 4928.144 do not provide the Commission with subject matter jurisdiction to authorize recovery of the Capacity Shopping Tax 10

C. R.C. Chapters 4905 and 4909 and the Reliability Assurance Agreement do not provide the Commission subject matter jurisdiction to authorize recovery of the Capacity Shopping Tax 13

D. The Commission is without subject matter jurisdiction to authorize an increase in wholesale capacity revenue under R.C. Chapter 4909 17

E. The Commission lacks subject matter jurisdiction to authorize transition revenue or its equivalent 18

F. An order authorizing the recovery of additional Capacity Shopping Tax revenue is preempted by the Federal Power Act 20

V. Conclusion 21

**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of )

Ohio Power Company to Adopt a ) Case No. 14-1186-EL-RDR

Final Implementation Plan for the )

Retail Stability Rider )

**Industrial Energy Users-Ohio’s**

**Reply to the Memorandum in Opposition to the Motion to Dismiss of Ohio Power Company**

# Introduction

On July 8, 2014, Ohio Power Company (“AEP-Ohio”) filed an application seeking authority to collect up to $445 million. In support of that application, AEP-Ohio pointed to two orders of the Public Utilities Commission of Ohio (“Commission”) authorizing AEP-Ohio to bill and collect above-market revenue for a wholesale generation-related service provided to competitive retail electric service (“CRES”) providers. In those orders, the Commission authorized AEP-Ohio to price wholesale generation capacity service (“Capacity Service”) at $188.88/megawatt-day (“MW-day”), charge CRES providers the price established by PJM Interconnection, L.L.C. (“PJM”) through the Reliability Pricing Model (“RPM” or “RPM-based Price”), and to defer the difference between the RPM-based Price of Capacity Service and $188.88/MW-day for future recovery through the Retail Stability Rider (“RSR”) authorized for the current Electric Security Plan (“ESP”) and some future nonbypassable rider.[[1]](#footnote-1)

On August 19, 2014, Industrial Energy Users-Ohio (“IEU-Ohio”) filed a Motion to Dismiss demonstrating that the Commission lacked subject matter jurisdiction under both state and federal law to grant the relief requested by AEP-Ohio in its application. As demonstrated in the Memorandum in Support of the Motion to Dismiss, the Commission is a creature of statute and can issue only those orders that are within its subject matter jurisdiction as defined by state and federal law. State and federal law do not provide the Commission subject matter jurisdiction to increase AEP-Ohio’s total compensation for Capacity Service by inventing and applying a cost-based ratemaking methodology. Further, the Commission cannot order a nonbypassable rider to phase-in the recovery of the Capacity Shopping Tax under state law. Additionally, the Federal Power Act (“FPA”) preempts the Commission from authorizing an increase in AEP-Ohio’s total compensation for Capacity Service; any order doing so is void. Accordingly, the Commission should dismiss AEP-Ohio’s application seeking to extract an additional $445 million in above-market compensation for Capacity Service.

 On September 3, 2014, AEP-Ohio filed its Memorandum in Opposition to the Motion to Dismiss (“Memo Contra”).[[2]](#footnote-2) In its Memo Contra, AEP-Ohio seeks to recast the issues presented by its application as nothing more than an accounting exercise.[[3]](#footnote-3) In addition to its attempt to recharacterize the issues presented by its application, AEP-Ohio also advances two arguments in opposition to the Motion to Dismiss. First, it asserts that the Commission may not address the issues presented by the Motion to Dismiss because they were addressed by prior Commission orders.[[4]](#footnote-4) Second, it argues that the Commission has subject matter jurisdiction to grant the request for relief.[[5]](#footnote-5) Neither argument has merit.[[6]](#footnote-6)

# The Commission lacks subject matter jurisdiction to authorize the Capacity Shopping Tax

As demonstrated in the Motion to Dismiss, the Capacity Shopping Tax is the above-market component of the $188.88/MW-day price that the Commission authorized under provisions of R.C. Chapter 4905 with reference to R.C. Chapter 4909, but with no compliance with the requirements of latter Chapter. In summary, the Commission is without subject matter jurisdiction to address the merits of the application for several reasons:

First, Capacity Service is a wholesale service. The Commission has no authority under any of the provisions of Ohio law to establish prices for wholesale electric service. It follows that the Commission cannot authorize the recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized in the Capacity Case.

Second, Capacity Service is a generation-related service; generation service has been declared competitive and is not subject to the Commission’s traditional rate setting authority under R.C. Chapter 4909. The Commission’s only remaining authority to establish a price for a service declared competitive such as retail generation-related electric service is limited to establishing terms and conditions that may be authorized as part of a standard service offer (“SSO”) under R.C. 4928.141 to R.C. 4928.144. The Capacity Shopping Tax was not and cannot be authorized under the Commission’s authority to authorize an SSO. It follows that the Commission cannot authorize the recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized.

Third, with regard to R.C. 4928.144, that section is limited to the phase-in of a price or charge approved under R.C. 4928.141 to R.C. 4928.143. These provisions concern the approval of applications seeking to establish an SSO. The Commission’s assertion of jurisdiction that resulted in the Capacity Shopping Tax, however, was not under provisions governing an application seeking an SSO. Instead, the Commission relied upon its general regulatory authority provided by R.C. Chapter 4905. It follows that the Commission cannot authorize the recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized under R.C. 4928.144.

Fourth, the Commission has no subject matter jurisdiction to approve a wholesale generation charge under R.C. Chapter 4909, and even if it did, the Commission did not follow the requirements, procedurally or substantively, to increase AEP-Ohio’s compensation for wholesale capacity service. Further, AEP-Ohio did not invoke by application the Commission’s authority to do so. It follows that the Commission cannot authorize the recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized.

Fifth, the Commission cannot rely on R.C. 4905.26 to authorize an increase in AEP-Ohio’s compensation for Capacity Service since that provision, like all other relevant ones in Title 49, limits the Commission’s authority to retail services of the electric light company or electric distribution utility (“EDU”) and cannot serve as a basis to expand the substantive rate regulation of the Commission. It follows that the Commission cannot authorize the recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized.

 Sixth, the above-market compensation AEP-Ohio is seeking authorization to bill and collect in this application is transition revenue or its equivalent, and R.C. 4928.38 prohibits the Commission from authorizing an electric utility to recover transition revenue or its equivalent.

 Seventh, even if there were some basis under state law for the Commission to invent and apply a cost-based ratemaking methodology to uniquely increase AEP-Ohio’s compensation for wholesale generation-related services, the pricing of wholesale generation-related services is within the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”). State commissions are without jurisdiction to increase the compensation of electric utilities for sales for resale. As there is no dispute that Capacity Service is a wholesale electric service, the Commission may not set AEP-Ohio’s total compensation for that service in an amount greater than that approved under federally-approved tariffs. Any order attempting to exercise subject matter jurisdiction over the pricing of Capacity Service, including the relief requested in this case, would be void.

For the reasons outlined above and fully developed in the Motion to Dismiss, therefore, the Commission lacks subject matter jurisdiction to address the merits of AEP-Ohio’s application, and the Commission should dismiss it.[[7]](#footnote-7)

# Res judicata and collateral estoppel do not bar the Commission from dismissing the Application

As noted above, AEP-Ohio responds to the Motion to Dismiss by advancing two claims. Initially, AEP-Ohio argues that the Motion to Dismiss is barred by *res judicata* because the Capacity Order and the ESP II Order “can only be modified by the Supreme Court of Ohio in pending appeals reviewing [the Capacity Case and ESP II Orders].”[[8]](#footnote-8)

AEP-Ohio’s argument ignores the simple fact that the Commission cannot assert jurisdiction over a matter for which it does not have jurisdiction to consider. As discussed below, AEP-Ohio’s request to increase its compensation for Capacity Service is not within the subject matter that the Commission may lawfully address. Accordingly, the Commission is without authority to proceed on AEP-Ohio’s application regardless of what it may have done in prior proceedings.

Further, the preclusive effect of res judicata does not bar a challenge to the subject matter jurisdiction of the Commission, regardless of what the Commission may have decided in a prior proceeding. As AEP-Ohio recognizes, the Motion to Dismiss raises a challenge to the subject matter jurisdiction of the Commission to authorize billing and collection of the Capacity Shopping Tax.[[9]](#footnote-9) In any proceeding, the court or agency may not exceed its subject matter jurisdiction.[[10]](#footnote-10) As a result, a prior incorrect adjudication regarding subject matter jurisdiction may be raised in a subsequent proceeding.[[11]](#footnote-11) Thus, *res judicata* and collateral estoppel do not prevent the Commission from addressing the merits of the Motion to Dismiss.

# The Commission lacks subject matter jurisdiction to authorize the relief requested by AEP-Ohio

In the second ground AEP-Ohio advances as a basis to deny the Motion to Dismiss, AEP-Ohio asserts incorrectly that the Commission has subject matter jurisdiction to allow AEP-Ohio to increase its compensation for wholesale generation-related electric service based on provisions of R.C. Chapters 4905 and 4909. Further, it asserts that the Commission is not barred by R.C. 4928.38 or preempted by federal law from increasing AEP-Ohio’s wholesale compensation for generation-related services. These claims are not correct.

## The Commission has no authority under R.C. Chapters 4905, 4909, or 4928 to increase AEP-Ohio’s total compensation for wholesale generation-related service

As demonstrated in the Motion to Dismiss, R.C. Chapters 4905, 4909, and 4928, apply to public utilities as that term is defined in R.C. 4905.02 and 4905.03. Commission jurisdiction over an “electric light company,” which also includes an electric distribution company,[[12]](#footnote-12) extends to “[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.”[[13]](#footnote-13) By definition, therefore, R.C. Chapters 4905, 4909, and 4928 do not extend the Commission’s subject matter jurisdiction to wholesale electric services provided by electric light companies.[[14]](#footnote-14)

In response to IEU-Ohio’s demonstration that the Commission lacks subject matter jurisdiction over Capacity Service, AEP-Ohio argues generally that the Commission derives jurisdiction from its general authority of public utilities, claims more specifically that the Commission has jurisdiction under R.C. 4905.26, and suggests that IEU-Ohio “glosses over the Commission’s substantial jurisdiction under [that section].”[[15]](#footnote-15) None of these claims is correct.

AEP-Ohio advances the broad argument that the Commission has jurisdiction under the general regulatory provisions of R.C. Chapter 4905 to establish a price for what AEP-Ohio terms a “non-competitive” wholesale service,[[16]](#footnote-16) but this argument misses the key point that the Commission’s jurisdiction is limited to the pricing of retail electric services. As discussed in both the Motion to Dismiss and above, neither R.C. Chapter 4905, 4909, or 4928 extends the Commission’s authority to a wholesale service.[[17]](#footnote-17) As AEP-Ohio repeatedly recognizes, Capacity Service is a wholesale service.[[18]](#footnote-18) It is long been past debate that the Commission lacks authority to establish a price for a wholesale electric service.[[19]](#footnote-19)

AEP-Ohio’s admission that CRES providers are captive buyers does not provide the Commission any basis to assert subject matter jurisdiction in this matter.[[20]](#footnote-20) Amended Substitute Senate Bill 3 (“SB 3”) specifically declared generation services to be competitive.[[21]](#footnote-21) There is no dispute that Capacity Service is a generation-related service. As a result of the changes effected by SB 3, therefore, those services, whether wholesale or retail, are no longer subject to the traditional Commission regulation governed by R.C. Chapter 4909.[[22]](#footnote-22) Moreover, the Commission is prohibited from setting retail generation service prices except as provided by R.C. 4928.141 to R.C. 4928.144, and then only in regard to the default generation-related services provided to retail customers.[[23]](#footnote-23) Accordingly, there is no legal basis for the Commission to assert subject matter jurisdiction over a retail generation-related service other than through a proceeding seeking approval of an SSO.[[24]](#footnote-24) Regardless of which statutes AEP-Ohio points to for support for its application, none provides the Commission subject matter jurisdiction to authorize AEP-Ohio to increase its compensation for Capacity Service.

Its reliance on R.C. 4905.26 and the suggestion that IEU-Ohio “glossed over” this jurisdictional basis likewise is wrong, As IEU-Ohio showed in its Motion to Dismiss, R.C. 4905.26 is governed by the same jurisdictional constraints as those governing R.C. 4905.04, 4905.05, and 4905.06.[[25]](#footnote-25)

Additionally, AEP-Ohio fails to address the case law that constrains the Commission’s ratemaking authority under R.C. 4905.26 that IEU-Ohio identified in its Motion to Dismiss. While the Commission may establish new rates in a complaint case initiated under R.C. 4905.26, its authority to establish such rates is constrained by its ratemaking authority found elsewhere in Ohio law.[[26]](#footnote-26) “[T]he General Assembly did not intend the complaint *procedure* of R.C. 4905.26” to be utilized to upset the substantive statutes in Chapter 4909, that among other things requires “a public utility [to] charge its consumers in accordance with the Commission-approved rate schedule.”[[27]](#footnote-27) Thus, the determination of whether an existing rate is unjust or unreasonable must be done by reference to the ratemaking formula enacted by the General Assembly; the Commission’s ratemaking authority for competitive retail electric services such as retail generation-related services and non-competitive retail electric services is found in R.C. Chapter 4928, and in R.C. Chapter 4909, respectively.[[28]](#footnote-28) Simply put, R.C. 4905.26 does not extend the Commission’s subject matter jurisdiction to invent and apply a cost-based ratemaking methodology to increase uniquely AEP-Ohio’s compensation for Capacity Service.

## R.C. 4928.142(B)(2)(d) and R.C. 4928.144 do not provide the Commission with subject matter jurisdiction to authorize recovery of the Capacity Shopping Tax

AEP-Ohio further asserts that IEU-Ohio failed to address the Commission’s authority under R.C. 4928.143(B)(2)(d) and 4928.144 to authorize the RSR. As discussed below, that argument is both irrelevant to the resolution of the Motion to Dismiss and wrong.

Although the Commission approved the current RSR as part of an ESP under R.C. 4928.143(B)(2)(d),[[29]](#footnote-29) the Commission’s authority to authorize the current RSR is not an issue in this case. Under the terms of the ESP II Order, the current RSR will expire on May 31, 2015.[[30]](#footnote-30) According to the application in this case, AEP-Ohio is seeking a new charge that it also wants to call the RSR to allow it to amortize the remaining Capacity Shopping Tax over a period of thirty-two months.[[31]](#footnote-31) Other than establishing the mechanics for requiring AEP-Ohio to reduce the balance of Capacity Shopping Tax during the current ESP, the authorization of the existing RSR is independent, and irrelevant, to the relief that AEP-Ohio is seeking through this application.

Further, the Capacity Shopping Tax was not authorized as a term of the current ESP. The Commission authorized increased compensation for Capacity Service in the Capacity Case in reliance on its general supervisory authority contained in sections R.C. 4905.04, 4905.05, 4905.06, and 4905.26.[[32]](#footnote-32) The Commission has never asserted that it has jurisdiction over Capacity Service under Chapter 4928. In fact, it explicitly rejected this argument in the *Capacity Case*.[[33]](#footnote-33) Thus, as IEU-Ohio explained in its Motion to Dismiss, the Commission may not rely on R.C. 4928.144 as a legal basis to authorize the recovery of the Capacity Shopping Tax because it is not a rate or charge approved under R.C. 4928.141 to R.C. 4928.143.[[34]](#footnote-34)

Additionally, AEP-Ohio is not correct when it asserts that the Motion to Dismiss does not address the Commission’s lack of authority to authorize a Capacity Shopping Tax under R.C. 4928.144. As noted above, the Motion to Dismiss fully explains that the Commission lacks authority under R.C. 4928.144 to authorize a nonbypassable rider because the underlying rate or charge being phased in was not authorized under R.C. 4928.141 to R.C. 4928.143.[[35]](#footnote-35)

Moreover, reliance on the ESP II Order also is misplaced. In the ESP II Order, the Commission authorized the RSR to provide AEP-Ohio “financial integrity.”[[36]](#footnote-36) In authorizing the rider, the Commission identified the amount it believed would provide AEP-Ohio the opportunity to secure a return on equity of 7-11%.[[37]](#footnote-37) The Commission then directed AEP-Ohio to apply a portion of the RSR to reduce the Capacity Shopping Tax.[[38]](#footnote-38) Thus, the current RSR is unrelated to the Commission’s order increasing AEP-Ohio’s compensation for Capacity Service except for the provision that a portion of the revenue collected under the RSR should be applied to reduce the Capacity Shopping Tax balance.

AEP-Ohio also fails to address the jurisdictional problem its pending ESP application has created if it is seeking to have the Capacity Shopping Tax authorized through a rider based on R.C. 4928.143(B)(2)(d). Any authorization of a rider under R.C. 4928.143(B)(2)(d) as part of an ESP would be subject to the Commission finding that the ESP, in the aggregate, is more favorable than a market rate offer (“MRO”) as required by R.C. 4928.143(C)(1). In its recent application seeking an ESP, however, AEP-Ohio did not seek authorization of a rider to amortize the Capacity Shopping Tax because it assumed that it could seek authority to collect the Capacity Shopping Tax in a separate proceeding.[[39]](#footnote-39) Without that Commission review including a finding under R.C. 4928.143(C)(1), R.C. 4928.143(B)(2)(d) cannot serve as a basis for the new rider AEP-Ohio is seeking.

Additionally, AEP-Ohio has not and could not demonstrate that the Capacity Shopping Tax can be authorized as a provision of an ESP. The capacity charges the Commission authorized in the *Capacity Case*, and the resulting Capacity Shopping Tax, are not a component of default service provided to non-shopping customers. Accordingly, it is not a provision that could be authorized as part of the SSO.[[40]](#footnote-40)

## R.C. Chapters 4905 and 4909 and the Reliability Assurance Agreement do not provide the Commission subject matter jurisdiction to authorize recovery of the Capacity Shopping Tax

 AEP-Ohio further asserts that the Commission should ignore the statutory constraints, asserting that “no provision of chapter 4905 or 3909 of the revised code prohibits the Commission from initiating a review of or fixing a wholesale rate”[[41]](#footnote-41) and concluding that the Commission may expand its jurisdiction to regulate wholesale electric service.[[42]](#footnote-42) It further argues that the Reliability Assurance Agreement (“RAA”) authorizes the Commission to increase AEP-Ohio’s compensation for Capacity Service and that FERC approval of its wholesale capacity charges supports jurisdiction by this Commission.[[43]](#footnote-43) These claims are without merit.

 Contrary to AEP-Ohio’s claim that the Commission can act in any area that is not specifically prohibited, it cannot be disputed that the Commission is a creature of statute and may exercise only that authority conferred upon it by the General Assembly.[[44]](#footnote-44) AEP-Ohio’s suggestion that the Commission can expand its subject matter jurisdiction to address anything “not prohibited” is plainly without merit.

Further, as IEU-Ohio demonstrated in its Motion to Dismiss, R.C. Chapter 4905 does not provide the Commission with authority to invent a cost-based ratemaking methodology.[[45]](#footnote-45) When the Commission has previously attempted to use its general authority to adjust rates in a manner inconsistent with that jurisdiction provided by R.C. Chapter 4909, the Supreme Court of Ohio has reversed the Commission.[[46]](#footnote-46) Thus, AEP-Ohio’s assertion that the general regulatory statutes contained in R.C. Chapter 4905 provide the Commission authority to authorize recovery of the Capacity Shopping Tax is groundless.

 AEP-Ohio’s assertion that the Commission can assert jurisdiction as long as there is no prohibition also would lead to an absurd result. Under this claim, the Commission could assert jurisdiction over any related or unrelated matter regarding utility service. The Supreme Court, however, has recognized that the Commission may not assert jurisdiction over entities or services beyond that authorized by law.[[47]](#footnote-47) Without a positive authorization, the Commission is without authority to apply its ratemaking statutes or other regulatory authority.

 Likewise, the RAA does not and cannot provide the Commission with jurisdiction to increase AEP-Ohio’s compensation for wholesale generation-related services. The relevant language in the RAA provides that “[i]n the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail.”[[48]](#footnote-48) This plain language does not grant any state jurisdiction to regulate Capacity Service.

 Furthermore, the increased compensation AEP-Ohio is seeking through the Capacity Shopping Tax Application is not authorized by the RAA. The default compensation under the RAA for Capacity Service is RPM-based Pricing. That compensation remains in place unless and until a new lawful compensation level is authorized under the RAA. Following the Commission’s orders in the *Capacity Case* and *ESP II Case,* AEP-Ohio made a filing at FERC requesting that FERC approve an appendix to the RAA.[[49]](#footnote-49) The FERC-approved appendix to the RAA confirms that AEP-Ohio’s compensation for Capacity Service is limited to the RPM-based Price.[[50]](#footnote-50)

 Additionally, AEP-Ohio falsely asserts that in approving an appendix to the RAA FERC also approved this Commission’s assertion of jurisdiction.[[51]](#footnote-51) In pleadings (attached to this Reply) filed on behalf of AEP-Ohio, AEP Service Corporation (“AEPSC”) requested that FERC “confirm that the Ohio Commission’s decision to adopt a state compensation mechanism with retail and wholesale charges is fully consistent with Section D.8” of the RAA and “to accept for filing the wholesale component of the Ohio state compensation mechanism.”[[52]](#footnote-52) It ultimately agreed to an appendix to the RAA that made no reference to the $188.88/MW-day price the Commission ordered in the *Capacity Case* and that was limited to an authorization of the market-based RPM-based Price.[[53]](#footnote-53) At AEP-Ohio’s request, FERC did not address the retail component of the capacity price the Commission authorized in the *Capacity Case*.*[[54]](#footnote-54)* As approved by FERC, the appendix to the RAA does nothing more than authorize AEP-Ohio to recover the RPM-based Price from CRES providers.

 Finally, AEP-Ohio raises an inconsequential claim that the dismissal of the application due to lack of authority provided by the RAA is waived because it was not advanced in rehearing in prior cases.[[55]](#footnote-55) AEP-Ohio presents no legal support relevant to that claim and cannot. As noted above, a challenge to subject matter jurisdiction can be raised at any time and in any relevant proceeding. Additionally, AEP-Ohio’s assertion is once again factually wrong. IEU-Ohio has challenged the Commission’s reliance on the RAA as a basis to authorize the Capacity Shopping Tax in the *Capacity Case*.[[56]](#footnote-56) Thus, the Motion to Dismiss properly advances the claim that the RAA does not provide the Commission jurisdiction to approve the application.

## The Commission is without subject matter jurisdiction to authorize an increase in wholesale capacity revenue under R.C. Chapter 4909

 In an argument that is internally inconsistent, AEP-Ohio further claims that the Commission could regulate this so-called “noncompetitive” Capacity Service under provisions of R.C. Chapter 4909, but need not follow the substantive and procedural requirements of that Chapter “because the Commission’s investigation was not a traditional base rate case.”[[57]](#footnote-57) Apparently, AEP-Ohio is suggesting that the Commission can ignore statutory requirements as it invents and applies a cost-based ratemaking methodology to increase AEP-Ohio’s compensation for wholesale generation-related capacity service while also relying on that same statutory structure as a basis for subject matter jurisdiction. Additionally, R.C. 4909.18 does not provide the Commission subject matter jurisdiction to set a price for a wholesale generation-related service, as discussed previously. There is no legal authority for this nonsensical claim, and none is presented by AEP-Ohio.

 AEP-Ohio further argues that the procedural requirements for an increase in rates are inapplicable under R.C. 4909.19 since the Commission could treat its *Capacity Case* as a first filing under R. C. 4909.18.[[58]](#footnote-58) Once again, AEP-Ohio is advancing an argument that is complete nonsense. As it notes, AEP-Ohio did not file or initiate the *Capacity Case*; it was an investigation initiated by the Commission.[[59]](#footnote-59) In its initial order, the Commission established the RPM-based Price as the price for Capacity Service.[[60]](#footnote-60) In an order issued on July 2, 2012, the Commission substantially increased AEP-Ohio’s compensation for Capacity Service. Accordingly, even if the Commission construed the process by which it increased AEP-Ohio’s compensation for Capacity Service as a proceeding subject to R. C. 4909.18, the proceeding was one for an increase in an existing rate and thus would have triggered the procedural and substantive requirements of R.C. 4909.15 and R.C. 4909.19. Thus, AEP-Ohio cannot rely on R.C. 4909.18 as a basis for the Commission to assert subject matter jurisdiction to address its request for $445 million in additional above-market revenue for wholesale generation-related services.

## The Commission lacks subject matter jurisdiction to authorize transition revenue or its equivalent

 As demonstrated in the Motion to Dismiss, AEP-Ohio’s application should also be dismissed because it seeks unlawful transition revenue or its equivalent.[[61]](#footnote-61) Under R.C. 4928.38, the Commission has no authority to authorize such revenue. Accordingly, the Motion to Dismiss correctly urges the Commission to dismiss the application.

 In response, AEP-Ohio incorrectly asserts that the Commission has already addressed this issue in the ESP II Order.[[62]](#footnote-62) The ESP II Order specifically reserved the recovery of the Capacity Shopping Tax to a separate proceeding.[[63]](#footnote-63) As discussed in the Motion to Dismiss, the Commission cannot authorize the recovery of transition revenue or its equivalent in this proceeding.[[64]](#footnote-64)

Additionally, as noted above, the Commission’s improper assertion of jurisdiction in the prior case does not preclude the Commission from correcting that error in this case when the Commission lacks subject matter jurisdiction.

Further, as the record in the *Capacity Case* demonstrated, the revenue increase that AEP-Ohio is seeking to recover through this application is the aggregated portion of the price the Commission established that exceeds the market-based RPM price. This above-market revenue, whether related to retail or wholesale service, is an amount not recoverable in the market.[[65]](#footnote-65) AEP-Ohio entered into a settlement in which it agreed to forgo the collection of generation-related transition charges, and any claim to additional transition revenue is precluded by the time limits contained in R.C. 4928.40.[[66]](#footnote-66) Accordingly, the Motion to Dismiss properly urges the Commission to dismiss the application because the Commission does not have authority to authorize AEP-Ohio to bill and collect transition revenue.

## An order authorizing the recovery of additional Capacity Shopping Tax revenue is preempted by the Federal Power Act

 Finally, the Motion to Dismiss demonstrates that the Commission is preempted from authorizing an increase in AEP-Ohio’s compensation for wholesale capacity service.[[67]](#footnote-67) Under the FPA, FERC has exclusive jurisdiction to establish prices for wholesale electric services. State commission action attempting to increase an electric utility’s compensation for wholesale generation service is preempted and void.

 In response, AEP-Ohio argues that the case law does not support a finding that the Commission’s order increasing AEP-Ohio’s compensation for wholesale capacity service is preempted. According to AEP-Ohio, cases finding that the Commission action increasing compensation for wholesale capacity and energy services is preempted do not apply because AEP-Ohio is willing to voluntarily increase its compensation.[[68]](#footnote-68) Whether AEP-Ohio is willing to increase its compensation for wholesale Capacity Service does not create jurisdiction; AEP-Ohio cannot confer subject matter jurisdiction on its claim by waiving its prior position that the Commission lacked jurisdiction.[[69]](#footnote-69)

 The recent cases cited in the Motion to Dismiss, moreover, demonstrate that the state commissions are without authority to increase an electric utility’s compensation for a wholesale service.[[70]](#footnote-70) Further, neither the RAA nor FERC’s approval of the appendix to the RAA can expand the Commission’s jurisdiction. As any action by the Commission to increase AEP-Ohio’s compensation for wholesale capacity service would be preempted and void, the Commission lacks subject matter jurisdiction to authorize the relief AEP-Ohio is seeking through this application.

# Conclusion

 AEP-Ohio, through this application, seeks authorization to bill and collect an additional $445 million in unlawful charges. For the reasons outlined above, the Commission should dismiss this application because it lacks subject matter jurisdiction to approve it.

Respectfully submitted,

 */s/ Matthew R. Pritchard*

Samuel C. Randazzo (Counsel of Record) (Reg. No. 0016386)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Phone: (614) 469-8000 / Fax: (614) 469-4653

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

**Attorneys for Industrial Energy Users-Ohio**

**Certificate Of Service**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio’s Reply to the Memorandum in Opposition to the Motion to Dismiss of Ohio Power Company*was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 10th day of September 2014, *via* electronic transmission.

*/s/ Matthew R. Pritchard*

 Matthew R. Pritchard

Steven T. Nourse (Reg. No. 0046705)

Matthew J. Satterwhite (Reg. No. 0071972)

American Electric Power Service Corporation

1 Riverside Plaa, 29th Floor

Columbus, OH 43215

stnourse@aep.com

mjsatterwhite@aep.com

**Attorneys for Ohio Power Company**

David F. Boehm (Reg. No. 0021881)

Michael L. Kurtz (Reg. No. 0033350)

Jody Kyler Cohn (Reg. No. 0085402)

Boehm, Kurtz & Lowry

36 E. Seventh St., Suite 1510

Cincinnati, OH 45202

dboehm@BKLlawfirm.com

mkurtz@BKLlawfirm.com

jkyler@BKLlawfirm.com

**Attorneys for the Ohio Energy Group**

Richard L. Sites (Reg. No. 0019887)

General Counsel & Senior Director of Health Policy

Ohio Hospital Association

155 East Broad Street, 15th Floor

Columbus, OH 43215-3620

ricks@ohanet.org

Thomas J. O’Brien (Reg. No. 0066249)

Bricker & Eckler LLP

100 South Third Street

Columbus, OH 43215-4291

tobrien@bricker.com

**Attorneys for the Ohio Hospital Association**

Kimberly W. Bojko (Reg. No. 0069402)

Rebecca L. Hussey (Reg. No. 0079444)

Jonathan A. Allison (Reg. No. 0062720)

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, OH 43215

Bojko@carpenterlipps.com

Hussey@carpenterlipps.com

Allison@carpenterlipps.com

**Attorneys for the OMA Energy Group**

Mark S. Yurick (Reg. No. 0039176)

(Counsel of Record)

Zachary D. Kravitz (Reg. No. 0084238)

TAFT STETTINIUS & HOLLISTER LLP

65 East State Street, Suite 1000

Columbus, OH 43215

myurick@taftlaw.com

zkravitz@taftlaw.com

**Attorney for The Kroger Co.**

Maureen R. Grady (Reg. No. 0020847)

Terry L. Etter (Reg. No. 0067445)

Assistant Consumers’ Counsel

Office of the Ohio Consumers’ Counsel

10 West Broad Street, Suite 1800

Columbus, OH 43215-3485

Maureen.grady@occ.state.oh.us

etter@occ.state.oh.us

**Attorney for the Office of the Ohio Consumers’ Counsel**

William Wright (Reg. No. 0018010)

Chief, Public Utilities Section

Ohio Attorney General

180 East Broad Street, 6th Floor

Columbus, OH 43215-3793

william.wright@puc.state.oh.us

**Attorney for the Staff of the Public Utilities Commission of Ohio**

Sarah Parrot (Reg. No. 0082197)

Greta See

Attorney Examiners

Public Utilities Commission of Ohio

180 East Broad Street

Columbus, OH 43215

Greta.See@puc.state.oh.us

sarah.parrot@puc.state.oh.us

**Attorney Examiners**

1. Application at 1 n.1, citing *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,, Opinion and Order (July 2, 2012) (“Capacity Order” or “*Capacity Case*” as appropriate) and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al*., Opinion and Order (Aug. 8, 2012) (hereinafter “*ESP II Case*” or “ESP II Order” as appropriate). [↑](#footnote-ref-1)
2. Ohio Power Company's Memorandum in Opposition to the Motion to Dismiss of Industrial Energy Users-Ohio (Sept. 3, 2014) ("Memo Contra"). [↑](#footnote-ref-2)
3. *Id.* at 2 and 5. [↑](#footnote-ref-3)
4. *Id.* at 4-6. [↑](#footnote-ref-4)
5. *Id.* at 6-16. [↑](#footnote-ref-5)
6. See discussion below. [↑](#footnote-ref-6)
7. The legal support for this outline of IEU-Ohio’s Motion to Dismiss are fully detailed in the accompanying Memorandum in Support. [↑](#footnote-ref-7)
8. Memo Contra at 4-5. [↑](#footnote-ref-8)
9. *Id.* at 4-5. [↑](#footnote-ref-9)
10. *State v. Wilson*, 73 Ohio St.3d 40, 45 n.6 (1995). [↑](#footnote-ref-10)
11. *Id.*; *Grimes v. Grimes*, 173 Ohio App.3d 537 (4th Dist. Ct. App. 2007*); D’Agnese v. Hollern*, 2004 WL 744610 (8th Dist. Ct. App. Apr. 8, 2004). [↑](#footnote-ref-11)
12. R.C. 4928.01(A)(6) & (7). [↑](#footnote-ref-12)
13. R.C. 4905.03(C) (emphasis added). [↑](#footnote-ref-13)
14. Motion to Dismiss at 7–10. [↑](#footnote-ref-14)
15. Memo Contra at 7. [↑](#footnote-ref-15)
16. Memo Contra at 9-10. [↑](#footnote-ref-16)
17. Each of the relevant statutory provisions limits the Commission's authority to the pricing of a retail service. *See,* R.C. 4905.02, R.C. 4905.03, R.C. 4909.01(A) & (B), and R.C. 4928.01(A)(6) & (7). Motion to Dismiss at 7-10. [↑](#footnote-ref-17)
18. *See, e.g*., Memo Contra at 9. [↑](#footnote-ref-18)
19. *United Fuel Gas Co. v. Pub. Util. Comm.*, 46 F. Supp. 309 (S.D. 1941). [↑](#footnote-ref-19)
20. Memo Contra at 9-10. Notably, this was a claim that AEP-Ohio disputed when it was raised by CRES providers during the *Capacity Case*. *Capacity Case*, Ohio Power Company’s Initial Post-Hearing Brief at 33 (May 23, 2012). AEP-Ohio appears unable to “keep its story straight.” [↑](#footnote-ref-20)
21. R.C. 4928.05(A)(1). [↑](#footnote-ref-21)
22. R.C. 4928.03 & R.C. 4928.05(A)(1). [↑](#footnote-ref-22)
23. R.C. 4928.05(A)(1). In other proceedings in which AEP-Ohio has sought recovery of generation-related costs, the Commission has recognized that it does not have authority to establish a nonbypassable recovery mechanism for generation-related services outside of proceedings establishing an SSO. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16-19 (Jan. 11, 2012). [↑](#footnote-ref-23)
24. *Id.* [↑](#footnote-ref-24)
25. Motion to Dismiss at 17. [↑](#footnote-ref-25)
26. *See, e.g.*, *Consumers’ Counsel v. Pub. Util. Comm*., 110 Ohio St.3d 394, 2006-Ohio-4706 ¶¶ 29, 32; *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347-49 (1997) (“Pursuant to R.C. 4905.26 and 4909.15(D), the Commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable.”); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979). [↑](#footnote-ref-26)
27. *Lucas Cty.*, 80 Ohio St.3d at 347 (emphasis added). [↑](#footnote-ref-27)
28. Motion to Dismiss at 16-18. [↑](#footnote-ref-28)
29. ESP II Order at 26-38 (Aug. 8, 2012). [↑](#footnote-ref-29)
30. *Id*., *passim*. [↑](#footnote-ref-30)
31. Application at 3 and Ex. A. [↑](#footnote-ref-31)
32. Capacity Order at 12-13 (July 2, 2012). [↑](#footnote-ref-32)
33. *Id.* at 13. [↑](#footnote-ref-33)
34. Motion to Dismiss at 14-16 [↑](#footnote-ref-34)
35. *Id.* [↑](#footnote-ref-35)
36. ESP II Order at 31 (Aug. 8, 2012). [↑](#footnote-ref-36)
37. *Id.* at 33. [↑](#footnote-ref-37)
38. *Id.* at 36. [↑](#footnote-ref-38)
39. *In the Matter of the Application of 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. 13-2385-EL-SSO, *et al*., Application at 14 and AEP-Ohio Ex. 7 at 12 (Dec. 20, 2013). [↑](#footnote-ref-39)
40. The Commission may authorize only those provisions of an ESP that are authorized by R.C. 4918.143(B). *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). [↑](#footnote-ref-40)
41. Memo Contra at 10. [↑](#footnote-ref-41)
42. *Id.* at 11. [↑](#footnote-ref-42)
43. *Id.* [↑](#footnote-ref-43)
44. *Columbus S. Power Co. v. Pub. Util. Comm’n of Ohio*, 67 Ohio St.3d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153 (1981); *Dayton Communications Corp. v. Pub. Util. Comm,* 64 Ohio St.2d 302 (1980). [↑](#footnote-ref-44)
45. Motion to Dismiss at 16-18. [↑](#footnote-ref-45)
46. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540 (1993). [↑](#footnote-ref-46)
47. *Plodger v. Pub. Util. Comm.*, 109 Ohio St.3d 463 (2006) (Commission lacks jurisdiction over landlords that rebill utility services to tenants); *Rodeo Relay Corp. v. Pub. Util. Comm.,* 45 Ohio St.2d 121 (1976) (Commission lacks jurisdiction to regulate paging services that rely on landlines); *Ohio Mining Co. v. Pub. Util. Comm.,* 106 Ohio St. 138 (1922) (Commission may not regulate mining operations tied to electric generation operations of an affiliate). [↑](#footnote-ref-47)
48. *Id.* [↑](#footnote-ref-48)
49. *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.,* FERC Docket ER13-1164, Order Accepting Appendix to Reliability Assurance Agreement Subject to Compliance Filing at 1 (May 23, 2013),

available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13265974> (last accessed Aug. 19, 2014). [↑](#footnote-ref-49)
50. *Id.* at 6; RAA at 137, available at: <http://pjm.com/~/media/documents/agreements/raa.ashx> (last accessed Aug. 19, 2014). AEP-Ohio’s assertion that FERC has approved AEP-Ohio total compensation for Capacity Service at the level the Commission set borders on frivolous. [↑](#footnote-ref-50)
51. AEP-Ohio Memo Contra at 11 (AEP-Ohio argues in its Memo Contra that “FERC concluded that the capacity charge mechanism adopted by the Commission was ‘consistent with the RAA.’”). [↑](#footnote-ref-51)
52. *Id.* at 2 (Apr. 30, 2013) (emphasis in original). [↑](#footnote-ref-52)
53. *Id*., Order Accepting Appendix to Reliability Assurance Agreement Subject to a Compliance Filing at 6-7 (May 23, 2013). [↑](#footnote-ref-53)
54. *American Electric Power Service Corporation*, FERC Docket No. 13-1146-000, Response of American Electric Power Service Corporation at 4 (Apr. 30, 2013). As AEP-Ohio made clear (through a filing made by AEPSC on its behalf in the FERC docket before FERC issued its order):

Ohio Power’s right to recover *from retail customers* the difference between $188.88/MW-day and the wholesale charges assessed to CRES providers will be in accordance with the retail rate component adopted by the Ohio Commission, ***which is not before [FERC] in this proceeding.*** (emphasis in original).

*Id.* [↑](#footnote-ref-54)
55. Memo Contra at 11. [↑](#footnote-ref-55)
56. *Capacity Case*, Industrial Energy Users-Ohio’s Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 42-59 (Aug. 1, 2012) (challenging the Commission’s reliance and application of the RAA to establish a capacity charge). [↑](#footnote-ref-56)
57. Memo Contra at 10 & 13. [↑](#footnote-ref-57)
58. *Id.* at 14. [↑](#footnote-ref-58)
59. *Capacity Case*, Entry (Dec. 8, 2010). [↑](#footnote-ref-59)
60. *Id.* at 2. [↑](#footnote-ref-60)
61. Motion to Dismiss at 22-24. [↑](#footnote-ref-61)
62. Memo Contra at 14. [↑](#footnote-ref-62)
63. *ESP II Case*, Opinion and Order at 36 (Aug. 8, 2012). [↑](#footnote-ref-63)
64. Motion to Dismiss at 22-24. [↑](#footnote-ref-64)
65. R.C. 4928.38(C). [↑](#footnote-ref-65)
66. Motion to Dismiss at 22-24. [↑](#footnote-ref-66)
67. *Id.* at 24-28. [↑](#footnote-ref-67)
68. Memo Contra at 15. [↑](#footnote-ref-68)
69. *Capacity Case*, Ohio Power Company’s and Columbus Southern Power Company’s Application for Rehearing at 3, 18-21 (Jan. 7, 2011); *Section 205 Case*, Request for Rehearing of AEPSC at 13-14 (Feb. 22, 2011), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12569314> (last accessed Aug. 19, 2014). [↑](#footnote-ref-69)
70. *PPL Energy Plus, LLC v. Nazarian*, 2013 WL 5432346 (D. Md. Sept. 30, 2013), *aff’d*, *PPL Energy Plus, LLC v. Nazarian*, Case No. 13-2419 slip op., 2014 WL 2445800 (4th Cir. 2014); *PPL Energy Plus, LLC v. Hanna,* 2013 WL 5603896 (D. New Jersey October 11, 2013). An attempt by the generation owner to circumvent the courts’ decisions was rejected by FERC. *CPV Shore, LLC*, FERC Case No. ER14-2105-001, *et al*., Order Rejecting Filings (Aug. 5, 2014). [↑](#footnote-ref-70)