

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company to Adopt a)	Case No. 14-1186-EL-RDR
Final Implementation Plan for the)	
Retail Stability Rider)	

**INDUSTRIAL ENERGY USERS-OHIO'S
MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT**

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MOTION TO DISMISS**

In accordance with Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") hereby moves the Public Utilities Commission of Ohio ("Commission") to dismiss the application filed by Ohio Power Company ("AEP-Ohio") in the above-captioned proceeding on July 8, 2014 (the "Capacity Shopping Tax Application") because the Commission does not have jurisdiction under state law and is preempted under federal law from approving the application. The grounds for this Motion to Dismiss are set forth in more detail in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In two orders issued in 2012, the Commission invented and applied a cost-based ratemaking methodology to set a unique price of \$188.88/megawatt-day (“MW-day”) for wholesale capacity service (“Capacity Service”) associated with the shopping load in AEP-Ohio’s service area served by competitive retail electric service (“CRES”) providers. The Commission ordered that AEP-Ohio charge CRES providers the market-based price set by PJM Interconnection, LLC’s (“PJM”) Reliability Pricing Model (“RPM,” “RPM-Based Pricing,” or “RPM-Based Price,” as appropriate) for Capacity Service. The Commission further directed AEP-Ohio to modify its accounting practices so as to defer the difference between \$188.88/MW-day and the market-based price (“Capacity Shopping Tax”) as a regulatory asset and to apply \$1/megawatt-hour (“MWh”) of the Retail Stability Rider (“RSR”) to the regulatory asset. According to its Capacity Shopping Tax Application, AEP-Ohio expects that the regulatory asset will have a value of \$445 million by June 1, 2015 when the RSR terminates.¹

On July 8, 2014, AEP-Ohio filed the Capacity Shopping Tax Application seeking authorization for a new non-bypassable RSR set at a rate of \$4/MWh (“Capacity Shopping Tax Rider”). AEP-Ohio proposes to use the revenue collected through the

¹ Capacity Shopping Tax Application at Exhibit A.

Capacity Shopping Tax Rider to amortize the \$445 million regulatory asset over 32 months.

As discussed below, the Commission lacks jurisdiction under state law and is preempted by federal law from approving the relief sought in the Capacity Shopping Tax Application. Because the Commission is without authority to approve the requested relief, the Commission should grant this Motion to Dismiss.

I. BACKGROUND

The genesis of the unlawful Capacity Shopping Tax began when AEP-Ohio filed an application with the Federal Energy Regulatory Commission (“FERC”) in November 2010.² Through this application at FERC, AEP-Ohio sought to displace the market-based pricing for Capacity Service established by RPM-Based Pricing.³ 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.⁴ 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

² The application at FERC was filed by AEP 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 Aug. 19, 2014) (hereinafter “*Section 205 Case*”).

³ *Id.*

⁴ *Id.*

mechanism.⁵ 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.⁶

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 Sections 4905.04, 4905.05, and 4905.06, Revised Code.⁷ On rehearing, the Commission held that Section 4905.26, Revised Code, also provided the Commission jurisdiction.⁸ After finding it had jurisdiction to regulate Capacity Service, the Commission invented and applied cost-based ratemaking methodology to set AEP-Ohio's capacity-related compensation at a level significantly greater than the RPM-Based Price.⁹ The Commission also found that its exercise of jurisdiction under these sections was consistent with the cost-based ratemaking formula found in Chapter 4909, Revised Code, and consistent with PJM's Reliability Assurance Agreement ("RAA").¹⁰

Using an invented cost-based ratemaking methodology, the Commission found AEP-Ohio's "cost" of capacity was \$188.88/MW-day.¹¹ Although the record

⁵ *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, Entry at 2 (Dec. 8, 2010) (hereinafter "*Capacity Case*").

⁶ *Capacity Case*, Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 3, 18-21 (Jan. 7, 2011); *Section 205 Case*, Request for Rehearing of AEPSC at 13-14 (Feb. 22, 2011), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12569314> (last accessed Aug. 19, 2014).

⁷ *Capacity Case*, Opinion and Order at 12 (July 2, 2012) (hereinafter "*Capacity Order*").

⁸ *Capacity Case*, Entry on Rehearing at 9-10 (Oct. 17, 2012).

⁹ *Id.*

¹⁰ *Capacity Order* at 13.

¹¹ *Id.* at 36.

demonstrated that the assumptions embedded in AEP-Ohio's \$355.72/MW-day formula rate were complete fiction, the Commission nonetheless relied upon AEP-Ohio's claimed cost of capacity as a starting point for its invented ratemaking methodology.¹² The Commission then adopted several of the Commission Staff's ("Staff") recommended adjustments to AEP-Ohio's \$355.72/MW-day rate, which reduced AEP-Ohio's price of capacity to \$188.88/MW-day.¹³

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 Section 4905.13, Revised Code, 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.¹⁴ The Commission then held it would establish a mechanism for the collection of the portion of the \$188.88/MW-day not collected from CRES providers in AEP-Ohio's pending *ESP II Case*.¹⁵

In the *ESP II Case*, the Commission authorized the non-bypassable RSR set at a rate of \$3.50/MWh through May 2014, and \$4/MWh for the period of June 2014 through May 2015.¹⁶ The Commission directed AEP-Ohio to credit \$1/MWh of the revenue collected through the non-bypassable RSR rates against the deferred Capacity

¹² *Id.* at 33 ("Staff followed its traditional process of making reasonable adjustments to AEP-Ohio's proposed capacity pricing mechanism.").

¹³ *Id.* at 33-35 (the Commission accepted some of Staff's recommended adjustments to AEP-Ohio's proposed rate and rejected several others).

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 23-24. *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).

¹⁶ *ESP II Order* at 25.

Shopping Tax.¹⁷ 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.”¹⁸

Having secured a substantial increase in the price of Capacity Service, AEP-Ohio now takes the position that the Commission is authorized to invent and apply a cost-based ratemaking methodology to uniquely increase its compensation for Capacity Service. Before the Ohio Supreme Court, for example, it has stated “[t]he Commission properly exercised its broad authority under R.C. 4905.26 to investigate and modify the wholesale capacity rate.”¹⁹

AEP-Ohio’s prior position before the Commission and FERC, however, indicates that it also recognizes that the Commission is without jurisdiction under state and federal law to invent and apply a cost-based ratemaking methodology to uniquely increase its compensation for Capacity Service. Before the Commission, AEP-Ohio argued that the Commission lacked jurisdiction under state and federal law to regulate Capacity Service.²⁰ At FERC, AEPSC argued on behalf of AEP-Ohio, that Capacity Service “is a wholesale transaction that falls within the exclusive wholesale ratemaking jurisdiction of [FERC].”²¹

¹⁷ *Id.*

¹⁸ *Id.* at 36.

¹⁹ *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Supreme Court Case No. 2013-0228, *et al.*, Second Merit Brief of AEP-Ohio at 1 (Sept. 23, 2013), available at: http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=734101.pdf (last accessed Aug. 19, 2014) (hereinafter “*Capacity Appeal*”).

²⁰ *Capacity Case*, AEP-Ohio’s Application for Rehearing at 3, 18-21 (Jan. 7, 2011).

²¹ *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 Aug. 19, 2014); *Section 205 Application*, Request for Rehearing of AEPSC at 13-14 (Feb. 22, 2011),

Although AEP-Ohio has taken inconsistent positions before this Commission and FERC, it has filed the Capacity Shopping Tax Application seeking authorization to collect an additional \$445 million, the unamortized balance of the unlawful Capacity Shopping Tax. AEP-Ohio argues the Commission has authority to authorize the Capacity Shopping Tax Application based upon the Capacity Order, the ESP II Order, and Section 4928.144, Revised Code.²² As discussed below (as well as in IEU-Ohio's briefs in the *Capacity Case* and *ESP II Case*), the Commission lacks jurisdiction to regulate Capacity Service, lacked jurisdiction to issue the Capacity Order and ESP II Order (as the latter order pertained to Capacity Service), and lacks jurisdiction to authorize a non-bypassable phase-in rider under Section 4928.144, Revised Code, to collect the Capacity Shopping Tax. Because the Commission is without jurisdiction to regulate Capacity Service or authorize a non-bypassable phase-in rider under Section 4928.144, Revised Code, to collect the Capacity Shopping Tax, the Commission lacks authority to approve the Capacity Shopping Tax Application and should therefore grant IEU-Ohio's Motion to Dismiss.

II. ARGUMENT

A. The Commission lacks jurisdiction under Chapters 4905, 4909, and 4928, Revised Code, to regulate Capacity Service and therefore lacks jurisdiction to approve AEP-Ohio's Capacity Shopping Tax Application

The Commission's jurisdiction over electric services under Chapters 4905, 4909, and 4928, Revised Code, extends to only overseeing public utilities that are "supplying electricity to consumers," *i.e.*, providing a retail electric service. Because the

available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12569314> (last accessed Aug. 19, 2014).

²² Capacity Shopping Tax Application at 1-3.

Commission has no jurisdiction over wholesale electric services, such as Capacity Service, the Commission lacks jurisdiction to approve the Capacity Shopping Tax Application and should therefore dismiss it.

Chapters 4905, 4909, and 4928, Revised Code, apply to public utilities as that term is defined in Sections 4905.02 and 4905.03, Revised Code. Section 4905.02, Revised Code, 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.” Section 4905.03, Revised Code, then provides a list of the types of public utilities, including an electric light company, subject to the Commission’s jurisdiction under Chapter 4905, Revised Code:

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.” Section 4905.03(C), Revised Code, also exempts regional transmission organizations (“RTOs”), such as PJM, from the definition of an electric light company. Additionally, Section 4928.02(A)(6) & (7), Revised Code, extends the definition (and jurisdictional limitations) of electric light companies to electric distribution utilities (“EDUs”) and the entirety of Chapter 4928, Revised Code. Thus and by definition, Chapters 4905, 4909, and 4928, Revised Code, do not apply to wholesale electric services.

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

[i]n this case, the electric service in question (*i.e.*, capacity service) is provided by AEP-Ohio for CRES providers, with CRES providers compensating the Company in return for its [Fixed Resource Requirement (“FRR”)] capacity obligations. Such capacity service is not provided directly by AEP-Ohio to retail customers. Although the capacity service benefits shopping customers in due course, they are initially one step removed from the transaction, which is more appropriately characterized as an intrastate wholesale matter between AEP-Ohio and each CRES provider operating in the Company’s service territory.²³

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 Chapter 4928, Revised Code, 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.²⁴

Before it secured above-market compensation for Capacity Service through the Commission’s orders, AEP-Ohio and AEPSC, arguing on behalf of AEP-Ohio, also agreed that the Commission lacks jurisdiction under Ohio law to regulate Capacity Service. 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.*”²⁵ AEPSC

²³ Capacity Order at 13 (internal citations omitted).

²⁴ *Capacity Case*, Entry on Rehearing at 19-20 (Oct. 17, 2012).

²⁵ *Capacity Case*, Ohio Power Company’s and Columbus Southern Power Company’s Application for Rehearing at 3, 18-21 (Jan. 7, 2011) (emphasis added).

argued to FERC that Capacity Service “is a wholesale transaction that falls within the exclusive wholesale ratemaking jurisdiction of [FERC].”²⁶

Through the Capacity Shopping Tax Application, however, AEP-Ohio requests authority to collect the remainder of the Capacity Shopping Tax. As the Commission found, however, the above-market compensation that comprises the Capacity Shopping Tax is for a wholesale generation-related electric service, Capacity Service. Because Chapters 4905, 4909, and 4928, Revised Code, apply to only retail electric services, the Commission lacks jurisdiction to authorize the requested Capacity Shopper Tax Rider to bill and collect revenue for a wholesale service provided by AEP-Ohio. Therefore, the Commission must dismiss the Capacity Shopping Tax Application.

B. If Capacity Service is a retail electric service, it would be a competitive retail electric service and the Commission would lack jurisdiction to approve the Capacity Shopping Tax Application

Because Capacity Service is a wholesale service, the Commission lacks jurisdiction to invent and apply a cost-based ratemaking methodology to uniquely increase AEP-Ohio’s compensation for it. However, even if Capacity Service is incorrectly deemed a retail electric service, the Commission would still lack the jurisdiction to approve the Capacity Shopping Tax Application.

²⁶ *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 Aug. 19, 2014).

1. **Ohio law declares the entire generation service component competitive and limits the Commission's price setting authority over competitive services to Sections 4928.141 to 4928.144, Revised Code. AEP-Ohio did not invoke and the Commission did not authorize the Capacity Shopping Tax in accordance with the Commission's limited authority over a competitive retail electric service. Therefore, AEP-Ohio's attempt to secure approval of additional compensation is not within the authority the Commission may lawfully exercise**

Section 4928.01(A)(27), Revised Code, 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. (Emphasis added.)

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.²⁷ (Emphasis added.)

Section 4928.05(A)(1), Revised Code, provides that the Commission's jurisdiction over the price of competitive retail electric services is limited to Chapter 4928, Revised Code, specifically Sections 4928.141 to 4928.144, Revised Code.²⁸ Section 4928.05(A)(2),

²⁷ Section 4928.03, Revised Code. The definition of "retail electric service" (in combination with the balance of Chapter 4928, Revised Code) also makes it clear that a service component or function is either competitive or non-competitive. Because non-competitive service components are defined to be everything except competitive service components or functions, a service component must be either competitive or non-competitive.

²⁸ 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: Section 4905.10, Revised

Revised Code, provides that non-competitive services remain subject to Commission jurisdiction under Chapters 4901 to 4909, 4933, 4935, and 4963, Revised Code.

The record in the *Capacity Case* makes it clear that 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.²⁹ Finally, the Commission has also conceded that Capacity Service is part of the generation service function: "[t]he Commission does not dispute that capacity is a component of generation necessary to provide competitive retail electric service to customers."³⁰ 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*.³¹

Code (regarding the funding of the Commission); Section 4905.31, Revised Code (allowing the Commission to establish reasonable arrangements between utilities or between a utility and a customer); Section 4905.33(B), Revised Code (prohibiting charging different rates for providing a like and contemporaneous service under substantially the same circumstances and conditions); Section 4905.35, Revised Code (prohibiting discrimination); Sections 4933.81 to 4933.90, Revised Code (addressing utility and municipality territorial issues); and Sections 4905.06, 4935.03, 4963.40, and 4963.41, Revised Code, but "only to the extent related to service reliability and public safety."

²⁹ 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.

³⁰ *Capacity Appeal*, 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 Aug. 19, 2014).

³¹ Section 4928.05(A)(1), Revised Code. 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.

The Commission agrees that it cannot regulate any competitive retail electric service (including retail electric generation service) except as provided in Chapter 4928, Revised Code. 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 49028.144, Revised Code.³²

The Commission also argued to the Court that it cannot regulate "a utility's competitive activities" under Sections 4905.04, 4905.05, and 4905.06, Revised Code.³³

In the *Capacity Case*, the Commission recognized that it could not establish a price for Capacity Service under Chapter 4928, Revised Code, because the service was not a retail service. Instead, it claimed it had authority to establish a price for Capacity Service under Sections 4905.04, 4905.05, 4905.06, 4905.13 and 4905.26, Revised Code, and concluded (incorrectly) that its invented and applied cost-based ratemaking methodology was consistent with Chapter 4909, Revised Code, and the RAA.³⁴ As noted above, however, the Commission's authority does not extend to a generation-related service except as provided by Sections 4928.141 to 4928.143, Revised Code. Thus, its claim that it can invent and apply a cost based ratemaking methodology under Sections 4905.04, 4905.05, 4905.06 and 4905.26, Revised Code, is unsupported. Because generation-related services have been declared competitive, the Commission

³² *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) (hereinafter "*Sporn Case*" or "*Sporn Order*" as appropriate).

³³ *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*, 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 Aug. 19, 2014).

³⁴ Capacity Order at 13, 22.

has no authority under Sections 4905.04, 4905.05, 4905.06 and 4905.26, Revised Code, to establish a price for that service.

Because the Commission lacks jurisdiction to act under Sections 4905.04, 4905.05, 4905.06 and 4905.26, Revised Code, to establish a price for a generation-related service, it was without jurisdiction in the *Capacity Case* to establish the \$188.88/MW-day price for Capacity Service or authorize accounting changes that permitted AEP-Ohio to establish a deferred asset for the amounts not collected from CRES providers. Through this Capacity Shopping Tax Application, AEP-Ohio is seeking to collect the unlawful Capacity Shopping Tax remaining at the end of the current electric security plan (“ESP”). Because the relief AEP-Ohio is seeking in this Capacity Shopping Tax Application rests on the same illegal orders that produced the Capacity Shopping Tax, the Commission again lacks authority to authorize a new charge to amortize the \$445 million that AEP-Ohio is seeking.

2. Because the \$188.88/MW-day price was not established under Sections 4928.141 to 4928.143, Revised Code, the Commission lacked and lacks jurisdiction to authorize a non-bypassable phase-in rider under Section 4928.144, Revised Code, to collect the remainder of the deferred Capacity Shopping Tax

In the *Capacity Case*, the Commission invented and applied a cost-based ratemaking methodology to uniquely increase AEP-Ohio’s compensation for Capacity Service provided to CRES providers to \$188.88/MW-day. As its jurisdiction to authorize this price, the Commission cited its authority in Sections 4905.04, 4905.05, 4905.06 and 4905.26, Revised Code.³⁵ Additionally, it authorized AEP-Ohio to collect only the RPM-Based Price for Capacity Service from CRES providers and directed AEP-Ohio to adopt accounting changes to defer the Capacity Shopping Tax. In the *ESP II Case*, the

³⁵ Capacity Order at 12, 22.

Commission authorized the RSR under Section 4928.143(B)(2)(d), Revised Code, and directed AEP-Ohio to apply a portion of the revenue collected under the RSR against the Capacity Shopping Tax.³⁶ Any unrecovered deferred amount of the Capacity Shopping Tax would “be amortized over a three year period unless otherwise ordered by the Commission.”³⁷ According to the Commission, Section 4928.144 authorized the deferral and the non-bypassable recovery of the Capacity Shopping Tax.³⁸ The Commission, however, lacked jurisdiction in the *ESP II Case* to authorize a non-bypassable rider under Section 4928.144, Revised Code, to collect the remainder of the Capacity Shopping Tax. For the same reasons, the Commission lacks jurisdiction in this case to authorize the Capacity Shopping Tax Rider.

By its terms Section 4928.144, Revised Code, applies to only a “phase-in of any electric distribution utility rate or price established under *sections 4928.141 to 4928.143 of the Revised Code.*” (Emphasis added.) As discussed above, the Commission authorized the \$188.88/MW-day price and the Capacity Shopping Tax under Chapter 4905, Revised Code. Accordingly, Section 4928.144, Revised Code, did not provide the Commission with any jurisdiction to authorize deferral of the Capacity Shopping Tax or a non-bypassable rider to collect it either during the term of the ESP II or subsequently as requested in the Capacity Shopping Tax Application.

In sum, the Commission lacks jurisdiction to approve the Capacity Shopping Tax Application because Ohio law does not provide the Commission with any jurisdiction to regulate wholesale electric services, does not provide the Commission with jurisdiction to regulate competitive retail electric services under Chapter 4905, Revised Code, and

³⁶ ESP II Order at 31, 36.

³⁷ *Id.* at 36.

³⁸ *Id.* at 52.

does not provide the Commission with jurisdiction to authorize a phase-in of a rate authorized under Chapter 4905, Revised Code, pursuant to Section 4928.144, Revised Code. Because the Commission lacked jurisdiction to authorize the \$188.88/MW-day price for Capacity Service and lacks jurisdiction to approve the Capacity Shopping Tax Application, the Commission should grant the Motion to Dismiss.

C. Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, do not provide the Commission with jurisdiction to invent its own ratemaking methodology to increase AEP-Ohio's compensation for Capacity Service

As discussed above, Chapter 4905, Revised Code, does not provide the Commission with jurisdiction over wholesale services. Additionally, Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, do not provide the Commission with any authority to invent and apply its own cost-based ratemaking methodology. Because these Sections do not provide the Commission with any independent ratemaking authority, they could not serve as a jurisdictional basis in the *Capacity Case* or *ESP II Case*, and cannot serve as a jurisdictional basis in this case for the Commission to approve the Capacity Shopping Tax Application.

The Commission has identified four provisions as the statutory basis for its jurisdiction to authorize the Capacity Shopping Tax: Sections 4905.04, 4905.05, and 4905.06, and 4905.26, Revised Code. The first three provide the Commission with general supervisory jurisdiction over public utilities. Section 4905.26, Revised Code, governs complaint cases and Commission investigations and provides the Commission with authority to determine whether existing rates may be unjust, unreasonable, unjustly discriminatory, or in violation of law.

By their terms, Sections 4905.04, 4905.05, and 4905.06, Revised Code, do not provide the Commission with any specific ratemaking authority. As the Court has

previously held, “R.C. Chapter 4905 governs the commission’s general power to regulate public utilities, while R.C. Chapter 4909 governs the commission’s power to set utility rates and charges.”³⁹ The Court has also held that the Commission cannot bypass the specific ratemaking formulas contained elsewhere in Ohio law by relying on its general supervisory jurisdiction.⁴⁰

Section 4905.26, Revised Code, also does not give the Commission unconstrained rate setting authority. While the Commission may establish new rates in a complaint case initiated under Section 4905.26, Revised Code, its authority to establish rates in a complaint case is constrained by its ratemaking authority found elsewhere in Ohio law.⁴¹ “[T]he General Assembly did not intend the complaint *procedure* of R.C. 4905.26” to be utilized to upset the substantive statutes in Chapter 4909, Revised Code, that among other things requires “a public utility [to] charge its consumers in accordance with the commission-approved rate schedule.”⁴² Thus the determination of whether an existing rate is unjust or unreasonable must be done by reference to the ratemaking formula enacted by the General Assembly. And as discussed herein, the Commission’s entire ratemaking authority is found in Chapter 4928, Revised Code, for competitive retail electric services and in Chapter 4909, Revised Code, for non-competitive retail electric services.

In sum, Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, do not apply to wholesale electric services and do not provide the Commission with

³⁹ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 28.

⁴⁰ *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540 (1993).

⁴¹ See, e.g., *Consumers’ Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706 ¶¶ 29, 32; *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347-49 (1997) (“Pursuant to R.C. 4905.26 and 4909.15(D), the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable.”); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979).

⁴² *Lucas Cty.*, 80 Ohio St.3d at 347 (emphasis added).

independent ratemaking authority. Therefore, the Commission could not rely on its general supervisory jurisdiction to authorize the Capacity Shopping Tax and cannot rely on its general supervisory jurisdiction to approve the Capacity Shopping Tax Application.

D. The RAA does not provide the Commission with jurisdiction to approve the Capacity Shopping Tax Application

The RAA does not provide the Commission with jurisdiction under Ohio law to authorize the Capacity Shopping Tax Application. The Commission's subject matter jurisdiction is set by the General Assembly.⁴³ 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 must dismiss the Capacity Shopping Tax Application.

If a state has lawfully established a state compensation mechanism, the RAA provides that the pricing under that mechanism shall control the compensation that an FRR Entity is entitled to receive from CRES providers serving shopping customers in the FRR Service Area.⁴⁴ 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."⁴⁵ An alternative retail load serving entity ("LSE") is referred to as a CRES

⁴³ *City of Washington v. Pub. Util. Comm.*, 99 Ohio St.70, 72 (1918).

⁴⁴ *Capacity Case*, FES Ex. 110A at 127. The current version of the RAA is available at the following link: <http://pjm.com/~media/documents/agreements/raa.ashx> (last accessed Aug. 19, 2014).

⁴⁵ *Id.*

provider under Ohio law. This plain language does not grant any state jurisdiction to regulate Capacity Service.⁴⁶

Furthermore, the increased compensation AEP-Ohio is seeking through the Capacity Shopping Tax Application is not authorized by the RAA. The default compensation under the RAA for Capacity Service is RPM-Based Pricing. That compensation remains in place unless and until a new lawful compensation level is authorized under the RAA. Following the Commission's orders in the *Capacity Case* and *ESP II Case*, AEP-Ohio made a filing at FERC requesting that FERC approve an appendix to the RAA.⁴⁷ The FERC-approved appendix to the RAA confirms that AEP-Ohio's compensation for Capacity Service is limited to the RPM-Based Price.⁴⁸

⁴⁶ 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); Tr. Vol. VI at 1346-1349; 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.

⁴⁷ *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.*, FERC Docket ER13-1164, Order Accepting Appendix to Reliability Assurance Agreement Subject to Compliance Filing at 1 (May 23, 2013), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13265974> (last accessed Aug. 19, 2014).

⁴⁸ *Id.* at 6; RAA at 137, available at: <http://pjm.com/~media/documents/agreements/raa.ashx> (last accessed Aug. 19, 2014).

Accordingly, the RAA standing alone does not (and as discussed below, 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, the Commission must dismiss the Capacity Shopping Tax Application.

E. The Commission lacks jurisdiction to authorize a rate for a non-competitive retail electric service without following the procedural and substantive requirements of Chapter 4909, Revised Code

In the *Capacity Case*, the Commission applied a cost-based ratemaking methodology as if Capacity Service was a non-competitive electric generation service. If Capacity Service were a non-competitive electric service, the Commission's only authority to establish a rate or price for a non-competitive electric service is found in Chapter 4909, Revised Code.⁴⁹ The Commission, however, failed to comply with the detailed substantive and procedural requirements necessary to invoke its jurisdiction to authorize an increase in rates under this Chapter. If Chapter 4909, Revised Code, is relevant to Capacity Service, the Commission lacks jurisdiction to approve the Capacity Shopping Tax Application because the Commission has not yet complied with these jurisdictional requirements.

To secure an increase in rates under Chapter 4909, Revised Code, a notice of intent must be filed and properly served on various parties, followed by an application at least 30 days later that contains extensive details, which must be certified by proper

⁴⁹ In its Merit Brief in the appeal of the *Capacity Case*, the Commission argued that Capacity Service was a non-competitive 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 Aug. 19, 2014)..

personnel at the utility company.⁵⁰ Once the EDU has filed a proper application with all the appropriate information with the Commission, the Staff at the Commission 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.⁵¹ Interested parties that have intervened in the Commission proceeding are then afforded a statutory right to object to the Staff Report of Investigation.⁵²

AEP-Ohio did not attempt to satisfy, in any proceeding, any of the ratemaking requirements contained in Chapter 4909, Revised Code, 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 Chapter 4909, Revised Code. 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 Chapter 4909, Revised Code.

Therefore, even if Chapter 4909, Revised Code, could somehow be made relevant to AEP-Ohio's desired 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. Despite the failure of both AEP-Ohio and the Commission to comply with the requirements of Chapter 4909, Revised Code, AEP-

⁵⁰ Sections 4909.43 & 4909.18, Revised Code; Rule 4901-7-01, O.A.C. These details include a description of its property used and useful in rendering service to the public as laid out in Section 4909.05, Revised Code. It also must include a list of current and proposed rate schedules the public utility seeks to establish. 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." Section 4909.18(B) – (D), Revised Code.

⁵¹ Section 4909.19(C), Revised Code.

⁵² *Id.*

Ohio now seeks to recover the remaining balance of the Capacity Shopping Tax it has not collected through the RSR. Because the Commission could not authorize the Capacity Shopping Tax under Chapter 4909, Revised Code, the Commission also lacks the authority to authorize the billing and collection of any remaining deferred portion of the Capacity Shopping Tax through approval of AEP-Ohio's Capacity Shopping Tax Application in this case.

F. The Commission lacks jurisdiction to authorize transition revenue or equivalent revenue

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 the compensation for Capacity Service available to AEP-Ohio and produces, in substance, an untimely and precluded opportunity for AEP-Ohio to collect, on a non-bypassable basis, generation plant-related transition revenue.⁵³ In this case, AEP-Ohio has again sought authorization to recover above-market compensation in excess of the market-based pricing required by PJM through the RPM auctions for Capacity Service. Simply stated, through the Capacity Shopping Tax Application, AEP-Ohio again seeks the authorization of transition revenue or its equivalent. Because the Commission lacks jurisdiction to authorize AEP-Ohio to collect transition revenue or its equivalent, the Commission should dismiss the Capacity Shopping Tax Application.

⁵³ *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); *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 II Order* at 32.

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.⁵⁴ As the record in the *Capacity Case* demonstrates, AEP-Ohio’s above-market compensation for Capacity Service is transition revenue or its equivalent.⁵⁵ Thus, the above-market Capacity Shopping Tax is transition revenue or its equivalent.

Section 4928.38, Revised Code, 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. Section 4928.141, Revised Code, 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. In this case, the Commission still lacks

⁵⁴ Section 4928.39, Revised Code.

⁵⁵ *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.

jurisdiction to authorize the Capacity Shopping Tax Rider because it would allow AEP-Ohio to collect transition revenue or its equivalent, and should therefore dismiss the Capacity Shopping Tax Application.

AEP-Ohio's application in this case also is precluded by the binding settlement agreement approved by the Commission in the ETP cases of Ohio Power Company and Columbus Southern Power Company. In that settlement agreement approved by the Commission in 2000, 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.⁵⁶ The 2000 settlement agreement was subsequently incorporated in the rate plan approved by the Commission that preceded the plan adopted in the *ESP I Case*.⁵⁷ 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 generation capacity service through non-bypassable charges.

G. The Federal Power Act preempts the Commission from authorizing the Capacity Shopping Tax Application

In addition to being barred by Ohio law, the relief sought by AEP-Ohio in the Capacity Shopping Tax Application also is preempted by federal law. The Federal Power Act ("FPA") provides FERC with exclusive jurisdiction to regulate wholesale sales of electricity. Because the Capacity Shopping Tax Application would increase AEP-Ohio's compensation for wholesale Capacity Service, a field within the exclusive

⁵⁶ *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).

⁵⁷ *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).

jurisdiction of FERC, a Commission order authorizing the relief sought in the Capacity Shopping Tax Application would be preempted and void.

Under the Supremacy Clause of the United States Constitution, federal law is “the supreme Law of the Land.”⁵⁸ As the supreme law of the land, federal law can nullify or preempt state or local actions.⁵⁹ 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 the entire field of regulation.”⁶⁰

The preemptive effect of the FPA is implied.⁶¹ Under Section 201 of the FPA, Congress placed with FERC jurisdiction over “the sale of electric energy at wholesale in interstate commerce.”⁶² 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.”⁶³ 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.”⁶⁴ These wholesale rates include the prices for capacity and energy.⁶⁵ Accordingly, “it appears well accepted that Congress intended to use the FPA to give FERC exclusive

⁵⁸ U.S. Const. Art. VI, cl. 2.

⁵⁹ *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007).

⁶⁰ *La. Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 368 (1986).

⁶¹ *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992).

⁶² 16 U.S.C. § 824(b).

⁶³ *Miss. Power and Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988).

⁶⁴ *PPL Energy Plus, LLC v. Nazarian*, 2013 WL 5432346 *30 (D. Md. Sept. 30, 2013).

⁶⁵ *Id.*, citing *Miss. Indus. v. FERC*, 808 F.2d 1525, 1541 (D.C. Cir. 1987).

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.”⁶⁶

Two recent federal court decisions 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 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.⁶⁷

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.⁶⁸ As a result, the court held that the Maryland Commission’s order was preempted because the Maryland Commission was without authority to

⁶⁶ *Id.* at *31.

⁶⁷ *Id.* at *33-*34.

⁶⁸ *Id.* at *34.

establish the price for wholesale energy and capacity sales.⁶⁹ Based on its determination that FERC has exclusive authority in that field 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.⁷⁰ In the opinion affirming the decision of the district court, the Fourth Circuit Court of Appeals agreed that the Maryland Commission was preempted because the field of wholesale energy prices was exclusively within the jurisdiction of FERC.⁷¹

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 territories that benefit New Jersey.”⁷² The law authorized the New Jersey Board of Public Utilities to issue a standard offer capacity agreement and directed the state’s four EDUs to enter contracts with the generators to pay any difference between the RPM-Based Price and the development costs of the generators that the Board approved.⁷³ 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.⁷⁴ Based on its finding that the state

⁶⁹ *Id.* at *35.

⁷⁰ *Id.* at *42.

⁷¹ *PPL Energy Plus, LLC v. Nazarian*, Case No. 13-2419 slip op., 2014 WL 2445800 (4th Cir. 2014).

⁷² *PPL Energy Plus, LLC v. Hanna*, 2013 WL 5603896 at *19 (D. New Jersey October 11, 2013).

⁷³ *Id.* at *19.

⁷⁴ *Id.* at *35.

law was preempted, the federal court declared the statute under which the Board had authorized above-market payments to the generator “null and void.”⁷⁵

The preemptive effect of the FPA similarly precludes the Commission from asserting jurisdiction to authorize the recovery of the balance of the Capacity Shopping Tax requested by AEP-Ohio. As the Commission correctly noted in the *Capacity Case*, Capacity Service is a wholesale service.⁷⁶ The Commission’s orders inventing and applying a cost-based ratemaking methodology operate to increase the compensation of AEP-Ohio for the provision of Capacity Service to \$188.88/MW-day. Thus, it is clear that the Commission’s orders in the *Capacity Case* and *ESP II Case* authorize AEP-Ohio to secure capacity compensation in excess of the amounts authorized by FERC through its authorization of RPM. In the Capacity Shopping Tax Application, AEP-Ohio requests that the Commission issue an order that allows AEP-Ohio to continue to bill and collect additional revenue to recover its “cost” of capacity that exceeds the revenue it collects from PJM.⁷⁷

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 that AEP-Ohio agreed to. Because the Commission is preempted from increasing the compensation of AEP-Ohio for Capacity Service above FERC-approved prices, the Commission lacks jurisdiction to extend the RSR to collect the remainder of the Capacity Shopping Tax.

⁷⁵ *Id.* at *38.

⁷⁶ Capacity Order at 13.

⁷⁷ Capacity Shopping Tax Application at 1-5.

III. CONCLUSION

Accordingly, IEU-Ohio moves the Commission to grant IEU-Ohio's Motion to Dismiss the Capacity Shopping Tax Application because the Commission lacks jurisdiction to approve the application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Motion to Dismiss and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 19th day of August 2014, *via* electronic transmission.

/s/ Matthew R. Pritchard

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