

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA OF OHIO POWER COMPANY TO INDUSTRIAL
ENERGY USERS – OHIO’S AND FIRSTENERGY SOLUTIONS CORP’S NOVEMBER
16, 2012 APPLICATIONS FOR REHEARING AND THE OFFICE OF THE OHIO
CONSUMERS’ COUNSEL’S NOVEMBER 17, 2012
APPLICATION FOR REHEARING**

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On behalf of Ohio Power Company

I. INTRODUCTION

In its October 17 Entry on Rehearing, the Commission granted rehearing “for the limited purpose of clarifying that the [July 2, 2012] Capacity Order¹ was issued in accordance with the Commission’s authority found in Section, 4905.26, Revised Code, as well as Sections 4905.04, 4905.05, and 4905.06, Revised Code.” October 17 Entry on Rehearing at 29. The Commission explained that R.C. 4905.26 grants the Commission “considerable authority to review rates and authorizes [the Commission’s] investigation in this case.” *Id.* The Commission found that it “properly initiated this proceeding, consistent with that statute, to examine AEP-Ohio’s existing capacity charge for its [Fixed Resource Requirement] obligations and to establish an appropriate [state compensation mechanism] upon completion of [the Commission’s] review.” *Id.* R.C. 4905.26 provides:

[U]pon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement or practice affecting or relating to any service furnished by [a] public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.

Pursuant to Section 4903.10, Ohio Revised Code (“R.C.”), and Rule 4901-1-35, Ohio Administrative Code (“O.A.C.”), Industrial Energy Users – Ohio (“IEU”), FirstEnergy Solutions Corp. (“FES”), and the Office of the Ohio Consumers’ Counsel (“OCC”) filed applications for

¹ The Commission’s July 2, 2012 Opinion and Order in this proceeding is hereinafter referred to as the “Capacity Order.”

rehearing of the Commission's October 17, 2012 Entry on Rehearing in this case (the "October 17 Entry on Rehearing"). Ohio Power Company ("AEP Ohio" or the "Company") hereby files this memorandum in opposition.

FES, IEU, and OCC are incorrect in their assertions that R.C. 4905.26 does not grant the Commission authority to issue the Capacity Order. The Commission has broad authority to change rates, including wholesale rates, in proceedings under R.C. 4905.26. IEU and OCC's alternative arguments that R.C. 4905.26 does not form a basis for the Capacity Order because the Commission failed to satisfy certain procedural requirements in the statute also are misplaced. If necessary, that procedural requirements were satisfied may be clarified in a subsequent entry on rehearing, but these arguments do not form a basis for granting rehearing. FES's and IEU's arguments regarding the application of R.C. Chapter 4909 to proceedings conducted under R.C. 4905.26 also are without merit and should be disregarded. OCC's arguments regarding the deferral of capacity costs have already been considered and rejected by the Commission in this proceeding and are appropriately left for consideration in the Company's ESP II docket. Finally, IEU's contention that the Commission may not rely upon R.C. Chapter 4905 in issuing the Capacity Order because capacity service is not included in the services listed in the definition of "electric light company" in R.C. 4905.03(A)(3) should be disregarded because it contradicts IEU's prior positions and statements in this proceeding and because such a construction of the Chapter would improperly restrict the Commission's authority over public utilities. For the reasons set forth below, the Commission should deny each of the applications for rehearing in their entirety.

II. ARGUMENT

A. Arguments that the Commission does not have authority to issue the Capacity Order under R.C. 4905.26 are without merit.

FES, IEU,² and OCC seek rehearing of the October 17 Entry on Rehearing on the grounds that R.C. 4905.26 does not provide the Commission with authority to set rates, only the authority to review them. (FES App. for Rehearing at 4-6; IEU App. for Rehearing at 7; OCC App. for Rehearing at 5-6.) IEU and OCC also argue that R.C. Chapter 4905 generally, and R.C. 4905.26 in particular, do not permit the PUCO to set wholesale rates. (IEU App. for Rehearing at 17-18; OCC App. for Rehearing at 4-5.) Each of these arguments, however, is without merit.

The Ohio Supreme Court has repeatedly held that the Commission has broad authority to change utility rates in a proceeding conducted pursuant to R.C. 4905.26. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶ 29, citing *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 686 N.E.2d 501 (1997) ("Pursuant to R.C. 4905.26 * * *, 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 the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (1987) ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on

² IEU also repeats a number of now-familiar arguments in support of its view that the provision of wholesale capacity is a competitive retail electric service subject to regulation under R.C. Chapter 4928. (See e.g. IEU App. for Rehearing at 4-7.) Those arguments have previously been considered and rejected by the Commission. See Capacity Order at 13, 22; Oct. 17 Entry on Rehearing at 19-20, 28-29, 56-57. Because these arguments have already been thoroughly considered and rejected, the Commission should decline to revisit them on rehearing now.

previous orders”); *Ohio Util. Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 157, 12 O.O.3d 167, 389 N.E.2d 483 (1979) (in an R.C. 4905.26 proceeding, the PUCO can “order[] that new rates be put in effect”).³ Any contention to the contrary, therefore, is without merit.

IEU attempts to invent constraints on the Commission’s broad authority to affect utility rates under R.C. 4905.26, arguing that the Commission may only authorize rates pursuant to R.C. 4905.26 in “very ‘limited circumstances.’” (See IEU App. for Rehearing at 11-13.) To support that argument, IEU relies upon the *Suburban Natural Gas Co.*⁴ decision recently issued by the Commission. *Id.* That reliance, however, is misplaced. In *Suburban Natural Gas Co.*, the Commission considered a utility’s self-complaint application seeking to modify its tariff to add a rider, thereby modifying its customers’ rates. See *Suburban Natural Gas Co.*, Opinion and Order, at 2. In its order denying the self-complaint, the Commission explained that it has, “under certain limited circumstances, permitted the modification of rates in *self-complaint proceedings* arising under Section 4905.26, Revised Code[.]” and then went on to discuss when it has permitted such modifications in the past. *Id.* at 6 (emphasis added). The *Suburban Natural Gas Co.* decision merely enumerates the Commission’s past practices in self-complaint proceedings and, therefore, does not amount to a legal restriction on a Commission-initiated investigation like this case. But the list of examples discussed in the *Suburban Natural Gas Co.* decision (and

³ IEU’s reliance upon *Ohio Manufacturers’ Assoc. v. Pub. Util. Comm.*, 46 Ohio St.2d 214 (1976), to support its argument that the Commission lacks subject-matter jurisdiction under R.C. 4905.26 is misplaced. That case is inapposite, as it addressed a completely different statutory provision, R.C. 4909.16, and involved a utility that sought to penalize customers that consumed natural gas in excess of stated limitations. Here, however, the Commission is neither asserting authority under R.C. 4909.16, nor authorizing AEP Ohio to levy a penalty against customers. Thus, the Ohio Supreme Court’s narrow holding in *Ohio Manufacturers’ Assoc.* does not apply here.

⁴ *In the Matter of the Self Complaint of Suburban Natural Gas Co. Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF (“*Suburban Natural Gas Co.*”), Opinion and Order (Aug. 15, 2012).

cited by IEU) does show that individual rates can be changed based on R.C. 4905.26 and outside the context of a general rate proceeding under R.C. Chapter 4909; similarly, the scope of the proceeding at bar was whether to change a single rate that is paid by CRES providers to receive capacity service from AEP Ohio and did not involve adjustment of base rates. Apparently, intervenors believe that the Commission has broad authority to conduct proceedings under R.C. 4905.26 but narrow authority to fashion relief under the same statute. The objection that the Commission has departed from its *Suburban Natural Gas Co.* precedent, rather than from statutory requirements, demonstrates that the real debate is a matter of policy and discretion, not legal or jurisdictional restrictions. Intervenors' narrow interpretation of R.C. 4905.26 conflicts with both the language in the statute and the Supreme Court's caselaw interpreting the Commission's authority under the complaint statute.

IEU and OCC are also incorrect in their assertion that Chapter 4905, and R.C. 4905.26 in particular, do not permit the Commission to set wholesale rates. Notably, neither IEU nor OCC cite to any authority to support this contention. Nothing in Chapter 4905, however, limits its application solely to retail rates. Rather, it grants the Commission broad "power and jurisdiction to supervise and regulate public utilities" within the State of Ohio. *See, e.g.,* R.C. 4905.04, 4905.05, 4905.06. If the General Assembly had intended R.C. Chapter 4905 to be limited only to retail rates, it would have said so. *Accord In the Matter of the Complaint of AT&T Communications of Ohio, Inc. v. Ameritech Ohio*, Case No. 96-336-TP-CSS ("Ameritech Ohio"), Opinion and Order, at 17 (Sept. 18, 1997) ("[I]f the General Assembly had intended [certain sections of R.C. Chapter 4905] to be limited to utilities that were not subject to alternative regulation, it would have said so. However, this is not the case.").

One need only to look to previous Commission proceedings to see that the Commission has authority to address wholesale charges under R.C. Chapter 4905. As an example, in *Ameritech Ohio*, the Commission adjudicated an R.C. 4905.26 complaint that AT&T Communications of Ohio, Inc. filed against Ameritech Ohio alleging that Ameritech Ohio's intrastate carrier access charges, which are *wholesale charges*, violated certain provisions of Chapter 4905. *See id.* at 2. There are several additional examples where the Commission has regulated wholesale utility rates in Ohio and the Ohio Supreme Court has reviewed and upheld such decisions based on R.C. Title 49. *See, e.g., AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 88 Ohio St.3d 549, 2000-Ohio-422, 728 N.E.2d 371 (involving a complaint regarding wholesale interstate carrier access); *Time Warner AxS v. Pub. Util. Comm., et al.*, 75 Ohio St.3d 229, 235-236, 661 N.E.2d 1097 (1996) (noting the Commission's authority to regulate basic local exchange service under R.C. Title 49, including providing wholesale network access to competing long-distance carriers); *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 527 N.E.2d 777 (1988) (affirming Commission order setting transition plan for wholesale access charge and toll compensation plan); *Payphone Assn. v. Pub. Util. Comm.* (2006), 109 Ohio St.3d 453; *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306; *Allnet Communications Serv., Inc. v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202. Intervenors are wrong in claiming that R.C. 4905.26 cannot be lawfully used to regulate individual wholesale rates.

B. Claims that the Commission failed to satisfy the procedural requirements of R.C. 4905.26 are misplaced and do not warrant rehearing.

IEU and OCC also argue that the Commission's inclusion of R.C. 4905.26 as a basis for its Capacity Order was inappropriate because, they contend, certain procedural requirements

contained in the statute were not satisfied in this proceeding. (IEU App. for Rehearing at 14-15; OCC App. for Rehearing at 7-9.) Specifically, OCC contends that the Commission was required, and failed, under R.C. 4905.26 to make an express finding that “reasonable grounds for complaint” existed and to expressly find that ordering AEP Ohio to collect only an RPM-based capacity charge is unjust or unreasonable. (OCC App. for Rehearing at 7-9.) IEU similarly complains that the Commission “never alleged” that RPM-based rates are “unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law.” (IEU App. for Rehearing at 14-15.) These superficial attacks on the Commission’s application of R.C. 4905.26 are misplaced and, in any event, can be corrected on rehearing if the Commission wishes to further clarify its intent.

1. OCC’s argument that the Commission failed to satisfy R.C. 4905.26 because it did not explicitly state that “reasonable grounds for complaint” existed is meritless.

OCC’s view of the “reasonable grounds for complaint” requirement is overly technical and without basis in Commission or judicial precedent. First, OCC misstates the Ohio Supreme Court’s discussion of the requirement in *Ohio Utilities Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 154 (1979). While OCC is correct that the *Ohio Utilities Co.* court stated that the “reasonable grounds for complaint” requirement applies both when a party files a complaint and when the Commission begins an R.C. 4905.26 proceeding on its own initiative, the obvious purpose of that statement was to clarify that the Commission must have a basis for its investigation and may not initiate such investigations arbitrarily or as a matter of course. *See Ohio Utilities Co.*, 39 Ohio St.2d at 159.⁵ It did not, as OCC argues, create a requirement that the Commission must include

⁵ Specifically, affirming a Commission investigation of the reasonableness of a utility’s rates that began after a new rate law went into effect, the Ohio Supreme Court in *Ohio Utilities Co.* stated:

magic language or always make a rote statement of reasonable grounds for complaint in its entries in R.C. 4905.26 proceedings. This is especially true where, as here, the proceeding has involved substantial litigation among sophisticated, experienced parties based on explicit findings of the Commission as to the purpose of the proceeding.

OCC's reliance upon *Western Reserve Transit Authority v. Pub. Util. Comm.*, 39 Ohio St.2d 16 (1974), also is misplaced. In that case the Commission, responding to a complaint filed by a utility, initially found that reasonable grounds for complaint "may exist" but later dismissed the complaint. *Western Reserve*, 39 Ohio St.2d at 17-18. The Ohio Supreme Court reversed the dismissal, finding, *inter alia*, that the Commission failed to adhere to R.C. 4905.26's procedural requirements because the Commission was without legal authority to make a "tentative finding" that reasonable grounds for complaint "may exist." *Id.* at 19. The court found that the Commission should have conducted a hearing in accordance with the statute. *Id.* The effect of the court's decision thus was not to require the Commission to make an explicit finding of reasonable grounds for complaint in order to proceed with a hearing, but to require the Commission to hold a hearing.

Here, it is clear that the Commission believed it had reasonable grounds for complaint. The Commission itself initiated this proceeding nearly two years ago, expressly stating that an investigation was necessary to determine the impact of AEP Ohio's proposal to the FERC to

[W]e do not mean to imply that [the Commission] is free to require all utilities to defend their rate schedules in an R.C. 4905.26 investigation and hearing, simply because their rates were fixed under the old law. R.C. 4905.26 requires that "reasonable grounds for complaint" be stated before the commission can conduct a hearing and order a utility to produce information. This prerequisite should apply whether the commission brings such a proceeding on its own initiative, or on the complaint of another party.

Ohio Utilities Co., 39 Ohio St.2d at 159.

change the basis for compensation for its capacity costs to a cost-based mechanism under the FERC-approved Reliability Assurance Agreement. *See* Entry at 2 (Dec. 8, 2010).⁶ Thus, by initiating this proceeding, the Commission *at least implicitly* found that there were reasonable grounds for complaint. In short, intervenors attempt to elevate form over substance in raising this technical/procedural challenge. Nonetheless, if the Commission believes that there is any doubt that this statutory requirement has been satisfied in this proceeding, then the Commission may clarify this point on rehearing by clarifying its original intention when opening this docket.⁷

⁶ It should also be noted that OCC itself supported the Commission's decision to initiate these proceedings. (*See* OCC Comments (Jan. 7, 2011); OCC Reply Comments (Feb. 7, 2011).) Notably, in its Reply Comments, OCC even suggested that "if AEP Ohio is unsatisfied with the current state capacity compensation mechanism," which at that time was based on RPM, "it may seek to alter that mechanism at the state level through a future PUCO proceeding," which OCC stated should include "sworn testimony," data showing "the details of its actual current costs," "the impact of its proposed change, how the impact on customers of CRES Providers would compare with the capacity charges imposed on its own supply customers, and justification for any change in the state compensation mechanism." (OCC Reply Comments at 4 (Feb. 7, 2011).) While AEP Ohio admittedly did not initiate these proceedings, all of the process and evidence that OCC contended in its Reply Comments would suffice in a proceeding before the PUCO to alter the state compensation mechanism *occurred in this proceeding*. That OCC now does not like the results does not mean that the process was deficient or that the Commission lacked reasonable grounds under R.C. 4905.26.

⁷ OCC, IEU and FES wrongly criticize the Commission's clarification regarding the applicability of R.C. 4905.26 as an "after-the-fact" rationale asserted on rehearing for the first and as a "newly asserted claim" that is somehow untimely. These intervenors fail to recognize that the Commission is statutorily entitled to finalize both its factual and legal findings through the rehearing process, prior to being subject to judicial review on appeal. The rehearing process is a jurisdictional prerequisite to any appeal and, as a related matter, an appellant can only challenge a final order on appeal. *See* R.C. 4903.10(B) ("No cause of action arising out of any order of the commission * * * shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing."); R.C. 4903.13 ("A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."); R.C. 4903.11 ("No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days *after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing.*") (emphasis added); *Communications Workers of America, AFL-CIO v. Pub. Util.*

2. OCC's and IEU's arguments that the Commission failed to satisfy R.C. 4905.26 because it did not make an explicit finding that RPM-based pricing is unjust or unreasonable should be disregarded.

Like OCC's misguided view of the "reasonable grounds for complaint" requirement in R.C. 4905.26, both OCC and IEU take an overly technical and incorrect view that the statute requires the Commission to make an express finding or allegation that RPM-based capacity rates are "unjust or unreasonable." (OCC App. for Rehearing at 9; IEU App. for Rehearing at 14-15.)⁸ R.C. 4905.26, however, requires no such finding or allegation. Rather, by its plain language, the statute's pertinent requirement is that the Commission must hold a hearing pursuant to the statute if there are reasonable grounds for complaint that a rate is⁹ "unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law." In both the Capacity Order and the October 17 Entry on Rehearing in this case, the Commission found that it was necessary to supplement RPM pricing in order to achieve a rate regime that reasonably compensates AEP Ohio and that retaining RPM pricing alone would produce unjust and unreasonable results.

Comm., 57 Ohio St.2d 76, 77, 387 N.E.2d 230 (1979) ("The filing of an application for rehearing before the Public Utilities Commission is a jurisdictional prerequisite to an error proceeding from the order of the Commission to this Court * * *"); *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 333, 533 N.E.2d 353 (1988) (noting that an order issued after a rehearing may modify or even abrogate previously issued orders and holding that R.C. 4903.11's notice of appeal deadline begins to run upon denial of last application for rehearing). In sum, there is nothing improper about the Commission clarifying such matters through the rehearing process and the intervenor arguments in this regard should be ignored.

⁸ IEU also argues that AEP Ohio must satisfy a "*Mobile-Sierra* review standard that the [RPM] pricing under the RAA is not in the public interest." (IEU App. for Rehearing at 15-16.) That standard, however, applies only to bilateral power contracts approved by the FERC and is inapplicable here.

⁹ The Ohio Supreme Court has explained that the statute is stated in the present tense because "the General Assembly did not intend the complaint procedure of R.C. 4905.26 to be available to those dissatisfied with *former* utility rates," *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 377, 686 N.E.2d 501 (emphasis added), not because it requires the Commission to expressly find that a rate is unjust or unreasonable before conducting a hearing under the statute. Accordingly, IEU's reliance (at 9) is misplaced.

This docket was initiated in response to AEP Ohio's filing before FERC to establish a cost-based capacity charge for CRES providers in Ohio. December 8, 2010 Entry at 1. Absent the Commission's adoption of an interim SCM through the December 8, 2010 Entry or outright dismissal by the FERC, the rates reflected in AEP Ohio's 2010 FERC filing would have gone into effect 60 days after the filing without suspension or up to an additional five months if suspended. *See* 16 USC 824d; 18 CFR 35.1 and 35.13 (2012). The parties in the FERC proceeding (many of the same parties who are intervenors in this docket) complained that AEP Ohio's proposed cost-based capacity charge was unjust and unreasonable. Indeed, the Commission itself filed comments in the FERC case on December 10, 2010 asking the FERC to suspend AEP Ohio's filing until the 10-2929 docket was completed. The adoption of an interim SCM during the pendency of the Commission's review of AEP Ohio's capacity charge was done in order to adjudicate a determination as to whether the prior capacity charge regime should be retained as just and reasonable or whether it should be modified or replaced. The entire context of this case and the Commission's ultimate decision was to decide whether a change was needed in order to maintain just and reasonable capacity charges for AEP Ohio. Hence, the question of whether RPM pricing is just and reasonable for AEP Ohio was already "on the table" and obvious to all parties involved. In that context, it was simply unnecessary to make a finding that the prior rate regime was unjust and unreasonable and that it was necessary to make an explicit finding in that regard. As discussed below, however, the Commission has already set forth the substance of that finding in its Opinion and Order and Entry on Rehearing.

Contrary to IEU's and OCC's claim, there simply is no statutory requirement that the Commission must expressly find – as a prerequisite to exercising authority in this case – that the state compensation mechanism set in December 2010 was unjust or unreasonable. The argument

by IEU and OCC that the Commission is legally required to incorporate such generic or “boilerplate” findings into its decision wrongly elevates form over substance. Regardless, the Commission did make explicit findings in its decision regarding the unjust impact on AEP Ohio of RPM pricing and the need to supplement it with cost-based compensation.

Specifically, the Capacity Order made the following findings:

Pursuant to Section 4905.22, Revised Code, *all charges for service shall be just and reasonable* and not more than allowed by law or by order of the Commission. * * * As discussed above, the Commission finds that it has jurisdiction to establish a state compensation mechanism in this case pursuant to its general supervisory authority found in Sections 4905.04, 4905.05, and 4905.06, Revised Code. We further find, pursuant to our regulatory authority under Chapter 4905, Revised Code, as well as Chapter 4909, Revised Code, that *it is necessary and appropriate to establish a cost-based state compensation mechanism for AEP-Ohio*. Those chapters require that the Commission use traditional rate base/rate of return regulation to approve rates that are based on cost, *with the ultimate objective of approving a charge that is just and reasonable consistent with Section 4905.22, Revised Code*. * * * The Commission’s obligation under traditional rate regulation is to ensure that the jurisdictional utilities receive *reasonable compensation for the services that they render*. * * * The record further reflects that, *if RPM-based capacity pricing is adopted, AEP Ohio may earn an unusually low return on equity of 7.6 percent in 2012 and 2.4 percent in 2013, with a loss of \$240 million between 2012 and 2013 (AEP-Ohio Ex. 104 at 3-5, Ex. WAA-1; Tr. III at 701)*. In short, the record reveals that *RPM-based capacity pricing would be insufficient to yield reasonable compensation* for AEP-Ohio’s provision of capacity to CRES providers in fulfillment of its FRR capacity obligations.

Capacity Order at 22-23 (emphasis added). Thus, the Capacity Order clearly found that RPM pricing would produce unjust and unreasonable results for the Company and that it was necessary to supplement RPM pricing with cost-based compensation so that AEP Ohio would be reasonably compensated for providing capacity service. If these findings cannot already be characterized in form as making a finding that RPM-based capacity charges would be unjust and

unreasonable for AEP Ohio, the Commission's findings in substance do plainly achieve the same effect.

In the October 17 Entry on Rehearing, the Commission confirmed the meaning of the Capacity Order by describing its original decision as follows:

The Commission further determined, within its discretion, that it was necessary and appropriate to establish a cost-based SCM for AEP-Ohio, pursuant to our regulatory authority under Chapter 4905, Revised Code, as well as Chapter 4909, Revised Code, which authorized the Commission to use its traditional regulatory authority to approve rates that are based on cost, *such that the resulting rates are just and reasonable, in accordance with Section 4905.22, Revised Code.* * * * The Commission concluded that we have an obligation under traditional rate regulation *to ensure that the jurisdictional utilities receive just and reasonable compensation* for the services that they render.

Oct. 17 Entry on Rehearing at 28 (emphasis added). Again, the Commission indicated on rehearing that the SCM was necessary to avoid an unjust and unreasonable result and to establish rates that are just and reasonable.

In sum, it is highly technical and non-substantive to argue that the Commission failed to make a finding that the prior rate regime was unjust and unreasonable, since the Commission found that the prior compensation method would result in unjust and unreasonable compensation for the Company and found that it was necessary to adopt a modified SCM in order to achieve reasonable compensation for AEP Ohio. The entire purpose of the proceeding was to determine whether RPM pricing should be retained or should be modified – and the Commission ultimately determined it would be just and reasonable to modify the SCM. Nonetheless, as discussed above, if the Commission believes that there is any doubt that the requirements of R.C. 4905.26 have been satisfied in this proceeding, then the Commission may wish to clarify this point on rehearing.

C. Intervenor’s inconsistent arguments regarding R.C. Chapter 4909 are without merit.

FES argues both that construing R.C. 4905.26 as conferring authority upon the PUCO to issue the Capacity Order would make R.C. Chapter 4909 “mere surplusage” and that the Commission is required follow the procedures of Chapter 4909 to set a cost-based capacity charge pursuant to R.C. 4906.26. (*See* FES App. for Rehearing at 6.) FES’s latter argument, however, demonstrates that its former argument is without merit. Clearly, construing R.C. 4905.26 to authorize the Commission to issue the Capacity Order does not make R.C. Chapter 4909 superfluous if, as FES contends, the Commission is required to *follow* Chapter 4909 when issuing the Capacity Order pursuant to R.C. 4905.26. FES’s first assertion, therefore, is incorrect. Of course, it is also highly ironic and disingenuous for FES to maintain that R.C. Chapter 4909 should govern at all, given its ardent advocacy of deregulatory, market-based pricing throughout the course of this case.

Similarly, IEU (at 13-16) and FES (at 6-7) are mistaken in their assertion that the Commission is required to adhere to the procedural and substantive requirements of R.C. Chapter 4909 in this case. As AEP Ohio has previously explained, the argument that AEP Ohio and the Commission were required to conduct a full-blown traditional base rate case, following each and every procedural and substantive requirement in R.C. Chapter 4909 applicable to applications for an increase in rates, is without support. (*See* AEP Ohio Mem. Contra Apps. for Rehearing at 2-3 (Aug. 13, 2012).) Moreover, the Commission expressly rejected this argument in its October 17 Entry on Rehearing: “This proceeding is not a traditional rate case requiring an application from AEP-Ohio under Section 4909.18, Revised Code.” Oct. 17 Entry on Rehearing at 54. While the Commission certainly is permitted to apply R.C. Chapter 4909 after an R.C. 4905.26 hearing, *see, e.g., Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 1 Ohio St.3d 22, 24,

437 N.E.2d 586 (1982), there is no *requirement* that it must do so. *See Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 64 Ohio St.3d 145, 148, 593 N.E.2d 286 (1992) (holding that R.C. 4909.18 was inapplicable to Commission-initiated investigation). Moreover, contrary to the false premise of these arguments, the Commission has not adjusted retail rates in this docket – it has only done so in the context of the ESP II proceeding that is governed by R.C. 4928.143 and not by R.C. Chapter 4909. As a related matter, since the ultimate decision in this case was to retain the same RPM pricing regime that existed prior to initiation of the docket for wholesale rates paid by CRES providers (and the decision did not adjust retail rates), the entire discussion of R.C. Chapter 4909 is largely academic in this case. Accordingly, FES’s and IEU’s arguments regarding R.C. Chapter 4909 should be disregarded.

D. Contrary to OCC’s characterizations, the Commission properly determined that OCC’s arguments regarding the deferral of capacity costs should be raised and addressed in the Company’s ESP II¹⁰ case, not in this proceeding.

In its Capacity Order, the Commission (1) adopted a State Compensation Mechanism that directs AEP Ohio to charge CRES providers RPM-based pricing for the capacity it supplies to them, (2) stated that it would authorize AEP Ohio to modify its accounting procedures to defer incurred capacity costs not recovered from CRES providers during the ESP period up to the cost of \$188.88/MW-day in the ESP II proceeding, and (3) stated that it would “establish an appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the [ESP II Case] proceeding.” Capacity Order at 23. In applications for rehearing of the Capacity Order, OCC and other parties made a number of arguments regarding the mechanics of the deferral recovery mechanism to be established in the ESP II case and the potential negative consequences that they believed the deferral authorization would cause. *See*

¹⁰ Case No. 11-346-EL-SSO, *et al.* hereinafter is referred to as the “ESP II Case.”

Oct. 17 Entry on Rehearing at 44-50. The Commission denied those requests for rehearing, finding that the arguments “were prematurely raised in this case.” *Id.* at 51. It explained:

The [July 2, 2012] Capacity Order did not address the deferral recovery mechanism. Rather, the Commission merely noted that an appropriate recovery mechanism would be established in the [ESP II] Case and that any other financial considerations would also be addressed by the Commission in that case. The Commission finds it unnecessary to address arguments that were raised in this proceeding merely as an attempt to anticipate the Commission’s decision in the [ESP II] Case.

Id.

In its application for rehearing of the October 17 Entry on Rehearing, OCC claims that it was unreasonable and unlawful for the Commission to decline to address OCC’s arguments regarding the deferral of AEP Ohio’s capacity costs that are not collected from CRES provider billings. (OCC App. for Rehearing at 10-16.) Specifically, OCC contends that the Commission’s failure to “substantively address” those arguments in its October 17 Entry on Rehearing violates R.C. 4903.09 and improperly prevents OCC from timely filing an appeal on the issue to the Ohio Supreme Court. (*Id.* at 14-15.)

OCC (as well as AEP Ohio) has already argued that the Commission’s decision to address the issue of recovery of the deferral in the ESP II Case, rather than as a part of this proceeding, was unreasonable and unlawful. *See* Oct. 17 Entry on Rehearing at 51. And the Commission has already rejected that argument, finding that its decision to address the recovery mechanism for the deferral in the ESP II Case in order to “effectively consider how the deferral recovery mechanism would fit within the mechanics of AEP-Ohio’s ESP” was within its broad discretion to manage its dockets. *Id.* at 53-54. Accordingly, the Commission has already determined that OCC’s complaints regarding the creation of the deferral and the deferral’s recovery are more appropriate for consideration in the ESP II Case – the case in which they were

authorized. Because the Commission has already considered OCC's position on this issue, rehearing on this issue is unnecessary.

Moreover, the Commission did not change retail rates in this proceeding and OCC has no harm resulting from the decision. The ESP II docket is where the Commission adopted the Rate Stability Rider (RSR), in part to compensate AEP Ohio for the capacity deferral authorized in the 10-2929 docket. Accordingly, the Commission is correct in rejecting OCC's substantive arguments as being premature and unnecessary to further address in this docket.¹¹

E. IEU's arguments regarding the Commission's jurisdiction to regulate a State Compensation Mechanism for capacity service furnished to CRES providers are meritless.

IEU also contends (at 17-19) that the Commission may not rely on its general supervisory powers granted by Sections 4905.04, 4905.05, and 4905.06, or upon Section 4905.26, Revised Code, to regulate a state compensation mechanism for capacity service provided to CRES providers. Based upon the definition of an "electric light company" in Section 4905.03(A)(3), Revised Code, IEU argues that the Commission's jurisdiction under those provisions is limited to regulation of retail electric services. Because capacity service involves a wholesale transaction, IEU concludes that the Commission may not regulate in any fashion a state compensation mechanism for capacity service. IEU's arguments on rehearing are not persuasive.¹²

¹¹ OCC (at 13) cites *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384 (2006), for the proposition that the Supreme Court has recognized that accounting orders can cause harm. That holding, however, does not support OCC's conclusion that the accounting order in this case caused harm to residential customers. The Commission's decision authorizing recovery of the capacity deferral was in the ESP II case, not in this docket.

¹² AEP Ohio notes that it has maintained jurisdictional challenges to the Commission's jurisdiction in this case (including in its own application for rehearing), to the extent that the exercise of jurisdiction to establish a State Compensation Mechanism conflicts with federal law. While AEP Ohio continues to reserve the ability to pursue that jurisdictional question based on federal law, the distinct issue being raised by IEU in this regard is based on Ohio law.

First, they are directly in conflict with and refuted by IEU's own prior arguments in this case. Specifically, in a January 14, 2011 filing it made in this proceeding, IEU argued at length that the Commission does have jurisdiction to establish rates providing for capacity cost recovery. (*See* IEU Mem, Contra App. for Rehearing at 5-10 (Jan. 14, 2011).) Indeed, in that filing IEU characterized the proposition that the Commission lacks jurisdiction to set rates for capacity compensation as "fundamentally defective." (*Id.* at 5.) IEU noted that the Commission previously has rejected the argument that a specific grant of authority is required before it can make a determination that has significance for purposes of implementing a requirement approved by FERC. (*Id.* at 8.)

Specifically, IEU noted that in AEP Ohio's first ESP proceeding, Case No. 08-917 and 08-918-EL-SSO, AEP Ohio asked the Commission to approve a provision that would block retail customers from participating in PJM's demand response programs. One of the parties in that ESP proceeding argued that 18 CFR Section 35.28(g) prohibited the Commission from granting AEP Ohio's request, based on the following text:

Each Commission-approved independent system operator and regional transmission organization must permit a qualified aggregator of retail customers to bid demand response on behalf of retail customers directly into the Commission-approved independent system operator's or regional transmission organization's organized markets, unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate.

The Commission rejected the notion that it lacked jurisdiction because the General Assembly had not delegated specific authority to do so, responding as follows:

The Commission finds that the General Assembly has vested the Commission with broad authority to address the rate, charges, and service issues of Ohio's public utilities as evidenced in Title 49 of the Revised Code. Accordingly, we consider this Commission the entity to which the FERC was referring in the Final Rule when it

referred to the ‘relevant electric retail regulatory authority.’ We are not convinced . . . that a specific act of the General Assembly is necessary to grant the Commission authority to determine whether or not Ohio’s retail customers are permitted to participate in the RTO’s demand response programs.

Case No. 08-917-EL-SSO, *et al.*, Opinion and Order, at 57-58 (Mar. 18, 2009).

IEU contended in its January 14, 2011 filing in this case that the same logic applies to, and confirms, the Commission’s authority to establish rates for capacity, pursuant to the State compensation mechanism option that the FERC approved pursuant to Section D.8 of Schedule 8.1 of the PJM Reliability Assurance Agreement. IEU’s arguments in its second application for rehearing of the July 2, 2012, Opinion and Order, that the Commission does not have authority to establish rates for capacity that AEP Ohio furnishes to CRES providers, as part of a state compensation mechanism, are without merit and IEU should be estopped from making those arguments in light of the contrary positions it previously advanced in this case.

Second, IEU’s arguments are based on an over-reaching and inappropriately restrictive interpretation of the statutory provisions that it cites in support of its revised, self-contradicting, position concerning the Commission’s jurisdiction. Specifically, the characteristics of an entity that determine *whether* it is a public utility subject to the Commission’s jurisdiction do not also necessarily establish the *extent* of or *limitations* on the Commission’s jurisdiction over the entity’s activities. Rather, the extent and limitations of the Commission’s jurisdiction are a separate matter. As has already been established above, Supreme Court caselaw demonstrates that the Commission’s authority under R.C. 4905.26 is extremely broad and can encompass wholesale utility rates in Ohio.

IEU’s position also ignores that retail ratemaking often involves a determination by the Commission – either directly or indirectly – regarding allocation of non-jurisdictional costs or

imputation of non-jurisdictional revenues. For example, in a traditional rate case, the Commission routinely allocates FERC-jurisdictional investment and expense out of the ratemaking formula and excludes wholesale revenues. The retail rates established in a traditional rate case are based on the “residual” investment and expense after the jurisdictional allocation is performed.¹³ This approach is similar to the approach taken with respect to capacity costs. While the net effect of the Commission’s Capacity Order is to leave wholesale capacity charges in place based on RPM pricing, the decision in the ESP II Case was to establish retail rates based on the residual impact on AEP Ohio of RPM pricing when taking into account the financial impact on the Company of providing RPM-based capacity service. Though IEU challenges the Commission’s jurisdiction in this case, its true complaint (and the only one it has standing to address as a retail customer representative) is regarding the RSR – but that is a matter for the ESP II case.

¹³ Another example of such hybrid federal-state regulatory team work is pole attachment rates, which are wholesale rates charged among utilities for placing wires and equipment on poles (and into conduits) owned by another utility. Pole attachment rates are established by the Commission using a federally-approved formula. To the extent the wholesale pole attachment rates do not cover the utility’s costs, the remaining costs are recovered from retail ratepayers through base rates. Another example is wholesale power sales, often referred to by AEP Ohio as off-system sales. Again, the level of retail rates is routinely affected by the allocation or imputation of wholesale sales costs/revenues. These examples support the Commission’s approach in establishing the RSR as part of the ESP II case, separate and apart from the ESP statute and record bases supporting the RSR.

III. CONCLUSION

For the reasons set forth above, the Commission should deny FES's, IEU's, and OCC's applications for rehearing of the October 17, 2012 Entry on Rehearing.

Respectfully submitted,

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On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra of Ohio Power Company to Industrial Energy Users – Ohio's and FirstEnergy Solutions Corp's November 16, 2012 Application for Rehearing and The Office Of The Ohio Consumers' Counsel's November 17, 2012 Application for Rehearing* was served by electronic mail upon counsel for all other parties of record in this case on this 26th day of November, 2012.

//s/ Steven T. Nourse

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Summary: Memorandum Contra Application for Rehearing electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company