**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. )

**Application for Rehearing**

**of Industrial Energy Users-Ohio**

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)

**May 4, 2015 Attorneys for Industrial Energy Users-Ohio**

**Table Of Contents**

[I. BACKGROUND 9](#_Toc418508494)

[II. ARGUMENT 14](#_Toc418508495)

[A. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission lacks jurisdiction under R.C. Chapters 4905, 4909 and 4928 to establish AEP‑Ohio’s compensation for wholesale electric services 14](#_Toc418508496)

[B. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission cannot establish a rate or price for a competitive electric service outside of R.C. 4928.141 to 4928.144 18](#_Toc418508497)

[C. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission cannot authorize the RSR under R.C. 4928.144 because the Capacity Shopping Tax was established outside of R.C. 4928.141 to 4928.143 21](#_Toc418508498)

[D. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission authorized transition revenue or equivalent revenue in violation of R.C. 4928.38 and AEP-Ohio’s prior commitments 22](#_Toc418508499)

[E. The Capacity Shopping Tax Order is unlawful and unreasonable because, assuming the Commission is regulating a noncompetitive electric service, the Commission failed to follow the procedural and substantive requirements in R.C. Chapter 4909 25](#_Toc418508500)

[F. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission failed to address IEU‑Ohio’s arguments regarding the preemptive effect of the Federal Power Act 27](#_Toc418508501)

[G. The Capacity Shopping Tax Order is unlawful and unreasonable because the Federal Power Act preempts the Commission’s authorization of the Application 29](#_Toc418508502)

[H. The Capacity Shopping Tax Order is unlawful and unreasonable because the Reliability Assurance Agreement does not provide the Commission with jurisdiction to approve the Capacity Shopping Tax Application 34](#_Toc418508503)

[I. The Capacity Shopping Tax Order is unlawful and unreasonable as it incorrectly finds that challenges to its jurisdiction are collateral attacks 37](#_Toc418508504)

[III. REMEDY 39](#_Toc418508505)

[IV. CONCLUSION 40](#_Toc418508506)

**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. )

**Application for Rehearing**

**of Industrial Energy Users-Ohio**

On July 8, 2014, Ohio Power Company (“AEP-Ohio”) filed an application requesting authorization of a new rider, the nonbypassable Retail Stability Rider (“RSR”), to collect an outstanding deferral balance. The deferral balance was the result of an Opinion and Order (“Capacity Order”)[[1]](#footnote-1) issued in July 2012 and an Opinion and Order (“ESP II Order”)[[2]](#footnote-2) issued in August 2012.

In the Capacity Order, the Public Utilities Commission of Ohio (“Commission”) invented and applied a cost-based ratemaking methodology and found that AEP-Ohio’s unique cost of wholesale Capacity Service was $188.88 per megawatt-day (“MW-day”).[[3]](#footnote-3) The Commission also authorized AEP-Ohio to collect from competitive retail electric service (“CRES”) providers the market-based price for capacity, as determined by PJM Interconnection, L.L.C.’s (“PJM”) Reliability Pricing Model (“RPM” or “RPM-Based Pricing”).[[4]](#footnote-4) The Commission then authorized AEP-Ohio to modify its accounting procedures to defer the difference between the $188.88/MW-day price and the RPM‑Based Price, multiplied by the shopping load (“Capacity Shopping Tax”).[[5]](#footnote-5)

In the ESP II Order, the Commission authorized the RSR at rates of $3.50/ megawatt-hour (“MWh”) and $4.00/MWh for the term of AEP-Ohio’s electric security plan (“ESP”) and directed AEP-Ohio to apply $1/MWh against the accumulating Capacity Shopping Tax.[[6]](#footnote-6) Any remaining balance of the Capacity Shopping Tax was to be amortized over a three-year period after the conclusion of the ESP.[[7]](#footnote-7)

Industrial Energy Users-Ohio (“IEU-Ohio”) appealed both the Capacity Order and ESP II Order. The cases are pending at the Ohio Supreme Court.[[8]](#footnote-8)

In its Application in this matter, AEP-Ohio estimated that the Capacity Shopping Tax balance would be $445 million as of May 31, 2015.[[9]](#footnote-9) AEP-Ohio estimated that it would be able to amortize the Capacity Shopping Tax over a period of 32 months ending January 2019 if it is authorized to bill and collect $4/MWh on a nonbypassable basis.[[10]](#footnote-10)

On April 2, 2015, the Commission issued a Finding and Order in this matter (“Capacity Shopping Tax Order”) modifying and approving the Application. The Capacity Shopping Tax Order authorized AEP-Ohio to bill and collect a nonbypassable charge at a rate of $4/MWh until the Capacity Shopping Tax is amortized.[[11]](#footnote-11) The Commission held that AEP-Ohio should reduce the charge in the final month of collection to ensure that the collected revenue matches the remaining balance.[[12]](#footnote-12) The Commission further held that its Staff (“Staff”) or an auditor at its direction should conduct a financial audit of the Capacity Shopping Tax and that the Capacity Shopping Tax would be subject to adjustment and reconciliation as a result of the financial audit.[[13]](#footnote-13) Finally, the Commission noted that the Capacity Shopping Tax would be subject to adjustment as “is necessitated by the outcome of any pending proceeding.”[[14]](#footnote-14)

In accordance with R.C. 4903.10 and Rule 4901:1-35, Ohio Administrative Code (“O.A.C.”), IEU-Ohio hereby submits this Application for Rehearing of the Capacity Shopping Tax Order for the following reasons:

**1. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission lacks jurisdiction under R.C. Chapters 4905, 4909, and 4928 to establish AEP-Ohio’s compensation for wholesale electric services.**

**2. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission cannot establish a rate or price for a competitive electric service outside of R.C. 4928.141 to 4928.144.**

**3. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission cannot authorize the RSR under R.C. 4928.144 because the Capacity Shopping Tax was established outside of R.C. 4928.141 to 4928.143.**

**4. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission authorized transition revenue or equivalent revenue in violation of R.C. 4928.38 and AEP-Ohio’s prior commitments.**

**5. The Capacity Shopping Tax Order is unlawful and unreasonable because, assuming the Commission is regulating a noncompetitive electric service, the Commission failed to follow the procedural and substantive requirements in R.C. Chapter 4909.**

**6. The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission failed to address IEU-Ohio’s arguments regarding the preemptive effect of the Federal Power Act.**

**7. The Capacity Shopping Tax Order is unlawful and unreasonable because the Federal Power Act preempts the Commission’s authorization of the Application.**

**8. The Capacity Shopping Tax Order is unlawful and unreasonable because the Reliability Assurance Agreement does not provide the Commission with jurisdiction to approve the Capacity Shopping Tax Application.**

**9. The Capacity Shopping Tax Order is unlawful and unreasonable as it incorrectly finds that challenges to its jurisdiction are collateral attacks.**

As discussed in the Memorandum in Support, IEU-Ohio requests that the Commission grant IEU-Ohio’s Application for Rehearing and reverse the Capacity Shopping Tax Order authorizing AEP-Ohio to bill and collect the Capacity Shopping Tax. Further, the Commission should direct AEP-Ohio to return any amounts collected through the RSR authorized in the Commission’s Capacity Shopping Tax Order and prior amounts authorized by the Capacity Order and the ESP II Order for Capacity Service through either refunds or reductions of other outstanding deferral balances.

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

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)

**Attorneys for Industrial Energy Users-Ohio**

**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. )

**Memorandum in Support**

On April 2, 2015, the Commission issued the Capacity Shopping Tax Order and authorized AEP-Ohio to bill and collect a nonbypassable charge of $4/MWh for 32 months beginning June 2015. Labeled the Retail Stability Rider (“RSR”), the charge provides AEP-Ohio the ability to collect above-market compensation for a wholesale electric service, Capacity Service, which was unlawfully deferred pursuant to prior Commission orders. Like the Commission’s prior orders, the Capacity Shopping Tax Order is unlawful and unreasonable.

Capacity Service is undeniably a wholesale electric service.[[15]](#footnote-15) Because the Commission was without jurisdiction to authorize a wholesale price for Capacity Service, the Commission acted unlawfully and unreasonably when it increased AEP‑Ohio’s compensation for wholesale Capacity Service by authorizing AEP-Ohio to collect the Capacity Shopping Tax through the authorization of the nonbypassable RSR.

Even if Capacity Service were deemed a retail electric service, the Commission still lacks the authority to authorize the RSR to collect the Capacity Shopping Tax. Retail electric services are defined as either competitive or noncompetitive, with the entire generation service component declared as competitive. Capacity Service is undeniably part of the generation component of electric service. The Commission’s price-setting authority over competitive retail electric services is limited to R.C. 4928.141 to 4928.144. The Capacity Shopping Tax, however, was not authorized under these sections. The Commission is prohibited from utilizing R.C. 4928.144 to authorize a nonbypassable phase-in rider, as it has done here, if the initial rate or price was not established under R.C. 4928.141 to 4928.143. Further, the Commission is prohibited from authorizing above-market revenue, *i.e.* transition revenue or its equivalent, for competitive retail electric services.

Additionally, if the statute declaring the entire generation service component of electric service competitive was ignored and Capacity Service was treated as a noncompetitive retail electric service, the Commission’s actions would remain unlawful and unreasonable as the Commission failed to follow the procedural and substantive requirements in R.C. Chapter 4909 that govern the regulation and establishment of prices for noncompetitive retail electric services.

The Commission’s authorization of the recovery of the Capacity Shopping Tax is also unlawful because it is preempted by the Federal Power Act (“FPA”). The FPA places exclusive jurisdiction over wholesale electric prices with the Federal Energy Regulatory Commission (“FERC”) and preempts states from establishing wholesale electric prices. The Reliability Assurance Agreement (“RAA”) is a FERC-approved tariff that governs the rates for Capacity Service in the PJM region, which includes AEP‑Ohio’s service area. The RAA does not provide the Commission with any jurisdiction to establish the wholesale price for Capacity Service. The Commission erred when it failed to address the preemptive effect of the FPA and find that the authorization of the RSR was preempted.

Finally, the Commission erred when it concluded that arguments supporting a finding that the Commission is without jurisdiction to approve the Application are collateral attacks of prior Commission orders approving the Capacity Shopping Tax.

Because the Commission is without authority to approve the Application under state and federal law, the Commission acted unlawfully and unreasonably when it authorized AEP-Ohio to bill and collect the RSR for 32 months to collect the Capacity Shopping Tax. As discussed in more detail below, the Commission should grant IEU-Ohio’s Application for Rehearing and terminate the authorization of the RSR for the period of June 2015 to January 2019 and direct AEP‑Ohio to refund any amounts AEP‑Ohio has collected through the RSR related to the unlawful above-market compensation for Capacity Service. Alternatively, the Commission should direct AEP‑Ohio to reduce outstanding deferral balances for the amount of unlawfully collected above-market compensation for Capacity Service.

# BACKGROUND

AEP-Ohio filed an application seeking a “cost-based” or “formula-based” capacity charge with FERC in November 2010.[[16]](#footnote-16) Through this application at FERC, AEP-Ohio sought to displace the market-based pricing for Capacity Service established by RPM-Based Pricing.[[17]](#footnote-17) In its place, AEP‑Ohio requested authorization to bill CRES providers serving shopping customers in the AEP-Ohio service area a capacity charge based on a cost-based formula rate that produced an initial price of $355.72/MW-day.[[18]](#footnote-18) This formula-based price would have been much greater than the prevailing market price established by RPM.

In response to AEP-Ohio’s attempt to displace the market-based compensation at the RPM-Based Price at FERC, the Commission opened the *Capacity Case* and explicitly adopted the market-based RPM-Based Price as the state compensation mechanism.[[19]](#footnote-19) After the Commission adopted the RPM-Based Price, AEP-Ohio argued before the Commission and FERC that the Commission had no jurisdiction under state or federal law to regulate Capacity Service.[[20]](#footnote-20)

Following the hearing in the *Capacity Case* and despite unanimous support for RPM-Based Pricing by all parties but AEP-Ohio, the Commission issued the Capacity Order and found that it had jurisdiction to regulate Capacity Service pursuant to its general supervisory authority in R.C. 4905.04, 4905.05 and 4905.06.[[21]](#footnote-21) On rehearing, the Commission held that R.C. 4905.26 also provided the Commission jurisdiction.[[22]](#footnote-22) The Commission also claimed that its exercise of jurisdiction under these sections was consistent with the cost-based ratemaking formula found in R.C. Chapter 4909 and consistent with PJM’s RAA.[[23]](#footnote-23) After finding it had jurisdiction to regulate Capacity Service, the Commission invented and applied a cost-based ratemaking methodology to set AEP-Ohio’s capacity-related compensation at a level significantly greater than the RPM-Based Prices for the delivery years of 2012/2013 to 2014/2015.[[24]](#footnote-24)

Using an invented cost-based ratemaking methodology, the Commission found AEP-Ohio’s “cost” of capacity was $188.88/MW-day.[[25]](#footnote-25) Although the record demonstrated that the assumptions embedded in AEP-Ohio’s $355.72/MW-day formula rate were complete fiction,[[26]](#footnote-26) the Commission nonetheless relied upon AEP-Ohio’s claimed cost of capacity as a starting point for its invented ratemaking methodology.[[27]](#footnote-27) The Commission then adopted several of the Staff’s recommended adjustments to AEP-Ohio’s $355.72/MW-day rate, which reduced AEP‑Ohio’s price of capacity to $188.88/MW-day.[[28]](#footnote-28)

The Commission, however, also held that it would not permit AEP-Ohio to bill CRES providers for the full amount of the $188.88/MW-day price. Instead, it ordered AEP-Ohio to bill CRES providers the RPM-Based Price and stated it would authorize accounting changes under R.C. 4905.13 to allow AEP-Ohio to defer the difference between what it collected through the RPM-Based Pricing charges applicable to CRES providers and $188.88/MW-day, the Capacity Shopping Tax.[[29]](#footnote-29) The Commission then held it would establish a mechanism for the collection of the Capacity Shopping Tax in AEP-Ohio’s pending *ESP II Case*.[[30]](#footnote-30)

In the *ESP II Case,* the Commission authorized the nonbypassable RSR set at a rate of $3.50/MWh through May 2014, and $4/MWh for the period of June 2014 through May 2015.[[31]](#footnote-31) The Commission directed AEP-Ohio to credit $1/MWh of the revenue collected through the RSR rates against the Capacity Shopping Tax.[[32]](#footnote-32) The Commission then stated in the ESP II Order that “[a]ny remaining balance of [the Capacity Shopping Tax] that remains at the conclusion of this modified ESP shall be amortized over a three year period unless otherwise ordered by the Commission.”[[33]](#footnote-33)

AEP-Ohio filed the Application commencing this case on July 8, 2014. In the Application, AEP‑Ohio sought authorization to begin collection of the balance of the Capacity Shopping Tax that remained on June 1, 2015 through a new nonbypassable charge which it labeled the Retail Stability Rider.[[34]](#footnote-34) AEP-Ohio estimated that the remaining balance, after accounting for the $1/MWh the Commission ordered it to apply from the revenue collected under the RSR between August 2012 and May 2015, would be $445 million at the end of May 2015.[[35]](#footnote-35) AEP-Ohio anticipated that it would need to charge all customers $4/MWh for 32 months to fully amortize the $445 million plus interest accumulating at a rate of 5.34%.[[36]](#footnote-36)

On August 19, 2014, IEU-Ohio moved to dismiss the Application on grounds that the Commission lacked jurisdiction to approve the Application. The Commission took no action on the motion until it issued its order authorizing continued collection of the Capacity Shopping Tax. Instead of dismissing the Application, the Commission requested comments from interested parties.[[37]](#footnote-37) On December 1, 2014, and December 16, 2014, IEU-Ohio and others filed comments and reply comments demonstrating that the Commission lacked jurisdiction to approve the Application. Some parties also requested that the Commission defer ruling on the Application or authorize the RSR subject to refund, in recognition of the appeals of the Capacity Order and ESP II Order and a pending audit regarding a potential double-recovery of capacity costs by AEP-Ohio.[[38]](#footnote-38)

On April 2, 2015, the Commission modified and approved the Application. Initially, the Commission rejected parties’ challenges to the Commission’s jurisdiction under state and federal law to authorize the Application. The Commission found that it had thoroughly addressed and rejected the arguments in the *Capacity Case* and *ESP II Case* and that raising the arguments in this case constituted a collateral attack on the Capacity Order and ESP II Order.[[39]](#footnote-39) Rejecting the parties’ jurisdictional arguments, the Commission authorized AEP-Ohio to amortize the Capacity Shopping Tax through the RSR, at a rate of $4/MWh.[[40]](#footnote-40) The Commission also held that AEP-Ohio should reduce the charge in the final month of collection to ensure that the collected revenue matches the final balance.[[41]](#footnote-41)

The Commission further held that the Capacity Shopping Tax was subject to adjustment.[[42]](#footnote-42) The Commission ordered that its Staff or an outside auditor under Staff direction would conduct a financial audit of the Capacity Shopping Tax and that the Capacity Shopping Tax would be subject to adjustment and reconciliation as a result of the financial audit.[[43]](#footnote-43) The Commission further held that the Capacity Shopping Tax would be subject to adjustment as “is necessitated by the outcome of any pending proceeding.”[[44]](#footnote-44)

The Commission declined to rule on the federal preemption issued raised by IEU-Ohio and others, finding that constitutional issues “are best reserved for judicial determination.”[[45]](#footnote-45)

# ARGUMENT

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission lacks jurisdiction under R.C. Chapters 4905, 4909 and 4928 to establish AEP‑Ohio’s compensation for wholesale electric services

The Commission relied upon its findings in the Capacity Order and the ESP II Order to find that it had jurisdiction to issue the order authorizing the RSR in this case.[[46]](#footnote-46) In those prior orders, the Commission asserted that it had jurisdiction to increase AEP‑Ohio’s compensation for Capacity Service by inventing and applying a cost-based ratemaking methodology based on sections of R.C. Chapters 4905, 4909 and 4928. The Commission’s jurisdiction over electric services under those Chapters, however, extends to only overseeing public utilities that are “supplying electricity to consumers,” *i.e.* providing a retail electric service. Because the Commission has no jurisdiction to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio’s compensation for a wholesale electric service, such as Capacity Service, the Commission lacked jurisdiction to issue the Capacity Shopping Tax Order authorizing AEP‑Ohio to collect $445 million in excess of the federally-authorized rate for wholesale Capacity Service.

R.C. Chapters 4905, 4909 and 4928 apply to public utilities as that term is defined in R.C. 4905.02 and 4905.03. R.C. 4905.02 provides “[a]s used in this chapter, ‘public utility’ includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code.” R.C. 4905.03 then provides a list of the types of public utilities, including an electric light company, subject to the Commission’s jurisdiction under R.C. Chapter 4905:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

...

(C) An electric light company, *when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state*, but excluding a regional transmission organization approved by the federal energy regulatory commission. (Emphasis added.)

This definition specifically limits the Commission’s jurisdiction to electric light companies providing a retail service, *i.e.* electricity is being supplied “to consumers.” R.C. 4905.03(C) also exempts regional transmission organizations (“RTOs”), such as PJM, from the definition of an electric light company. Additionally, R.C. 4928.02(A)(6) & (7) extend the definition (and jurisdictional limitations) of electric light companies to electric distribution utilities (“EDUs”) and the entirety of R.C. Chapter 4928. By definition, therefore, R.C. Chapters 4905, 4909 and 4928 do not apply to wholesale electric services.

There is no dispute that the revenue the Commission authorized AEP-Ohio to collect through the Capacity Shopping Tax Order is related to a wholesale electric service. In the Capacity Order, the Commission found that Capacity Service is not a retail service:

In 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 matter between AEP-Ohio and each CRES provider operating in the Company’s service territory.[[47]](#footnote-47)

In the October 17, 2012 Entry on Rehearing in the *Capacity Case*, the Commission again asserted that its jurisdiction over Capacity Service was not governed by R.C. Chapter 4928 because 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 wholesale transaction between the Company and CRES providers.”[[48]](#footnote-48)

Because Capacity Service is a wholesale electric service, it is wholly outside the jurisdiction of the Commission to regulate its price, terms, and conditions. The Commission is a creature of statute.[[49]](#footnote-49) It may exercise jurisdiction over those services which the General Assembly has designated by statute as being subject to the Commission’s regulation. Wholesale electric services are outside that authority. Accordingly, the Commission lacked jurisdiction under Ohio law to invent and apply a cost-based ratemaking methodology to uniquely increase AEP-Ohio’s compensation for Capacity Service.

At one point, AEP-Ohio and its affiliated service company agreed. In its January 7, 2011 Application for Rehearing in the *Capacity Case*, AEP-Ohio asserted that the “Commission’s Entry establishing an interim wholesale capacity rate [was] unreasonable and unlawful because the Commission is a creature of statute and lacks jurisdiction under both Federal and Ohio law to issue an order affecting wholesale rates regulated by the Federal Energy Regulatory Commission.”[[50]](#footnote-50) Similarly, AEPSC argued to FERC that Capacity Service “is a wholesale transaction that falls within the exclusive wholesale ratemaking jurisdiction of [FERC].”[[51]](#footnote-51)

Through the Capacity Shopping Tax Order, the Commission has authorized AEP-Ohio to collect the Capacity Shopping Tax (*i.e.* above-market compensation for a wholesale electric service) based upon an erroneous assertion that it had jurisdiction to invent and apply a cost-based ratemaking methodology to authorize the above-market wholesale compensation in the first place. Because R.C. Chapters 4905, 4909 and 4928 apply to only retail electric services, the Commission lacks jurisdiction to authorize AEP‑Ohio to bill and collect the Capacity Shopping Tax in the prior cases and this case. Because the Commission erred by authorizing the billing and collection of the RSR to collect the Capacity Shopping Tax, the Commission should grant rehearing and reverse the order.

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission cannot establish a rate or price for a competitive electric service outside of R.C. 4928.141 to 4928.144

The Commission’s authority over electric services, as discussed, above, is limited to retail electric service. All retail electric services are defined as either competitive or noncompetitive, with the General Assembly declaring the entire generation service component of electric service as competitive. The Commission’s authority to establish prices for competitive retail electric services is limited to R.C. 4928.141 to 4928.144. The Commission, however, has authorized recovery of the Capacity Shopping Tax in this case under the same authority it claimed permitted it to invent and apply a cost-based ratemaking methodology to increase AEP-Ohio’s compensation for Capacity Service.[[52]](#footnote-52) Because the Commission lacks authority under state law to increase AEP‑Ohio’s compensation for Capacity Service, the Commission’s order in this case suffers from the same jurisdictional defects. Accordingly, the Commission acted unlawfully and unreasonably when it authorized the RSR in the Capacity Shopping Tax Order.

As demonstrated above, the Commission’s jurisdiction is limited by R.C. Title 49 to the regulation of retail electric services. R.C. 4928.01(A)(27) contains the definition of “retail electric service,” which is defined as:

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.

The General Assembly has defined the entire retail electric generation service component as competitive (from the point of generation to the point of consumption):

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 that the consumers may obtain subject to this chapter from any supplier or suppliers.[[53]](#footnote-53)

R.C. 4928.05(A)(1) further provides that the Commission’s jurisdiction over the price of competitive retail electric services is limited to R.C. Chapter 4928, specifically R.C. 4928.141 to 4928.144.[[54]](#footnote-54) R.C. 4928.05(A)(2) provides that noncompetitive services remain subject to Commission jurisdiction under Chapters 4901 to 4909, 4933, 4935 and 4963.

Capacity Service is a generation service; and the so-called cost of this service, as defined by the method invented and applied by the Commission, is tied directly, albeit illegally, to AEP-Ohio’s formerly owned generating plants.[[55]](#footnote-55) The Commission has also agreed that Capacity Service is part of the generation service function: “The Commission does not dispute that capacity is a component of generation necessary to provide competitive retail electric service to customers.”[[56]](#footnote-56) Thus, if Capacity Service is viewed as a retail electric service, it is beyond dispute that this service is a component of generation service and is therefore a competitive retail electric service as a matter of law.[[57]](#footnote-57)

The Commission agrees that it cannot regulate any competitive retail electric service (including retail electric generation service) except as provided in R.C. Chapter 4928. Previously, the Commission held that:

Section 4928.05(A)(1), Revised Code, generally prohibits Commission regulation of retail electric generation service. However, that section expressly provides that it does not limit the Commission’s authority under Sections 4928.141 to 4928.144, Revised Code.[[58]](#footnote-58)

The Commission also stated to the Court that it cannot regulate “a utility’s competitive activities” under R.C. 4905.04, 4905.05 and 4905.06.[[59]](#footnote-59)

In the *Capacity Case*, the Commission authorized the Capacity Shopping Tax under R.C. 4905.04, 4905.05, 4905.06, 4905.13 and 4905.26. Capacity Service is a generation service. By the Commission’s own reasoning, because the Commission’s ability to establish prices for competitive electric services is limited to R.C. 4928.141 to 4928.144, the Commission cannot establish a price for Capacity Service under its general authority provided by R.C. 4905.04, 4905.05, 4905.06, 4905.13 and 4905.26. Thus, its decision in this case to allow the collection of the Capacity Shopping Tax, a charge that the Commission was never authorized to order, was unlawful. Accordingly, the Commission should grant rehearing and reverse the Capacity Shopping Tax Order.

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission cannot authorize the RSR under R.C. 4928.144 because the Capacity Shopping Tax was established outside of R.C. 4928.141 to 4928.143

In the Capacity Shopping Tax Order, the Commission also cites its decision in the *ESP II Case* authorizing the deferral and collection of the Capacity Shopping Tax under R.C. 4928.144 as authority for the RSR.[[60]](#footnote-60) Once again, the Commission has erred because that section does not provide authority to bill and collect a charge authorized under any section other than R.C. 4928.141 to 4928.143.

By its terms, R.C. 4928.144 only applies to a “phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code.” As discussed above, the Commission stated that it exercised authority under R.C. 4905.04, 4905.05, 4905.06, 4905.13 and 4905.26 to authorize the Capacity Shopping Tax. By its express terms, therefore, R.C. 4928.144 cannot serve as a lawful basis for the Commission to authorize a nonbypassable rider to bill and collect the Capacity Shopping Tax. Therefore, the Commission’s reliance on R.C. 4928.144 to authorize the RSR to allow AEP-Ohio to collect the Capacity Shopping Tax is unlawful.

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission authorized transition revenue or equivalent revenue in violation of R.C. 4928.38 and AEP-Ohio’s prior commitments

As the record in the *Capacity Case* and *ESP II Case* demonstrated, the cost-based ratemaking methodology invented and applied by the Commission in the *Capacity Case* substantially and uniquely increased AEP-Ohio’s compensation for Capacity Service and produces, in substance, an untimely and prohibited opportunity for AEP-Ohio to collect, on a nonbypassable basis, generation plant-related transition revenue.[[61]](#footnote-61) The Capacity Shopping Tax is revenue that is unrecoverable in a competitive market; that is, it represents revenue that exceeds what is available for Capacity Service through the approved market-based rates established by the RPM process. Accordingly, the Capacity Shopping Tax Order is unlawful and unreasonable because it allows AEP-Ohio to collect the Capacity Shopping Tax which amounts to transition revenue or its equivalent in violation of R.C. 4928.38 and AEP-Ohio’s binding commitment to forgo generation-related transition revenue.

A transition revenue claim was eligible for collection through transition charges approved as part of an electric transition plan (“ETP”) if the utility’s claimed stranded costs were: (1)  prudently incurred; (2) legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (3) unrecoverable in a competitive market; and (4) the utility otherwise would have been entitled an opportunity to recover the costs.[[62]](#footnote-62) As the record in the *Capacity Case* demonstrates, AEP-Ohio’s above-market compensation for Capacity Service, *i.e.* the Capacity Shopping Tax, is transition revenue or its equivalent.[[63]](#footnote-63)

R.C. 4928.38 precludes the Commission from authorizing AEP-Ohio’s recovery of the above-market Capacity Shopping Tax from retail customers of AEP-Ohio. That section provides that “[t]he commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40.” These sections authorized, under certain conditions, transition revenue to be collected as part of an ETP, but expressly provided that transition revenue could not be collected beyond December 31, 2010. R.C. 4928.141 further requires the Commission to remove any transition charges from future rate plans. Because the record in the *Capacity Case* and the *ESP II Case* established that the Capacity Shopping Tax was transition revenue or its equivalent, the Commission lacked jurisdiction to authorize the deferral or collection of the Capacity Shopping Tax.

The deferred balance of the Capacity Shopping Tax is revenue related to generation-related costs that AEP-Ohio cannot recover in the competitive market; it is an amount that exceeds what AEP-Ohio has collected from its provision of Capacity Service to CRES providers at the market-based price established by PJM. Only by the Commission’s order will AEP-Ohio recover the deferred balance. R.C. 4928.38, however, prohibits the Commission from authorizing the recovery of the remaining Capacity Shopping Tax.

Authorization of the RSR to collect the balance of the Capacity Shopping Tax is also prohibited by the binding settlement agreement approved by the Commission in the ETP cases of Ohio Power Company and Columbus Southern Power Company in 2000. In that settlement agreement, AEP-Ohio agreed that it would forego recovery of any generation-related transition revenue and that it would not impose any lost generation-related revenue charges on shopping customers.[[64]](#footnote-64) The 2000 settlement agreement was subsequently incorporated in the rate stabilization plan approved by the Commission.[[65]](#footnote-65) Based on that twice-approved settlement, the Commission is without jurisdiction to abridge the rights of consumers to substantially and uniquely authorize AEP-Ohio to collect above-market compensation for Capacity Service through nonbypassable charges.

The Capacity Shopping Tax Order is unlawful and unreasonable because it allows AEP-Ohio to collect transition revenue or its equivalent in violation of R.C. 4928.38 and AEP-Ohio’s prior commitments. Accordingly, the Commission should grant rehearing and reverse the Capacity Shopping Tax Order.

## The Capacity Shopping Tax Order is unlawful and unreasonable because, assuming the Commission is regulating a noncompetitive electric service, the Commission failed to follow the procedural and substantive requirements in R.C. Chapter 4909

In the *Capacity Case*, the Commission invented and applied a cost-based ratemaking methodology as if Capacity Service was a noncompetitive electric generation service. If Capacity Service were a noncompetitive retail electric service, the Commission’s only authority to establish a rate or price for such a service is found in R.C. Chapter 4909.[[66]](#footnote-66) In the *Capacity Case*, however, the Commission did not comply with the detailed requirements of that Chapter for an increase in rates.

In this case, the Commission has again raised rates of customers and has failed to comply with the requirements of R.C. Chapter 4909. If, as the Commission has claimed, Capacity Service is a noncompetitive electric service, then under the requirements of R.C. 4928.05(A)(2), any increase in compensation is governed by the requirements of R.C. Chapter 4909.[[67]](#footnote-67) Having failed to comply with the statutory requirements applicable to an application to increase rates for noncompetitive services, the Capacity Shopping Tax Order is unlawful.

To secure an increase in rates under R.C. Chapter 4909, AEP-Ohio must file a notice of its intention to seek an increase in rates.[[68]](#footnote-68) The notice of intent must be sent to the mayor and legislative authority of each municipality served by AEP‑Ohio.[[69]](#footnote-69) At least 30 days later, AEP-Ohio may then file its application to increase rates.[[70]](#footnote-70) The president or vice-president and the secretary or treasurer of AEP-Ohio must also verify the accuracy of the application.[[71]](#footnote-71) The application itself must also contain extensive details.[[72]](#footnote-72)

An application to increase rates must include a description of its property used and useful in rendering service to the public as laid out in R.C. 4909.05. An application to increase rates must also include a list of current rate schedules and the proposed rate schedules.[[73]](#footnote-73) Further, the application must contain a “complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;” “a statement of the income and expense anticipated under the application filed;” and “a statement of financial condition summarizing assets, liabilities, and net worth.”[[74]](#footnote-74)

Once the EDU has filed a proper application with all the appropriate information with the Commission, the Staff is required by statute to investigate the facts contained in the rate increase application and issue a report. The Staff Report of Investigation then must be properly served upon various parties.[[75]](#footnote-75) Interested parties that have intervened in the Commission proceeding are then afforded a statutory right to object to the Staff Report of Investigation.[[76]](#footnote-76)

AEP-Ohio did not attempt to satisfy, in this or any prior proceeding, any of the ratemaking requirements contained in R.C. Chapter 4909, which serve as a jurisdictional prerequisite to secure an increase in rates. The Commission, and its Staff, likewise failed to comply with the requirements of R.C. Chapter 4909. The Staff did not issue a Staff Report of Investigation, and the Commission made no findings regarding the test year, the value of AEP-Ohio’s used and useful property, the inadequacy of AEP-Ohio’s current compensation, or the other elements of the cost-based ratemaking methodology that is set forth in R.C. Chapter 4909.

Therefore, if R.C. Chapter 4909 could somehow be made relevant to AEP-Ohio’s application to bill and collect above-market compensation for Capacity Service, the Commission and AEP-Ohio have complied with none of the mandatory steps to seek, obtain, and authorize a rate increase. Because the Commission raised rates unlawfully, the Commission should grant rehearing and reverse its order authorizing the RSR.

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Commission failed to address IEU‑Ohio’s arguments regarding the preemptive effect of the Federal Power Act

In the Capacity Shopping Tax Order, the Commission summarized IEU-Ohio’s preemption argument, but declined to rule on the issue.[[77]](#footnote-77) According to the Commission, it “decline[d] to address such constitutional issues, which are best reserved for judicial determination.”[[78]](#footnote-78) The Commission erred when it failed to address the preemption issue and find, as discussed below, that it is preempted from authorizing billing and collection of the Capacity Shopping Tax in this case.

Previously, the Commission has not been reluctant to address whether it is preempted from acting on a request for an order.[[79]](#footnote-79) It has repeatedly addressed whether it is preempted or not preempted by federal law based on the relevant statutes. In a rulemaking proceeding, for example, the Commission noted that federal law preempted all state laws relating to the price, route, or service of any motor carrier when engaged in intrastate transportation and rescinded rules in conflict with federal law.[[80]](#footnote-80) Similarly, the Commission concluded it was preempted from reviewing transmission costs incurred by AEP-Ohio that were the subject of a pending FERC application.[[81]](#footnote-81) In the *Capacity Case*, the Commission likewise did not defer ruling on the issue and instead determined, incorrectly, that it had the authority to increase AEP-Ohio’s compensation for wholesale Capacity Service.[[82]](#footnote-82)

In this case, the Commission has not offered any reason for deferring to a court of appropriate jurisdiction, and there is no reason for the Commission to refrain in this instance from finding that the FPA preempts the Commission from authorizing the RSR. Accordingly, it was unreasonable and unlawful for the Commission to refuse to address the preemptive effect of the FPA on its authority to increase AEP-Ohio’s compensation for Capacity Service by approving the Application. As discussed below, the Commission should further find that it is preempted and reverse its order authorizing the RSR.

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Federal Power Act preempts the Commission’s authorization of the Application

The FPA provides FERC with exclusive jurisdiction to regulate wholesale sales of electricity. Because the Capacity Shopping Tax Order provides AEP-Ohio with compensation in excess of the federally-authorized price, the order is preempted and void.

Under the Supremacy Clause of the United States Constitution, federal law is “the supreme Law of the Land.”[[83]](#footnote-83) As the supreme law of the land, federal law can nullify or preempt state or local actions.[[84]](#footnote-84) Preemption may be express or implied. A federal law or regulation may impliedly preempt state law or regulation “where Congress has legislated comprehensively, thus occupying an entire field of regulation.”[[85]](#footnote-85) No conflict between state and federal law is required if a state law or regulatory action is field preempted.[[86]](#footnote-86)

The preemptive effect of the FPA is implied.[[87]](#footnote-87) Under Section 201 of the FPA, Congress placed with FERC jurisdiction over “the sale of electric energy at wholesale in interstate commerce.”[[88]](#footnote-88) As a result of Congress’s enactment of the FPA, “Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.”[[89]](#footnote-89) To ensure the lawfulness and reasonableness of wholesale electric energy rates, “the FPA implements a regulatory framework that vests FERC with authority to determine the lawfulness of wholesale energy rates or prices.”[[90]](#footnote-90) These wholesale rates include the prices for capacity and energy.[[91]](#footnote-91) Accordingly, “it appears well accepted that Congress intended to use the FPA to give FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus intended this field to be occupied exclusively by federal regulation. Thus, state action that regulates within this field is void under the doctrine of field preemption.”[[92]](#footnote-92)

Two recent federal court cases, which were upheld on appeal, demonstrate that attempts by states to price wholesale generation-related capacity and energy services are preempted because they invade a field of regulation within the exclusive authority of FERC. In the first decision, a federal district court in Maryland reviewed an order of the Maryland Public Service Commission (“Maryland Commission”) that increased compensation for the provision of wholesale electric services of an entity that was seeking to construct a generation plant (“Generation Owner”). In the challenged order, the Maryland Commission had directed the incumbent local electric utilities to enter into contracts with the Generation Owner. The contracts would have required the local electric utilities to pay the Generation Owner the difference between what the Generation Owner received for market-based sales of capacity and energy to PJM and a contract price established by the Maryland Commission based on the cost of construction and operation of the plant for 20 years. Any loss or gain that the local electric utilities incurred under the contracts ordered by the Maryland Commission was to be passed on to Maryland ratepayers by the local electric utilities.[[93]](#footnote-93)

The federal court concluded that the Maryland Commission’s order fixed the monetary value of wholesale generation-related capacity and energy services provided by the Generation Owner.[[94]](#footnote-94) Based on its determination that FERC has exclusive authority in that field of sales for resale of electricity and has fixed the price for wholesale energy and capacity sales in the PJM markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM, the district court declared the action of the Maryland Commission to be preempted.[[95]](#footnote-95) In the opinion affirming the decision of the district court, the Fourth Circuit Court of Appeals agreed that the Maryland Commission’s order was preempted because the field of wholesale energy prices was exclusively within the jurisdiction of FERC.[[96]](#footnote-96)

A federal district court in New Jersey reached the same result, concluding that state legislation that attempted to encourage the construction of new generation plants by guaranteeing a price of capacity to the builder was preempted. In the New Jersey case, the state legislature passed legislation “to provide a transaction structure that would result in new power plants being constructed in the PJM territory that benefit New Jersey.”[[97]](#footnote-97) The law authorized the New Jersey Board of Public Utilities to issue a standard offer capacity agreement and directed the state’s four electric distribution companies to enter into contracts with the generators to pay any difference between the RPM-Based Price and the development costs of the generators that the Board approved.[[98]](#footnote-98) Like the Maryland federal court, the New Jersey federal court found that the New Jersey legislation was preempted because the FPA occupied the field of wholesale electricity sales, including the price at which electricity is sold at wholesale.[[99]](#footnote-99) Based on its finding that the state law was preempted, the federal court declared the statute under which the Board had authorized above-market payments to the generator “null and void.”[[100]](#footnote-100)

The Third Circuit Court of Appeals affirmed the New Jersey district court’s decision holding that “the Federal Power Act, as administered by FERC, preempts and, therefore, invalidates, state intrusions into the field” of wholesale electricity pricing.[[101]](#footnote-101) The Third Circuit noted that FERC had set the wholesale capacity price in PJM through the RPM auction process.[[102]](#footnote-102) At the same time, however, the New Jersey law provided certain generators “an additional amount” of compensation in excess of the wholesale market price.[[103]](#footnote-103) “Because FERC has exercised control over the field of interstate capacity prices, and because FERC’s control is exclusive, New Jersey’s efforts to regulate the same subject matter cannot stand.”[[104]](#footnote-104)

Based on the well-understood principles of federal preemption, the Commission has no authority to increase AEP-Ohio’s compensation for Capacity Service. Because Capacity Service is a wholesale service, FERC’s jurisdiction to set the price of Capacity Service is exclusive. FERC has approved the RPM-Based Price for Capacity Service provided by AEP-Ohio in the appendix to the RAA agreed to by AEP-Ohio.[[105]](#footnote-105) Accordingly, the Capacity Shopping Tax Order is preempted and void because the order authorizes AEP-Ohio to collect compensation in excess of the federally-authorized rates.

## The Capacity Shopping Tax Order is unlawful and unreasonable because the Reliability Assurance Agreement does not provide the Commission with jurisdiction to approve the Capacity Shopping Tax Application

In the Capacity Shopping Tax Order, the Commission once again invokes its decision in the *Capacity Case* to justify authorization of the new RSR. In the Capacity Order, the Commission held it was acting consistent with the RAA.[[106]](#footnote-106) The RAA, however, does not provide the Commission with jurisdiction to authorize the Application. The Commission’s subject matter jurisdiction is set by the General Assembly.[[107]](#footnote-107) Because the RAA does not and cannot provide the Commission with any jurisdiction to authorize the Capacity Shopping Tax, and no other jurisdiction exists, the Commission’s authorization of the RSR to collect the Capacity Shopping Tax was unlawful and unreasonable.

The relevant language in the RAA provides “[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.”[[108]](#footnote-108) An alternative retail load serving entity (“LSE”) is referred to as a CRES provider under Ohio law. This plain language does not grant any state jurisdiction to regulate Capacity Service.[[109]](#footnote-109)

Additionally, the increased compensation authorized by the Commission in the Capacity Shopping Tax Order is not authorized by the RAA. The default compensation under the RAA for Capacity Service is RPM-Based Pricing.[[110]](#footnote-110) 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.[[111]](#footnote-111) The FERC-approved appendix to the RAA confirms that AEP-Ohio’s compensation for Capacity Service is limited to the RPM-Based Price.[[112]](#footnote-112)

Furthermore, in approving an appendix to the RAA, FERC did not approve this Commission’s assertion of jurisdiction. In pleadings filed on behalf of AEP-Ohio, 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.”[[113]](#footnote-113) Following protests, AEPSC 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.[[114]](#footnote-114) At AEPSC’s request, FERC did not address the above-market retail component of the capacity price the Commission authorized in the *Capacity Case*, *i.e.* the Capacity Shopping Tax.[[115]](#footnote-115) 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.[[116]](#footnote-116)

Accordingly, the RAA standing alone does not (and as discussed above, cannot) expand the jurisdiction of the Commission to provide the Commission with authority to regulate prices for wholesale electric services. Because the RAA does not provide the Commission with jurisdiction over Capacity Service and no other jurisdiction exists, the Commission acted unlawfully and unreasonably when it authorized the RSR to provide AEP-Ohio with compensation for Capacity Service in excess of the FERC-approved compensation.

## The Capacity Shopping Tax Order is unlawful and unreasonable as it incorrectly finds that challenges to its jurisdiction are collateral attacks

The arguments IEU-Ohio raised in its Motion to Dismiss and Comments address the Commission’s jurisdiction to authorize AEP-Ohio to collect compensation for wholesale Capacity Service in excess of the FERC-approved compensation. In the Capacity Shopping Tax Order, the Commission stated that it had already addressed and rejected in the *Capacity Case* and *ESP II Case* the jurisdictional arguments that demonstrate that the Commission is without authority to authorize AEP-Ohio to recover the Capacity Shopping Tax.[[117]](#footnote-117) It also stated that the arguments “constitute a collateral attack on the Commission’s final orders in the *Capacity Case* and the *ESP 2 Case*.”[[118]](#footnote-118) The Commission’s finding that IEU-Ohio’s arguments are a collateral attack is in error.

A collateral attack is “an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.”[[119]](#footnote-119) IEU-Ohio’s arguments in this case do not seek to overturn the Commission’s decisions in the *Capacity Case* and *ESP II Case*. In those cases, the Commission authorized an unlawful deferral (the Capacity Shopping Tax)and an unlawful rider (the RSR) that terminates on May 31, 2015. IEU-Ohio’s arguments in this case challenge the Commission’s authority to authorize a charge beginning June 1, 2015 and extending through January 2019. The charge (the RSR) authorized in the Capacity Shopping Tax Order was not authorized in either the *Capacity Case* or the *ESP II Case*.

Even if IEU-Ohio’s arguments were construed as a collateral attack of the prior orders, however, that construction does not excuse the Commission for rejecting the arguments because the arguments go to the jurisdiction of the Commission to authorize the Capacity Shopping Tax. The doctrine disfavoring collateral attacks does not apply when the court or the agency lacks jurisdiction.[[120]](#footnote-120) A prior incorrect adjudication regarding subject matter jurisdiction may be raised in a subsequent proceeding.[[121]](#footnote-121) Because the Commission asserted jurisdiction it does not have, the doctrine disfavoring collateral attacks does not apply. Accordingly, the Commission acted unlawfully and unreasonably when it failed to address IEU-Ohio’s arguments challenging the Commission’s jurisdiction to authorize AEP-Ohio to bill and collect the Capacity Shopping Tax because it found that those claims were a collateral attack of the Capacity Order and the ESP II Order. The Commission should reverse its finding and find that it is without jurisdiction to authorize AEP-Ohio to bill and collect the increased and above-market compensation for wholesale Capacity Service under the RSR.

# Remedy

In this case, AEP-Ohio has received authorization to begin billing and collection of an estimated $445 million over the next 32 months. In addition, AEP-Ohio has collected and applied an estimated $188 million to the Capacity Shopping Tax deferral balance under the terms of the ESP II Order. None of the amounts collected by AEP‑Ohio is lawful. To remedy the injury inflicted on customers, the Commission should deny AEP-Ohio the opportunity to bill and collect any remaining deferred amount and order AEP-Ohio either to refund, with interest, the amounts it has previously collected and applied to the Capacity Shopping Tax deferred balance or reduce other deferred balances it is amortizing under the terms of the ESP I Order.[[122]](#footnote-122)

In the Capacity Shopping Tax Order, the Commission has already determined that it has retained authority to adjust AEP-Ohio’s rates to account for the results of the pending appeals.[[123]](#footnote-123) Further, the Commission has advised the Supreme Court in a separate matter that customers will be afforded an adjustment to the rates to account for amounts unlawfully collected under riders similar to the one at issue here because the adjustment of the rates of the riders would not constitute retroactive ratemaking.[[124]](#footnote-124)

The Commission acted without authority when it authorized AEP-Ohio to defer and subsequently collect the Capacity Shopping Tax. Customers have incurred a significant and growing injury because of the Commission’s unlawful actions. To afford customers a meaningful remedy, the Commission should direct that AEP-Ohio refund the amounts previously billed and applied to the Capacity Shopping Tax balance and any amounts collected under the order in this case before a reversal is ordered either by the Commission or a reviewing court. Alternatively, the Commission should direct that AEP-Ohio reduce any outstanding deferral balances it is currently amortizing such as the balance being collected under the Phase-In Recovery Rider so that customers are relieved from the heavy financial load created by the Commission’s unlawful and unreasonable orders in this case, the Capacity Order, and the ESP II Order related to the Commission’s authorization of above-market compensation for Capacity Service.

# Conclusion

For the reasons stated herein, the Commission should grant IEU-Ohio’s Application for Rehearing, find that it does not have jurisdiction to provide AEP-Ohio with above-market compensation for wholesale Capacity Service, and direct AEP-Ohio to refund the amounts previously billed and applied to the Capacity Shopping Tax balance and any amounts collected under the order in this case before a reversal is ordered either by the Commission or a reviewing court. Alternatively, the Commission should order AEP-Ohio to reduce any outstanding deferral balances commensurate with the magnitude of the above-market compensation AEP-Ohio has illegally collected for Capacity Service.

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

Telecopier: (614) 469-4653

**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 *Application for Rehearing of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 4th day of May 2015, *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 Plaza, 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)

Devin D. Parram (Reg. No. 0082507)

TAFT STETTINIUS & HOLLISTER LLP

65 East State Street, Suite 1000

Columbus, OH 43215

myurick@taftlaw.com

dparram@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**

M. Howard Petricoff (Reg. No. 0008287)

Counsel of Record

Gretchen L. Petrucci (Reg. No. 0046608)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, OH 43216-1008

mhpetricoff@vorys.com

glpetrucci@vorys.com

**Attorney for the Retail Energy Supply Association**

Joseph M. Clark

Counsel of Record

Direct Energy

21 East State Street, 19th Floor

Columbus, OH 43215

joseph.clark@directenergy.com

**Attorney for Direct Energy Services, LLC, Direct Energy Business, LLC and Direct Energy Business Marketing, LLC**

Werner Margard

Assistant Attorney General

Public Utilities Section

180 East Broad Street, 6th Floor

Columbus, OH 43215-3793

werner.margard@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. *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) (hereinafter “*Capacity Case*” or “Capacity Order,” as appropriate). [↑](#footnote-ref-1)
2. *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-2)
3. Capacity Order at 33. [↑](#footnote-ref-3)
4. *Id*. at 23. [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. ESP II Order at 36. [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company  
    and Columbus Southern Power Company*, Sup. Ct. Case No. 2013-0228, Notice of Appeal   
   of Appellant Industrial Energy Users-Ohio (Feb. 6, 2013), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=721987.pdf (last accessed May 4, 2015); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company   
   for Authority to Establish A Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the   
   Form of an Electric Security Plan,* Sup. Ct. Case No. 2013-521, Notice of Second   
   Appeal of Appellant Industrial Energy Users-Ohio (May 8, 2013), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=726902.pdf (last accessed May 4, 2015). [↑](#footnote-ref-8)
9. Application, Exhibit A. [↑](#footnote-ref-9)
10. *Id*. at 3. The $4/MWh rate is an average of the rates across the various customer classes. [↑](#footnote-ref-10)
11. Capacity Shopping Tax Order at 11-12. [↑](#footnote-ref-11)
12. *Id.* at 12. [↑](#footnote-ref-12)
13. *Id.* at 13. [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. Capacity Order at 13. [↑](#footnote-ref-15)
16. The application at FERC was filed by American Electric Power Service Corporation (“AEPSC”)   
    acting as an agent for AEP‑Ohio. *American Electric Power Service Corporation,* FERC   
    Docket ER11-2183-000, Section 205 Application (Nov. 24, 2010), available at: http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12494899 (last accessed May 4, 2015) (hereinafter “*Section 205 Case*” or “Section 205 Application,” as appropriate). [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. *Id.* The Section 205 Application presented the requested capacity charge separately for Ohio Power Company and Columbus Southern Power Company, requesting a cost-based formula rate of $387.89/MW-day and $299.81/MW-day for Ohio Power Company and Columbus Southern Power Company, respectively. Blended together, these amounts equal $355.72/MW-day. [↑](#footnote-ref-18)
19. *Capacity Case*, Entry at 2 (Dec. 8, 2010). [↑](#footnote-ref-19)
20. *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 May 4, 2015). [↑](#footnote-ref-20)
21. Capacity Order at 12. [↑](#footnote-ref-21)
22. *Capacity Case*,Entry on Rehearing at 9-10 (Oct. 17, 2012). [↑](#footnote-ref-22)
23. Capacity Order at 13. [↑](#footnote-ref-23)
24. *Id.* at 10. [↑](#footnote-ref-24)
25. *Id.* at 36. [↑](#footnote-ref-25)
26. *See Capacity Case*, Tr. Vol. VI at 1346-1347. [↑](#footnote-ref-26)
27. Capacity Order at 33 (“Staff followed its traditional process of making reasonable adjustments to AEP‑Ohio’s proposed capacity pricing mechanism.”). [↑](#footnote-ref-27)
28. *Id.* at 33-35 (the Commission accepted some of Staff’s recommended adjustments to AEP-Ohio’s proposed rate and rejected several others). [↑](#footnote-ref-28)
29. *Id.* at 23. [↑](#footnote-ref-29)
30. *Id*. at 23-24. [↑](#footnote-ref-30)
31. ESP II Order at 36. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *Id*. [↑](#footnote-ref-33)
34. Application at 3. The RSR established under the ESP II Order terminates on May 31, 2015 and is designed to assure that AEP-Ohio’s total generation-related revenues remain at approximately $826 million over the life of ESP II. ESP II Order at 32-35. Although AEP-Ohio is required to apply a portion of the revenue generated from the RSR to the deferred Capacity Shopping Tax balance, the RSR approved in the ESP II Order is a separate and distinct rider from that authorized in this case. The only thing the Commission extended was the rate and the inaccurate name. The purpose and design of the rider are new. [↑](#footnote-ref-34)
35. *Id*., Exhibit A. [↑](#footnote-ref-35)
36. *Id*. at 3. [↑](#footnote-ref-36)
37. Entry at 3-4 (Oct. 30, 2014). [↑](#footnote-ref-37)
38. *See* Capacity Shopping Tax Order at 4-7 (summary of comments and reply comments). [↑](#footnote-ref-38)
39. Capacity Shopping Tax Order at 13-14. [↑](#footnote-ref-39)
40. *Id*. at 12. [↑](#footnote-ref-40)
41. *Id*. [↑](#footnote-ref-41)
42. *Id.* at 13. [↑](#footnote-ref-42)
43. *Id.* [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. *Id.* [↑](#footnote-ref-45)
46. *Id*. at 14. [↑](#footnote-ref-46)
47. Capacity Order at 13 (internal citations omitted). [↑](#footnote-ref-47)
48. *Capacity Case*,Entry on Rehearing at 19-20 (Oct. 17, 2012). [↑](#footnote-ref-48)
49. *Discount Cellular, Inc. v. Pub. Util. Comm’n of Ohio*,112 Ohio St.3d 360, 373 (2007). [↑](#footnote-ref-49)
50. *Capacity Case*,Ohio Power Company’s and Columbus Southern Power Company’s Application for Rehearing at 3, 18-21 (Jan. 7, 2011). [↑](#footnote-ref-50)
51. *Section 205 Case*, Response of American Electric Power Service Corporation at 6-7 (Dec. 17, 2010), available at: http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12513884 (last accessed May 4, 2015). [↑](#footnote-ref-51)
52. Capacity Shopping Tax Order at 14. [↑](#footnote-ref-52)
53. R.C. 4928.03. The definition of “retail electric service” (in combination with the balance of R.C. Chapter 4928) also makes it clear that a service component or function is either competitive or noncompetitive. Because noncompetitive service components are defined to be everything except competitive service components or functions, a service component must be either competitive or noncompetitive. [↑](#footnote-ref-53)
54. In addition to the limited pricing authority the Commission retains over retail electric generation services provided for default service customers under a standard service offer (“SSO”), the Commission also retains limited jurisdictional authority under the following statutory provisions: R.C. 4905.10 (regarding the funding of the Commission); R.C. 4905.31 (allowing the Commission to establish reasonable arrangements between utilities or between a utility and a customer); R.C. 4905.33(B) (prohibiting charging different rates for providing a like and contemporaneous service under substantially the same circumstances and conditions); R.C. 4905.35 (prohibiting discrimination); R.C. 4933.81 to 4933.90 (addressing utility and municipality territorial issues); and R.C. 4905.06, 4935.03, 4963.40 and 4963.41, but “only to the extent related to service reliability and public safety.” [↑](#footnote-ref-54)
55. *See* Capacity Order at 24; *Capacity Case*, IEU-Ohio’s Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 29 (Aug. 1, 2012); *Capacity Case*,Tr. Vol. VI at 1346‑1349; *Capacity Case*,Tr. Vol. IX at 2530-2534. [↑](#footnote-ref-55)
56. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Sup. Ct. Case No. 2013-0228, Second Merit Brief Submitted on Behalf of the Public Utilities Commission of Ohio at 17 (Sept. 23, 2013), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=734059.pdf (last accessed May 4, 2015) (hereinafter “*Capacity Appeal”*). [↑](#footnote-ref-56)
57. R.C. 4928.05(A)(1). Additionally, in *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 20, the Court stated:

    It is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 2, we stated that S.B. 3 “provided for restructuring Ohio’s electric-utility industry to achieve retail competition with respect to the generation component of electric service.” R.C. 4928.03 specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation. [↑](#footnote-ref-57)
58. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 17 (Jan. 11, 2012). [↑](#footnote-ref-58)
59. *In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Sup. Ct. Case No. 2012‑2008, Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio at 14-16 (Apr. 19, 2013), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=725902.pdf (last accessed May 4, 2015). [↑](#footnote-ref-59)
60. Capacity Shopping Tax Order at 12, citing ESP II Order at 36 & 52. [↑](#footnote-ref-60)
61. *Capacity Case*, Direct Testimony of J. Edward Hess on Behalf of Industrial Energy Users-Ohio at 8-9, 11-13, 18 (Apr. 4, 2012); *Capacity Case*, Direct Testimony of Kevin M. Murray on Behalf of Industrial Energy Users-Ohio at 16-20 (Apr. 4, 2012); *ESP II Case*, Direct Testimony of J. Edward Hess on Behalf of Industrial Energy Users-Ohio at 9-20, 24 (May 4, 2012). In the *Capacity Case*, the Commission does not address the issue of transition revenue recovery. In the *ESP II Case*, the Commission rejects the argument that transition revenue recovery is “inappropriate,” but does not reject the conclusion that AEP‑Ohio will recover transition revenue as a result of the Commission’s decision. ESP IIOrder at 32. [↑](#footnote-ref-61)
62. R.C. 4928.39. [↑](#footnote-ref-62)
63. *Capacity Case*, Direct Testimony of J. Edward Hess on Behalf of Industrial Energy Users-Ohio at 8-9, 11-13, 18 (Apr. 4, 2012); *Capacity Case*, Direct Testimony of Testimony of Kevin M. Murray on Behalf of Industrial Energy Users-Ohio at 16-20 (Apr. 4, 2012). In fact, AEP-Ohio’s request for above-market compensation for Capacity Service was calculated in the same manner as the request for transition revenue that AEP-Ohio made in its ETP application. [↑](#footnote-ref-63)
64. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Electric Transition Plan and Application for Receipt of Transition Revenues*, Case Nos. 99‑1729‑EL‑ETP, *et al.,* Opinion and Order at 18 (Sept. 28, 2000). [↑](#footnote-ref-64)
65. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No 04-169-EL-UNC, Opinion and Order at 9, 14 (Jan. 26, 2005). [↑](#footnote-ref-65)
66. In its Merit Brief in the appeal of the *Capacity Case,* the Commission argued that Capacity Service was a noncompetitive service. *Capacity Appeal*, Second Merit Brief Submitted on Behalf of the   
    Public Utilities Commission of Ohio at 16-18 (Sept. 23, 2013), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=734059.pdf (last accessed May 4, 2015). [↑](#footnote-ref-66)
67. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶27-31. [↑](#footnote-ref-67)
68. R.C. 4909.43; Rule 4901-7-01, O.A.C., Appendix at 7. [↑](#footnote-ref-68)
69. R.C. 4909.43. [↑](#footnote-ref-69)
70. *Id.* [↑](#footnote-ref-70)
71. R.C. 4909.18. [↑](#footnote-ref-71)
72. *See* R.C. 4909.18, 4909.19 and 4909.05. [↑](#footnote-ref-72)
73. R.C. 4909.18. [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. R.C. 4909.19(C). [↑](#footnote-ref-75)
76. *Id.* [↑](#footnote-ref-76)
77. Capacity Shopping Tax Order at 5-6, 13. [↑](#footnote-ref-77)
78. *Id*. at 13. [↑](#footnote-ref-78)
79. *See, e.g., In the Matter of the Application of Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 85‑76‑EL‑AIR, 1986 Ohio PUC Lexis 49 at \*80 (July 10, 1986). [↑](#footnote-ref-79)
80. *In the Matter of the Rescission of Chapter 4901:2-3, Ohio Administrative Code*, Case No. 00‑663‑TR‑ORD, Entry at 2 (Nov. 30, 2000). [↑](#footnote-ref-80)
81. *In the Matter of the Application of Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 85‑76‑EL‑AIR, 1986 Ohio PUC Lexis 49 at \*80 (July 10, 1986). [↑](#footnote-ref-81)
82. CapacityOrder at 13. The Opinion and Order is currently on appeal. *Capacity Appeal*, Notice of Appeal of Appellant Industrial Energy Users-Ohio (Feb. 6, 2013), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=721987.pdf (last accessed May 4, 2015). The appeal presents to the Court the Commission’s erroneous determination that it is not preempted by the FPA from increasing AEP‑Ohio’s compensation in violation of the terms of the RAA, a federally-approved tariff. *Id.* at 2. [↑](#footnote-ref-82)
83. U.S. Const. Art. VI, cl. 2. [↑](#footnote-ref-83)
84. *Anderson v. Sara Lee Corp*., 508 F.3d 181, 191 (4th Cir. 2007). [↑](#footnote-ref-84)
85. *La. Pub. Serv. Comm’n v. F.C.C*., 476 U.S. 355, 368 (1986). [↑](#footnote-ref-85)
86. *Oneok, Inc. v. Learjet*, Inc., 575 U.S. \_\_, 2015 U.S. Lexis 2808 (2015). [↑](#footnote-ref-86)
87. *Morales v. Trans World Airlines,* 504 U.S. 374, 383 (1992). [↑](#footnote-ref-87)
88. 16 U.S.C. § 824(b). [↑](#footnote-ref-88)
89. *Miss. Power and Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). [↑](#footnote-ref-89)
90. *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 827-828 (D. Md. 2013). [↑](#footnote-ref-90)
91. *Id*. at 828 (citing *Miss. Indus. v. FERC*, 808 F.2d 1525, 1541 (D.C. Cir. 1987)). [↑](#footnote-ref-91)
92. *Id.* at 828-829. [↑](#footnote-ref-92)
93. *Id.* at 830-833. [↑](#footnote-ref-93)
94. *Id*. at 833. [↑](#footnote-ref-94)
95. *Id*. at 840. [↑](#footnote-ref-95)
96. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). [↑](#footnote-ref-96)
97. *PPL EnergyPlus, LLC v. Hanna,* 977 F. Supp. 2d 372, 393 (D. N.J. 2013). [↑](#footnote-ref-97)
98. *Id*. at 393-394. [↑](#footnote-ref-98)
99. *Id*. at 406-412. [↑](#footnote-ref-99)
100. *Id*. at 412. [↑](#footnote-ref-100)
101. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014). [↑](#footnote-ref-101)
102. *Id.* at 252. [↑](#footnote-ref-102)
103. *Id.* [↑](#footnote-ref-103)
104. *Id.* at 253. [↑](#footnote-ref-104)
105. *PJM Interconnection, LLC*, 143 FERC ¶ 61,164 (2013). Contrary to the implied claim of the Commission in the Capacity Shopping Tax Order at page 13, n.1, FERC did not approve the Commission’s decision to increase AEP-Ohio’s total compensation for Capacity Service. The appendix that FERC approved states only that the price of Capacity Service provided to CRES providers will be the RPM-Based Price. *Id*. *See* discussion below. [↑](#footnote-ref-105)
106. Capacity Order at 13. [↑](#footnote-ref-106)
107. *City of Washington v. Pub. Util. Comm.*, 99 Ohio St.70, 72 (1918). [↑](#footnote-ref-107)
108. RAA at 130 (Schedule 8.1(D)(8)), available at the following link: http://pjm.com/~/media/documents/agreements/raa.ashx (last accessed May 4, 2015). [↑](#footnote-ref-108)
109. Even if the RAA did grant the Commission jurisdiction to regulate Capacity Service (which it does not), the Commission’s invented and applied cost-based ratemaking methodology is entirely inconsistent with the RAA. The record established during the evidentiary hearing in the *Capacity Case* demonstrated that AEP-Ohio is not an FRR Entity; rather, AEPSC, acting on behalf of a group of affiliated AEP operating companies in PJM’s territory including AEP-Ohio, made a single FRR election in 2007 for the combined group of affiliated companies. *Capacity Case*,Tr. Vol. II at 436-437; *Capacity Case*,Tr. Vol. XI at 2533‑2534. The FRR election for all of the affiliated AEP operating companies in PJM will remain in place through May 31, 2015, at which time AEP-Ohio will be segregated from the remaining affiliated companies that will remain under the FRR Alternative election and AEP-Ohio will participate in the RPM auction process. *See* Capacity Order at 14. AEP-Ohio will begin participating in the RPM process beginning June 1, 2015. *Id.* The record also demonstrated that AEP-Ohio’s and the Commission’s assumption that AEP-Ohio’s owned or controlled generating assets were the source of Capacity Resources that was made available to CRES providers is complete fiction. *Capacity Case*,IEU-Ohio’s Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 29 (Aug. 1, 2012); *Capacity Case*,Tr. Vol. VI at 1346-1349; *Capacity Case*,Tr. Vol. IX at 2530-2534. The record demonstrated that Capacity Resources are committed to PJM to satisfy region-wide reliability and are ***not*** “dedicated” to specific customer loads. *Capacity Case*,Tr. Vol. VI at 1346-1349. The record further demonstrated that whatever Capacity Resources were committed to PJM to meet the overall capacity obligation of the entire FRR Entity, those Capacity Resources would have included Capacity Resources other than AEP-Ohio’s owned or controlled generating facilities. *Capacity Case*,Tr. Vol. IX at 2530-2534 (the affiliated AEP companies pooled their resources to meet the FRR Entity’s capacity obligation and did not rely solely on AEP-Ohio’s generating units). AEP-Ohio did not, however, introduce evidence regarding what Capacity Resources had been committed to PJM. [↑](#footnote-ref-109)
110. RAA at 130 (Schedule 8.1(D)(8)), available at http://pjm.com/~/media/documents/agreements/raa.ashx (last accessed May 4, 2015). [↑](#footnote-ref-110)
111. *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.,* FERC Docket ER13-1164-000, 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 May 4, 2015). [↑](#footnote-ref-111)
112. *Id.* at 6; RAA at 138 (Schedule 8.1-Appendix, Ohio Power Company FRR Capacity Rate), available at: http://pjm.com/~/media/documents/agreements/raa.ashx (last accessed May 4, 2015). [↑](#footnote-ref-112)
113. *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.,* FERC Docket ER13-1164-000, Response of AEPSC at 2 (Apr. 30, 2013) (emphasis in original), available at: http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13248834 (last accessed May 4, 2015). [↑](#footnote-ref-113)
114. *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.,* FERC Docket ER13-1164-000, Order Accepting Appendix to Reliability Assurance Agreement   
     Subject to a Compliance Filing at 6-7 (May 23, 2013), available at: http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13265974 (last accessed May 4, 2015). [↑](#footnote-ref-114)
115. *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.,* FERC Docket ER13-1164-000, Response of American Electric Power Service Corporation at 4 (Apr. 30, 2013), available at: http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13248834 (last accessed May 4, 2015). 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-115)
116. *See* RAA at 138 (Schedule 8.1-Appendix, Ohio Power Company FRR Capacity Rate) (“For purposes of administering the state compensation mechanism, the wholesale rate shall be equal to the adjusted final zonal PJM RPM rate in effect for the rest of the RTO region for the current PJM delivery year, and with the rate changing annually on June 1, 2013, and June 1, 2014, to match the then current   
     adjusted final zonal PJM RPM rate in the rest of the RTO region.”), available at: http://pjm.com/~/media/documents/agreements/raa.ashx (last accessed May 4, 2015). [↑](#footnote-ref-116)
117. Capacity Shopping Tax Order at 14. [↑](#footnote-ref-117)
118. *Id*. [↑](#footnote-ref-118)
119. *Ohio Pyro, Inc. v. Ohio Department of Commerce*, 115 Ohio St.3d 375, 379 (2007) (citations and internal quotations omitted). [↑](#footnote-ref-119)
120. *Id.* at 380; *see State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 30 (2008) (Court noting its refusal to apply res judicata to cases where decision was void for lack of subject matter jurisdiction). [↑](#footnote-ref-120)
121. *State v. Wilson*, 73 Ohio St.3d 40, 45 n.6 (1995); *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-121)
122. *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan, and the Sale or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO*, et al.,* Opinion and Order (Mar. 18, 2009). [↑](#footnote-ref-122)
123. Capacity Shopping Tax Order at 13. [↑](#footnote-ref-123)
124. *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Sup. Ct. Case No. 2014‑328,Brief Regarding Bond Requirements Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio at 2-3, 8 (Aug. 12, 2014), available at: http://www.sconet.state.oh.us/pdf\_viewer/pdf\_viewer.aspx?pdf=751487.pdf (last accessed May 4, 2015). [↑](#footnote-ref-124)