

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INDUSTRIAL ENERGY USERS-OHIO'S
REPLY TO THE MEMORANDUM IN OPPOSITION TO THE MOTION TO
DISMISS OF OHIO POWER COMPANY**

Samuel C. Randazzo (Counsel of Record)
(Reg. No. 0016386)
Frank P. Darr (Reg. No. 0025469)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
(willing to accept service by e-mail)
fdarr@mwncmh.com
(willing to accept service by e-mail)
mpritchard@mwncmh.com
(willing to accept service by e-mail)

September 10, 2014

Attorneys for Industrial Energy Users-Ohio

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO AUTHORIZE THE CAPACITY SHOPPING TAX.....	3
III. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR THE COMMISSION FROM DISMISSING THE APPLICATION.....	5
IV. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO AUTHORIZE THE RELIEF REQUESTED BY AEP-OHIO.....	7
A. The Commission has no authority under R.C. Chapters 4905, 4909, or 4928 to increase AEP-Ohio's total compensation for wholesale generation-related service.....	7
B. R.C. 4928.142(B)(2)(d) and R.C. 4928.144 do not provide the Commission with subject matter jurisdiction to authorize recovery of the Capacity Shopping Tax.....	10
C. R.C. Chapters 4905 and 4909 and the Reliability Assurance Agreement do not provide the Commission subject matter jurisdiction to authorize recovery of the Capacity Shopping Tax.....	13
D. The Commission is without subject matter jurisdiction to authorize an increase in wholesale capacity revenue under R.C. Chapter 4909.....	17
E. The Commission lacks subject matter jurisdiction to authorize transition revenue or its equivalent.....	18
F. An order authorizing the recovery of additional Capacity Shopping Tax revenue is preempted by the Federal Power Act.....	20
V. CONCLUSION.....	21

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INDUSTRIAL ENERGY USERS-OHIO'S
REPLY TO THE MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS OF
OHIO POWER COMPANY**

I. INTRODUCTION

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

¹ Application at 1 n.1, citing *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC,, Opinion and Order (July 2, 2012) ("Capacity Order" or "Capacity Case" as appropriate) and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order (Aug. 8, 2012) (hereinafter "ESP II Case" or "ESP II Order" as appropriate).

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

On September 3, 2014, AEP-Ohio filed its Memorandum in Opposition to the Motion to Dismiss ("Memo Contra").² In its Memo Contra, AEP-Ohio seeks to recast the issues presented by its application as nothing more than an accounting exercise.³ In addition to its attempt to recharacterize the issues presented by its application, AEP-Ohio also advances two arguments in opposition to the Motion to Dismiss. First, it asserts that the Commission may not address the issues presented by the Motion to Dismiss because they were addressed by prior Commission orders.⁴ Second, it argues

² Ohio Power Company's Memorandum in Opposition to the Motion to Dismiss of Industrial Energy Users-Ohio (Sept. 3, 2014) ("Memo Contra").

³ *Id.* at 2 and 5.

⁴ *Id.* at 4-6.

that the Commission has subject matter jurisdiction to grant the request for relief.⁵ Neither argument has merit.⁶

II. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO AUTHORIZE THE CAPACITY SHOPPING TAX

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

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

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

⁵ *Id.* at 6-16.

⁶ See discussion below.

recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized.

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

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

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

Commission cannot authorize the recovery of the above-market portion of the wholesale price of Capacity Service the Commission unlawfully authorized.

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

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

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

III. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR THE COMMISSION FROM DISMISSING THE APPLICATION

⁷ The legal support for this outline of IEU-Ohio's Motion to Dismiss are fully detailed in the accompanying Memorandum in Support.

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

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

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

⁸ Memo Contra at 4-5.

⁹ *Id.* at 4-5.

¹⁰ *State v. Wilson*, 73 Ohio St.3d 40, 45 n.6 (1995).

¹¹ *Id.*; *Grimes v. Grimes*, 173 Ohio App.3d 537 (4th Dist. Ct. App. 2007); *D’Agnese v. Hollern*, 2004 WL 744610 (8th Dist. Ct. App. Apr. 8, 2004).

IV. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO AUTHORIZE THE RELIEF REQUESTED BY AEP-OHIO

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

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

As demonstrated in the Motion to Dismiss, R.C. Chapters 4905, 4909, and 4928, apply to public utilities as that term is defined in R.C. 4905.02 and 4905.03. Commission jurisdiction over an "electric light company," which also includes an electric distribution company,¹² extends to "[a]n electric light company, *when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state*, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory Commission."¹³ By definition, therefore, R.C. Chapters 4905, 4909, and 4928 do not extend the Commission's subject matter jurisdiction to wholesale electric services provided by electric light companies.¹⁴

¹² R.C. 4928.01(A)(6) & (7).

¹³ R.C. 4905.03(C) (emphasis added).

¹⁴ Motion to Dismiss at 7–10.

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

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

AEP-Ohio's admission that CRES providers are captive buyers does not provide the Commission any basis to assert subject matter jurisdiction in this matter.²⁰ Amended Substitute Senate Bill 3 ("SB 3") specifically declared generation services to

¹⁵ Memo Contra at 7.

¹⁶ Memo Contra at 9-10.

¹⁷ Each of the relevant statutory provisions limits the Commission's authority to the pricing of a retail service. See, R.C. 4905.02, R.C. 4905.03, R.C. 4909.01(A) & (B), and R.C. 4928.01(A)(6) & (7). Motion to Dismiss at 7-10.

¹⁸ See, e.g., Memo Contra at 9.

¹⁹ *United Fuel Gas Co. v. Pub. Util. Comm.*, 46 F. Supp. 309 (S.D. 1941).

²⁰ Memo Contra at 9-10. Notably, this was a claim that AEP-Ohio disputed when it was raised by CRES providers during the *Capacity Case*. *Capacity Case*, Ohio Power Company's Initial Post-Hearing Brief at 33 (May 23, 2012). AEP-Ohio appears unable to "keep its story straight."

be competitive.²¹ There is no dispute that Capacity Service is a generation-related service. As a result of the changes effected by SB 3, therefore, those services, whether wholesale or retail, are no longer subject to the traditional Commission regulation governed by R.C. Chapter 4909.²² Moreover, the Commission is prohibited from setting retail generation service prices except as provided by R.C. 4928.141 to R.C. 4928.144, and then only in regard to the default generation-related services provided to retail customers.²³ Accordingly, there is no legal basis for the Commission to assert subject matter jurisdiction over a retail generation-related service other than through a proceeding seeking approval of an SSO.²⁴ Regardless of which statutes AEP-Ohio points to for support for its application, none provides the Commission subject matter jurisdiction to authorize AEP-Ohio to increase its compensation for Capacity Service.

Its reliance on R.C. 4905.26 and the suggestion that IEU-Ohio “glossed over” this jurisdictional basis likewise is wrong. As IEU-Ohio showed in its Motion to Dismiss, R.C. 4905.26 is governed by the same jurisdictional constraints as those governing R.C. 4905.04, 4905.05, and 4905.06.²⁵

Additionally, AEP-Ohio fails to address the case law that constrains the Commission’s ratemaking authority under R.C. 4905.26 that IEU-Ohio identified in its Motion to Dismiss. While the Commission may establish new rates in a complaint case initiated under R.C. 4905.26, its authority to establish such rates is constrained by its

²¹ R.C. 4928.05(A)(1).

²² R.C. 4928.03 & R.C. 4928.05(A)(1).

²³ R.C. 4928.05(A)(1). In other proceedings in which AEP-Ohio has sought recovery of generation-related costs, the Commission has recognized that it does not have authority to establish a nonbypassable recovery mechanism for generation-related services outside of proceedings establishing an SSO. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16-19 (Jan. 11, 2012).

²⁴ *Id.*

²⁵ Motion to Dismiss at 17.

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

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

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

²⁶ See, e.g., *Consumers’ Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706 ¶¶ 29, 32; *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347-49 (1997) (“Pursuant to R.C. 4905.26 and 4909.15(D), the Commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable.”); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979).

²⁷ *Lucas Cty.*, 80 Ohio St.3d at 347 (emphasis added).

²⁸ Motion to Dismiss at 16-18.

Although the Commission approved the current RSR as part of an ESP under R.C. 4928.143(B)(2)(d),²⁹ the Commission's authority to authorize the current RSR is not an issue in this case. Under the terms of the ESP II Order, the current RSR will expire on May 31, 2015.³⁰ According to the application in this case, AEP-Ohio is seeking a new charge that it also wants to call the RSR to allow it to amortize the remaining Capacity Shopping Tax over a period of thirty-two months.³¹ Other than establishing the mechanics for requiring AEP-Ohio to reduce the balance of Capacity Shopping Tax during the current ESP, the authorization of the existing RSR is independent, and irrelevant, to the relief that AEP-Ohio is seeking through this application.

Further, the Capacity Shopping Tax was not authorized as a term of the current ESP. The Commission authorized increased compensation for Capacity Service in the Capacity Case in reliance on its general supervisory authority contained in sections R.C. 4905.04, 4905.05, 4905.06, and 4905.26.³² The Commission has never asserted that it has jurisdiction over Capacity Service under Chapter 4928. In fact, it explicitly rejected this argument in the *Capacity Case*.³³ Thus, as IEU-Ohio explained in its Motion to Dismiss, the Commission may not rely on R.C. 4928.144 as a legal basis to authorize the recovery of the Capacity Shopping Tax because it is not a rate or charge approved under R.C. 4928.141 to R.C. 4928.143.³⁴

²⁹ ESP II Order at 26-38 (Aug. 8, 2012).

³⁰ *Id.*, *passim*.

³¹ Application at 3 and Ex. A.

³² Capacity Order at 12-13 (July 2, 2012).

³³ *Id.* at 13.

³⁴ Motion to Dismiss at 14-16

Additionally, AEP-Ohio is not correct when it asserts that the Motion to Dismiss does not address the Commission's lack of authority to authorize a Capacity Shopping Tax under R.C. 4928.144. As noted above, the Motion to Dismiss fully explains that the Commission lacks authority under R.C. 4928.144 to authorize a nonbypassable rider because the underlying rate or charge being phased in was not authorized under R.C. 4928.141 to R.C. 4928.143.³⁵

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

AEP-Ohio also fails to address the jurisdictional problem its pending ESP application has created if it is seeking to have the Capacity Shopping Tax authorized through a rider based on R.C. 4928.143(B)(2)(d). Any authorization of a rider under R.C. 4928.143(B)(2)(d) as part of an ESP would be subject to the Commission finding that the ESP, in the aggregate, is more favorable than a market rate offer ("MRO") as required by R.C. 4928.143(C)(1). In its recent application seeking an ESP, however,

³⁵ *Id.*

³⁶ ESP II Order at 31 (Aug. 8, 2012).

³⁷ *Id.* at 33.

³⁸ *Id.* at 36.

AEP-Ohio did not seek authorization of a rider to amortize the Capacity Shopping Tax because it assumed that it could seek authority to collect the Capacity Shopping Tax in a separate proceeding.³⁹ Without that Commission review including a finding under R.C. 4928.143(C)(1), R.C. 4928.143(B)(2)(d) cannot serve as a basis for the new rider AEP-Ohio is seeking.

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

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

AEP-Ohio further asserts that the Commission should ignore the statutory constraints, asserting that “no provision of chapter 4905 or 3909 of the revised code prohibits the Commission from initiating a review of or fixing a wholesale rate”⁴¹ and concluding that the Commission may expand its jurisdiction to regulate wholesale electric service.⁴² It further argues that the Reliability Assurance Agreement (“RAA”) authorizes the Commission to increase AEP-Ohio’s compensation for Capacity Service

³⁹ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Application at 14 and AEP-Ohio Ex. 7 at 12 (Dec. 20, 2013).

⁴⁰ The Commission may authorize only those provisions of an ESP that are authorized by R.C. 4918.143(B). *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

⁴¹ Memo Contra at 10.

⁴² *Id.* at 11.

and that FERC approval of its wholesale capacity charges supports jurisdiction by this Commission.⁴³ These claims are without merit.

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

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

AEP-Ohio's assertion that the Commission can assert jurisdiction as long as there is no prohibition also would lead to an absurd result. Under this claim, the Commission could assert jurisdiction over any related or unrelated matter regarding utility service. The Supreme Court, however, has recognized that the Commission may

⁴³ *Id.*

⁴⁴ *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153 (1981); *Dayton Communications Corp. v. Pub. Util. Comm*, 64 Ohio St.2d 302 (1980).

⁴⁵ Motion to Dismiss at 16-18.

⁴⁶ *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540 (1993).

not assert jurisdiction over entities or services beyond that authorized by law.⁴⁷ Without a positive authorization, the Commission is without authority to apply its ratemaking statutes or other regulatory authority.

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

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

⁴⁷ *Plodger v. Pub. Util. Comm.*, 109 Ohio St.3d 463 (2006) (Commission lacks jurisdiction over landlords that rebill utility services to tenants); *Rodeo Relay Corp. v. Pub. Util. Comm.*, 45 Ohio St.2d 121 (1976) (Commission lacks jurisdiction to regulate paging services that rely on landlines); *Ohio Mining Co. v. Pub. Util. Comm.*, 106 Ohio St. 138 (1922) (Commission may not regulate mining operations tied to electric generation operations of an affiliate).

⁴⁸ *Id.*

appendix to the RAA.⁴⁹ The FERC-approved appendix to the RAA confirms that AEP-Ohio's compensation for Capacity Service is limited to the RPM-based Price.⁵⁰

Additionally, AEP-Ohio falsely asserts that in approving an appendix to the RAA FERC also approved this Commission's assertion of jurisdiction.⁵¹ In pleadings (attached to this Reply) filed on behalf of AEP-Ohio, AEP Service Corporation ("AEPSC") requested that FERC "confirm that the Ohio Commission's decision to adopt a state compensation mechanism with retail and wholesale charges is fully consistent with Section D.8" of the RAA and "to accept for filing the wholesale component of the Ohio state compensation mechanism."⁵² It ultimately agreed to an appendix to the RAA that made no reference to the \$188.88/MW-day price the Commission ordered in the *Capacity Case* and that was limited to an authorization of the market-based RPM-based Price.⁵³ At AEP-Ohio's request, FERC did not address the retail component of the capacity price the Commission authorized in the *Capacity Case*.⁵⁴ As approved by

⁴⁹ *American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.*, FERC Docket ER13-1164, Order Accepting Appendix to Reliability Assurance Agreement Subject to Compliance Filing at 1 (May 23, 2013), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13265974> (last accessed Aug. 19, 2014).

⁵⁰ *Id.* at 6; RAA at 137, available at: <http://pjm.com/~media/documents/agreements/raa.ashx> (last accessed Aug. 19, 2014). AEP-Ohio's assertion that FERC has approved AEP-Ohio total compensation for Capacity Service at the level the Commission set borders on frivolous.

⁵¹ AEP-Ohio Memo Contra at 11 (AEP-Ohio argues in its Memo Contra that "FERC concluded that the capacity charge mechanism adopted by the Commission was 'consistent with the RAA.'").

⁵² *Id.* at 2 (Apr. 30, 2013) (emphasis in original).

⁵³ *Id.*, Order Accepting Appendix to Reliability Assurance Agreement Subject to a Compliance Filing at 6-7 (May 23, 2013).

⁵⁴ *American Electric Power Service Corporation*, FERC Docket No. 13-1146-000, Response of American Electric Power Service Corporation at 4 (Apr. 30, 2013). As AEP-Ohio made clear (through a filing made by AEPSC on its behalf in the FERC docket before FERC issued its order):

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

Id.

FERC, the appendix to the RAA does nothing more than authorize AEP-Ohio to recover the RPM-based Price from CRES providers.

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

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

In an argument that is internally inconsistent, AEP-Ohio further claims that the Commission could regulate this so-called "noncompetitive" Capacity Service under provisions of R.C. Chapter 4909, but need not follow the substantive and procedural requirements of that Chapter "because the Commission's investigation was not a traditional base rate case."⁵⁷ Apparently, AEP-Ohio is suggesting that the Commission can ignore statutory requirements as it invents and applies a cost-based ratemaking methodology to increase AEP-Ohio's compensation for wholesale generation-related capacity service while also relying on that same statutory structure as a basis for subject matter jurisdiction. Additionally, R.C. 4909.18 does not provide the Commission

⁵⁵ Memo Contra at 11.

⁵⁶ *Capacity Case*, Industrial Energy Users-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 42-59 (Aug. 1, 2012) (challenging the Commission's reliance and application of the RAA to establish a capacity charge).

⁵⁷ Memo Contra at 10 & 13.

subject matter jurisdiction to set a price for a wholesale generation-related service, as discussed previously. There is no legal authority for this nonsensical claim, and none is presented by AEP-Ohio.

AEP-Ohio further argues that the procedural requirements for an increase in rates are inapplicable under R.C. 4909.19 since the Commission could treat its *Capacity Case* as a first filing under R. C. 4909.18.⁵⁸ Once again, AEP-Ohio is advancing an argument that is complete nonsense. As it notes, AEP-Ohio did not file or initiate the *Capacity Case*; it was an investigation initiated by the Commission.⁵⁹ In its initial order, the Commission established the RPM-based Price as the price for Capacity Service.⁶⁰ In an order issued on July 2, 2012, the Commission substantially increased AEP-Ohio's compensation for Capacity Service. Accordingly, even if the Commission construed the process by which it increased AEP-Ohio's compensation for Capacity Service as a proceeding subject to R. C. 4909.18, the proceeding was one for an increase in an existing rate and thus would have triggered the procedural and substantive requirements of R.C. 4909.15 and R.C. 4909.19. Thus, AEP-Ohio cannot rely on R.C. 4909.18 as a basis for the Commission to assert subject matter jurisdiction to address its request for \$445 million in additional above-market revenue for wholesale generation-related services.

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

As demonstrated in the Motion to Dismiss, AEP-Ohio's application should also be dismissed because it seeks unlawful transition revenue or its equivalent.⁶¹ Under R.C.

⁵⁸ *Id.* at 14.

⁵⁹ *Capacity Case*, Entry (Dec. 8, 2010).

⁶⁰ *Id.* at 2.

⁶¹ Motion to Dismiss at 22-24.

4928.38, the Commission has no authority to authorize such revenue. Accordingly, the Motion to Dismiss correctly urges the Commission to dismiss the application.

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

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

Further, as the record in the *Capacity Case* demonstrated, the revenue increase that AEP-Ohio is seeking to recover through this application is the aggregated portion of the price the Commission established that exceeds the market-based RPM price. This above-market revenue, whether related to retail or wholesale service, is an amount not recoverable in the market.⁶⁵ AEP-Ohio entered into a settlement in which it agreed to forgo the collection of generation-related transition charges, and any claim to additional transition revenue is precluded by the time limits contained in R.C. 4928.40.⁶⁶ Accordingly, the Motion to Dismiss properly urges the Commission to dismiss the application because the Commission does not have authority to authorize AEP-Ohio to bill and collect transition revenue.

⁶² Memo Contra at 14.

⁶³ *ESP II Case*, Opinion and Order at 36 (Aug. 8, 2012).

⁶⁴ Motion to Dismiss at 22-24.

⁶⁵ R.C. 4928.38(C).

⁶⁶ Motion to Dismiss at 22-24.

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

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

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

The recent cases cited in the Motion to Dismiss, moreover, demonstrate that the state commissions are without authority to increase an electric utility's compensation for a wholesale service.⁷⁰ Further, neither the RAA nor FERC's approval of the appendix to

⁶⁷ *Id.* at 24-28.

⁶⁸ Memo Contra at 15.

⁶⁹ *Capacity Case*, Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 3, 18-21 (Jan. 7, 2011); *Section 205 Case*, Request for Rehearing of AEPSC at 13-14 (Feb. 22, 2011), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12569314> (last accessed Aug. 19, 2014).

⁷⁰ *PPL Energy Plus, LLC v. Nazarian*, 2013 WL 5432346 (D. Md. Sept. 30, 2013), *aff'd*, *PPL Energy Plus, LLC v. Nazarian*, Case No. 13-2419 slip op., 2014 WL 2445800 (4th Cir. 2014); *PPL Energy Plus, LLC v. Hanna*, 2013 WL 5603896 (D. New Jersey October 11, 2013). An attempt by the generation owner to circumvent the courts' decisions was rejected by FERC. *CPV Shore, LLC*, FERC Case No. ER14-2105-001, *et al.*, Order Rejecting Filings (Aug. 5, 2014).

the RAA can expand the Commission's jurisdiction. As any action by the Commission to increase AEP-Ohio's compensation for wholesale capacity service would be preempted and void, the Commission lacks subject matter jurisdiction to authorize the relief AEP-Ohio is seeking through this application.

V. CONCLUSION

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

Respectfully submitted,

/s/ Matthew R. Pritchard

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

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

McNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

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

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

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

/s/ Matthew R. Pritchard

Matthew R. Pritchard

Steven T. Nourse (Reg. No. 0046705)
Matthew J. Satterwhite (Reg. No. 0071972)
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com
mjsatterwhite@aep.com

ATTORNEYS FOR OHIO POWER COMPANY

David F. Boehm (Reg. No. 0021881)
Michael L. Kurtz (Reg. No. 0033350)
Jody Kyler Cohn (Reg. No. 0085402)
Boehm, Kurtz & Lowry
36 E. Seventh St., Suite 1510
Cincinnati, OH 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com

ATTORNEYS FOR THE OHIO ENERGY GROUP

Richard L. Sites (Reg. No. 0019887)
General Counsel & Senior Director of
Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien (Reg. No. 0066249)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

ATTORNEYS FOR THE OHIO HOSPITAL ASSOCIATION

Kimberly W. Bojko (Reg. No. 0069402)
Rebecca L. Hussey (Reg. No. 0079444)
Jonathan A. Allison (Reg. No. 0062720)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Hussey@carpenterlipps.com
Allison@carpenterlipps.com

ATTORNEYS FOR THE OMA ENERGY GROUP

Mark S. Yurick (Reg. No. 0039176)
(Counsel of Record)
Zachary D. Kravitz (Reg. No. 0084238)
TAFT STETTINIUS & HOLLISTER LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

ATTORNEY FOR THE KROGER CO.

Maureen R. Grady (Reg. No. 0020847)
Terry L. Etter (Reg. No. 0067445)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Maureen.grady@occ.state.oh.us
etter@occ.state.oh.us

**ATTORNEY FOR THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

William Wright (Reg. No. 0018010)
Chief, Public Utilities Section
Ohio Attorney General
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
william.wright@puc.state.oh.us

**ATTORNEY FOR THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

Sarah Parrot (Reg. No. 0082197)
Greta See
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
Greta.See@puc.state.oh.us
sarah.parrot@puc.state.oh.us

ATTORNEY EXAMINERS

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

American Electric Power
Service Corporation

)
)

Docket No. ER13-1164-000

**RESPONSE OF
AMERICAN ELECTRIC POWER SERVICE CORPORATION**

American Electric Power Service Corporation, on behalf of Ohio Power Company (“Ohio Power,” and collectively “AEP”), hereby responds to pleadings filed in this proceeding by the Retail Energy Supply Association (“RESA”), Exelon Corporation (“Exelon”), Duke Energy Ohio, Inc. and Duke Energy Corporation (“Duke”), the Industrial Energy Users-Ohio (“IEU”), FirstEnergy, and the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “Commenters”). The Commenters request that the Commission reject the filing at issue in this proceeding or dismiss other pending Ohio Power proceedings.¹ In response to these requests, AEP respectfully states as follows.

I. BACKGROUND

In the March 25, 2013 filing at issue in this proceeding, AEP, in conjunction with PJM Interconnection, L.L.C. (“PJM”), submitted a proposed appendix to the PJM Reliability

¹ Although Rule 213(a)(2) generally prohibits the filing of an answer to a protest “unless otherwise ordered by the decisional authority,” 18 C.F.R. § 385.213(a)(2) (2012), the Commission has found good cause to accept answers where the additional response will aid in the explication of the issues. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,285, at P 6 n.10 (2010). The Commission also has permitted an answer to a protest in instances where the issues raised in the protest are so intertwined with a request to dismiss or reject that they cannot be effectively distinguished. *Okla. Gas & Elec. Co.*, 54 FERC ¶ 61,212 at 61,629 (1991); *Ariz. Pub. Serv. Co.*, 48 FERC ¶ 61,075 at 61,350 (1989). Here, the Commenters intertwine the facts and arguments in their respective protests to support their requested relief, namely rejection of AEP’s filing. Commenters also misconstrue the relief requested by AEP. Therefore, AEP respectfully submits that good cause exists to accept this Response.

Assurance Agreement (“RAA”)² to address a question of first impression: how to implement the “state compensation mechanism” adopted by the Public Utilities Commission of Ohio (“Ohio Commission”) that established wholesale and retail charges that together yield the level of compensation that the Ohio Commission determined appropriate for Ohio Power to recover the costs of meeting its wholesale Fixed Resource Requirement (“FRR”) capacity obligation for shopping load.³ If the Ohio Commission had adopted a state compensation mechanism that established only *retail* charges, this Commission would have no jurisdiction to review those charges. But the Ohio Commission chose to adopt a mechanism that includes *wholesale* charges as well.

The RAA provides no guidance on how to address a state compensation mechanism that includes *retail* and *wholesale* charges. Thus, AEP’s filing requested that the Commission make two discrete and fairly straightforward rulings: First, AEP asked this Commission to confirm that the Ohio Commission’s decision to adopt a state compensation mechanism with retail and wholesale charges is fully consistent with Section D.8, which puts no restrictions on the form of compensation mechanism that a state commission may adopt.⁴ And second, in conjunction with that request, AEP asked the Commission to accept for filing the *wholesale* component of the Ohio state compensation mechanism consistent with the Commission’s exclusive authority under

² PJM Rate Schedule FERC No. 44.

³ Section D.8 of Schedule 8.1 to the RAA (“Section D.8”) entitles Ohio Power to recover the cost of the FRR capacity that Ohio Power is required to make available under the RAA. Section D.8 also enables a state utility commission to craft its own “state compensation mechanism” for the recovery of such costs. As discussed in the March 25th filing, the Ohio Commission adopted such a state compensation mechanism. Transmittal Letter at 5-10.

⁴ See also Exelon Comments at 3 (“There is no limitation in the RAA regarding the manner or structure such a state compensation mechanism may take.”).

the Federal Power Act. AEP explained that these rulings will bring certainty to longstanding proceedings at both the state and federal levels, and ultimately dispose of contentious jurisdictional issues pending before the Commission in related proceedings. Significantly, the Ohio Commission urged the Commission to accept AEP's filing for precisely the same reasons:

The Commission should accept [AEP's] filing of the wholesale component as proposed by the applicants. Accepting the proposed filing would greatly clarify and simplify a complicated situation. It would avoid an entirely artificial dispute between the jurisdictions.

* * * *

The adoption of the proposal will . . . avoid the need for the Supreme Court of Ohio to opine on the meaning of the RAA and further will avoid arguments claiming that there is some sort of jurisdictional dispute between the two. The proposal should be accepted.⁵

II. DISCUSSION

Certain of the Commenters (notably alternative suppliers who compete for Ohio Power's retail load and their customers) invented a parade of horrors that allegedly would result if the Commission were to accept the proposed RAA appendix. Others allege that the Ohio Commission exceeded its authority and caution this Commission not to take any action that would affect their appeals before the Ohio Supreme Court. Many of these arguments are based on misconceptions and misrepresentations of AEP's filing. Rather than belabor the record with a lengthy point-by-point response, the following discussion makes clear the rulings that AEP has **not** asked the Commission to make and, therefore, disposes of the majority of the Commenters' complaints:

⁵ Ohio Commission Comments at 4, 5.

1. AEP does **not** request that the Commission approve the Ohio Commission's determination as to Ohio Power's FRR capacity costs (\$188.88/MW-day). That determination was made in accordance with Ohio ratemaking principles after a lengthy evidentiary hearing including live testimony, and challenges to the Ohio Commission's findings can be pursued through appropriate Ohio appellate proceedings. Accordingly, there is no reason for the Commission to initiate hearing procedures to duplicate procedures already undertaken by the Ohio Commission. Nor is there any reason for the Commission to require AEP to submit detailed cost-of-service information, as the Commission need not address any cost-of-service issues in this proceeding.

2. AEP does **not** request Commission authorization for Ohio Power to recover from Ohio Competitive Retail Supply ("CRES") providers (or anyone else, for that matter) the wholesale component of the Ohio state compensation mechanism **plus** \$188.88/MW-day. The only charge for which AEP seeks Commission acceptance is the *wholesale* component of the Ohio state compensation mechanism; *e.g.*, the adjusted final zonal PJM Reliability Pricing Model ("RPM") rate in effect for the "rest of PJM" region. Ohio Power's right to recover *from retail customers* the difference between \$188.88/MW-day and the wholesale charges assessed to CRES providers will be in accordance with the retail rate component adopted by the Ohio Commission, which is not before the Commission in this proceeding. Thus, AEP is **not** duplicating the collection of any charges, and the total amount collected by AEP will equate to the level of compensation (\$188.88/MW-day) determined by the Ohio Commission as necessary and appropriate to enable Ohio Power to recover the costs of meeting its wholesale FRR capacity obligation for shopping load.

3. AEP does **not** request that the Commission invoke its FPA Section 205 authority to approve the overall Ohio state compensation mechanism or rule upon the Ohio Commission's state law authority to assess FRR capacity charges to *retail* customers.⁶ Again, any and all issues concerning the Ohio Commission's retail ratemaking authority under Ohio law and whether the Ohio Commission appropriately exercised that authority can be pursued through appropriate Ohio appellate proceedings. The Ohio Commission and AEP do, however, request that the Commission make one limited ruling that is squarely within the Commission's jurisdiction and authority: that the Ohio Commission's decision to adopt a two-part state compensation mechanism is fully consistent with the RAA, which was adopted pursuant to federal law. Contrary to arguments raised by certain Commenters, a Commission ruling interpreting the RAA will aid, rather than interfere with, the Ohio appellate process by providing guidance from the federal agency with primary jurisdiction to interpret a federal tariff.⁷ As the Ohio Commission correctly noted, having the Commission make this limited ruling "will avoid the need for the Supreme Court of Ohio to opine on the meaning of the RAA" Ohio Commission Comments at 5.⁸

⁶ In other words, the OCC is wrong in bemoaning AEP's alleged efforts to obtain "[the Ohio] Commission's stamp of approval of the controversial scheme which has already been implemented in Ohio and which is the subject of numerous challenges that parties, including OCC, have taken by appeals to the Ohio Supreme Court." OCC Comments at 3.

⁷ See, e.g., *Bay Gas Storage Co., Ltd.*, 131 FERC ¶ 61,034 at P 22 (2010) (Commission will assert its primary jurisdiction over disputes concerning jurisdictional contracts to the extent necessary to ensure that the rates charged are consistent with the Commission's regulations and the filed rate doctrine).

⁸ It's worth noting that parties who oppose such a ruling strongly oppose the Ohio Commission's state compensation mechanism and, quite naturally, would rather this Commission not clarify the issue in favor of the Ohio Commission. See, e.g., OCC Comments at 13 ("...the [Ohio Commission] over-stepped its authority in its July 2, 2012, order by authorizing charges for non-shopping retail customers."); and IEU Comments at 12 ("...the Ohio

(Continued ...)

4. AEP does **not** request that this Commission pre-approve future changes to the RAA appendix that Ohio Power may propose or even Ohio Power's rights to propose such changes. Nor did AEP ever suggest that the Commission permit any future filing to be effective retroactively. As AEP discussed in the filing, future rulings by the Ohio Supreme Court could imperil Ohio Power's ability to recover its FRR capacity costs under the current mechanism. AEP indicated that if that situation were to occur, Ohio Power *may* need to exercise its Section 205 rights to file a new wholesale FRR charge in a new case, which would be decided on its own merits based on the facts at that time. The filing made absolutely clear that AEP included language to this effect in the proposed RAA appendix solely for the purposes of alerting the Commission and the CRES providers of this possibility. Transmittal Letter at 17.

The foregoing discussion should adequately dispose of any concerns as to what the proposed RAA appendix is intended to accomplish, and eliminate the need for the Commission to address matters outside the scope of this proceeding. AEP believes that the text of the proposed appendix is not reasonably susceptible to the various interpretations suggested by certain Commenters, which is borne out by the fact that the complaints were far from universal. The Ohio Commission, for example, did not see any such problems. Nevertheless, in an effort to streamline the proceeding, if the Commission were to find it helpful, AEP would be willing to coordinate with PJM to submit a compliance filing that tracks the language proposed by

Commission acted well beyond its authority.”). Moreover, while IEU notes that it sought from the Ohio Supreme Court a writ of prohibition and a writ of mandamus to “prevent the Ohio Commission from asserting jurisdiction to invent and apply a cost-based rate methodology” (IEU Comments at 9-10), the Ohio Supreme Court recently granted motions to dismiss that proceeding. *See State ex rel. Indus. Energy Users-Ohio v. Pub. Util., Comm.*, Slip Op. No. 2013-Ohio-1472 (Ap. 16, 2013).

FirstEnergy (at page 7 of its Comments), with one exception. AEP does not agree that it is appropriate to strike the effective date (August 8, 2012) adopted by the Ohio Commission because that is the date that was adopted by the Ohio Commission. Deleting that fact, as FirstEnergy proposes, would be wholly inconsistent with FirstEnergy's stated goal of including language "to reflect [the Ohio Commission's] actual holding" *Id.*

B. The Commission Should Disregard Calls To Reject AEP's Filing

Certain Commenters argue that AEP's filing should be rejected because AEP either was not authorized to make the filing or need not have made the filing. For example, IEU and FirstEnergy argue that AEP did not have the authority to submit the filing, because amendments to the RAA must first be approved by the PJM Board of Managers and that there is no indication that the PJM Board in fact authorized this filing. IEU Comments at 12-15; FirstEnergy at 4-5. RESA argues that the RAA itself prohibits AEP from making the filing. RESA Comments at 8-9. And Exelon argues that the filing was "unnecessary." Exelon Comments at 2-3. Each of these arguments is wide of the mark.

As to IEU's argument, it is important to note that AEP did not attempt to unilaterally amend the RAA. As PJM's Comments confirm (at 2-4) (filed April 22, 2013), PJM and AEP closely coordinated the filing – *which was e-filed by PJM on behalf of Ohio Power* – to be consistent with the Commission's November 19, 2010 deficiency notice in Docket Nos. ER11-1995, -1997, and -2034. As PJM explained, subsequent to the issuance of that notice, the PJM Board adopted a resolution (attached to PJM's Comments) that authorized PJM staff to submit revisions to the RAA to incorporate an appendix to the RAA that reflects an FRR Entity's wholesale FRR capacity charges under Section D.8. PJM's Comments demonstrate that, based on the Commission's prior deficiency notice and the PJM Board resolution, PJM Staff had good

reason to believe that it was authorized to submit the filing on Ohio Power's behalf. Moreover, PJM made clear that it will collaborate with AEP to implement alternative procedural steps if the Commission deems that necessary. PJM Comments at 4.

RESA's contention that Section D.8 precludes AEP from submitting the filing also should be rejected, as RESA misapprehends the nature of AEP's filing. AEP did **not** submit its filing under the provision that permits FRR Entities to establish their own wholesale FRR compensation method, which was the subject of the January 2011 order referenced by RESA.⁹ Rather, AEP seeks Commission acceptance of the wholesale FRR charges that were adopted by the Ohio Commission as part of its state compensation mechanism in order to facilitate its implementation, not replace it with something different. Contrary to RESA's suggestion, therefore, approval of the filing will ensure that the Ohio state mechanism in fact "will prevail."¹⁰ And, unlike that prior proceeding, here, the Ohio Commission expressly urged the Commission to "accept for filing the wholesale component of the Ohio state compensation mechanism proposed in the filing." Ohio Commission Comments at 5.

Finally, Exelon suggests that the proposed RAA amendment may not be necessary because the charges were adopted as part of a state compensation mechanism and a Commission ruling might compromise a state commission's ability to establish such a mechanism. Exelon Comments at 2-3. The simple answer is that the Ohio Commission did not see it that way; as just noted, the Ohio Commission concurred with AEP that the Commission should accept AEP's filing of the wholesale component of the Ohio state compensation mechanism.

⁹ RESA Comments at 8 (citing *American Elec. Power Serv. Corp.*, 134 FERC ¶ 61,039 (2011); *reh'g pending* ("January 2011 Order")).

¹⁰ *Id.* (quoting Section D.8).

C. All Parties Have Had Full and Fair Notice of the Wholesale FRR Charges that the Ohio Commission Adopted as Part of its Interim and Final State Compensation Mechanisms.

As discussed in AEP's filing and in several of the comments, there were nearly two years of proceedings leading up to the Ohio Commission's adoption of its final state compensation mechanism. First, there was a series of orders addressing "interim" state compensation mechanisms adopted by the Ohio Commission. Then there were multiple dockets addressing the final state compensation mechanism, some of which involved hearing procedures with live witnesses and multiple rounds of comments and briefs. And ultimately, numerous orders were issued concerning the final state compensation mechanism. For example, the Ohio Commission's initial order was issued on July 2, 2012, and followed up by three orders addressing rehearing requests, the last of which was issued on January 30, 2013. The Ohio Commission's "Cost Deferral Recovery Order" (discussed at pages 8-9 of AEP's Transmittal Letter) was issued on August 8, 2012, and followed up by two rehearing orders, the latest of which was just recently issued on March 27, 2013. In light of the outstanding issues and proceedings pending before the Ohio Commission, AEP decided that the best course was to defer filing its proposed RAA appendix until there was a greater sense of certainty and finality surrounding the Ohio Commission's rulings. AEP nevertheless requested that the Commission permit the appendix to be made effective back to August 8, 2012, the date upon which the final Ohio state compensation mechanism went into effect. AEP also requested that the Commission accept the interim compensation mechanisms in line with the Ohio Commission's prior rulings establishing those interim mechanisms.

RESA argues that the proposed RAA appendix should not be made effective on the date that the Ohio state compensation mechanism became effective because, RESA contends, waiver

of the filing rules either is not needed or not justified. But RESA acknowledges that the Ohio Commission ordered that the state compensation mechanism be effective on August 8, 2012, that CRES providers have been paying the Ohio Commission-approved wholesale charges since that date, and that the waiver will not have financial consequences to AEP. RESA Comments at 13. RESA thus provides no basis why the Commission should not make the proposed RAA amendment effective on the date that the Ohio Commission required its state compensation mechanism to become effective.

FirstEnergy argues that the Commission should not permit Ohio Power to recover the wholesale charges that were in place as a result of the interim state compensation mechanisms adopted by the Ohio Commission, because the Commission has not yet accepted or approved those charges. FirstEnergy Comments at 11-12. AEP's filing requests that the Commission accept those wholesale charges, which will address the concern raised by FirstEnergy. Moreover, just as the January 2011 Order ruled that under the RAA, the Ohio Commission's December 2010 interim state compensation mechanism "will prevail" (an outcome urged by FirstEnergy), Commission acceptance of the wholesale charges adopted in the revised interim compensation mechanism will ensure that mechanism likewise "will prevail."

In considering RESA's and FirstEnergy's arguments, it is important to note that not a single Commenter argued that it had no notice that the Ohio Commission would be conducting proceedings aimed at establishing compensation mechanisms; in fact, each of the Commenters participated actively in those proceedings. Nor did any Commenter argue that it was unaware of the interim or final state compensation mechanisms ultimately adopted, or that approval of AEP's proposal will retroactively change the level of the wholesale charges that were and are being assessed to CRES providers in accordance with those mechanisms. Indeed, no Commenter

explained how Commission acceptance of AEP's proposal would subject CRES providers to wholesale charges different from those adopted by the Ohio Commission. Under the circumstances, therefore, it would be entirely appropriate for the Commission to accept the wholesale charges adopted by the Ohio Commission and make such a ruling effective to coincide with the Ohio Commission's orders establishing those charges.

Finally, IEU also argues that AEP should not be permitted to recover the interim wholesale charges adopted by the Ohio Commission, but the basis for IEU's argument is that the charges adopted by the Ohio Commission exceeded "RPM-Based Pricing," which, IEU argues, is "the only lawful rate for [FRR] capacity." IEU Comments at 18. IEU would have the Commission rule that the RAA limits the form of a state compensation mechanism that "will prevail," but IEU provides no legal or contractual basis for such a ruling. The interpretation urged by IEU would render meaningless the entire concept of a state-determined compensation mechanism, because it would dictate the form that such mechanism must take. If that were the intent of the settlement that led to the FRR procedures, there would have been no reason to include a provision that enables state commissions to adopt their own compensation mechanisms.

D. Duke's Issues Are Outside the Scope of this Proceeding.

Duke states that it "generally supports the AEP Filing." Duke Comments at 4. However, Duke submitted a "limited protest" to seek "confirmation" as to the continued applicability of Commission orders addressing how Duke Energy Ohio implements the FRR provisions. *Id.* at 4-8. Duke also asks the Commission to dismiss AEP's pending request for rehearing in Docket No. ER11-283 and AEP's pending complaint in Docket No. EL11-32. *Id.* at 8-13.

The first issue relates to Duke Energy Ohio's FRR charges and not Ohio Power's FRR charges, and thus is outside the scope of this proceeding. If Duke has concerns about its current procedures, it can seek resolution of those concerns in a Duke Energy Ohio proceeding. The record in this proceeding need not be burdened with issues unrelated to the Ohio state compensation mechanisms approved for Ohio Power.

The Commission should also disregard Duke's second request. First, AEP already indicated that should the Commission accept the proposed RAA appendix in an order that has become final, AEP would move to withdraw the rehearing request and dismiss the complaint proceeding. Transmittal Letter at 17. So, it was unnecessary for Duke to raise the same issue. Moreover, Duke has no standing to seek dismissal of those proceedings. Unless AEP voluntarily moves to withdraw the rehearing request and/or dismiss the complaint, AEP is entitled to a ruling on the merits in those proceedings.

III. CONCLUSION

For the foregoing reasons, AEP requests that the Commission accept this Response and deny the relief sought by the Commenters. Instead, AEP respectfully requests that the Commission accept for filing the RAA appendix proposed for Ohio Power and thereby accept the wholesale charges adopted by the Ohio Commission as part of its interim and final state compensation mechanisms. These rulings will appropriately facilitate the implementation of the Ohio state compensation mechanisms. And, as stated in AEP's March 25, 2013 filing, granting the requested relief will permit the parties to the various regulatory proceedings to move beyond pending jurisdictional disputes, bring certainty to longstanding proceedings at both the state and

federal levels, and ultimately dispose of these and other contentious issues pending before the Commission in related proceedings.

Respectfully submitted,

/s/

Amanda R. Conner
Senior Counsel
American Electric Power
Service Corporation
801 Pennsylvania Avenue, N.W., Suite 320
Washington, DC 2004-2684

Steven J. Ross
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036

Attorneys for American Electric Power
Service Corporation

April 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 30th day of April, 2013.

/s/ Karen Cottrell

Karen Cottrell
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
(202) 429-8037

143 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellingshoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

PJM Interconnection, L.L.C.
Ohio Power Company

Docket No. ER13-1164-000

ORDER ACCEPTING APPENDIX TO RELIABILITY ASSURANCE AGREEMENT
SUBJECT TO A COMPLIANCE FILING

(Issued May 23, 2013)

1. On March 25, 2013, American Electric Power Service Corporation, on behalf of Ohio Power Company (AEP Ohio), filed a proposed appendix (Appendix)¹ to the PJM Interconnection, L.L.C. (PJM) Reliability Assurance Agreement (RAA).² AEP Ohio requests that the Commission confirm that the Ohio state compensation mechanism is consistent with Schedule 8.1.D-FRR Capacity Plans (Schedule 8.1) of the PJM RAA and accept the Appendix to the RAA. In this order, we accept the proposed Appendix, to become effective August 8, 2012, subject to a compliance filing requiring AEP Ohio to implement certain revisions to which it has agreed.

I. Background

2. PJM has a capacity market designed to ensure the availability of necessary resources to provide reliable service to load within the PJM region. The PJM capacity market includes the reliability pricing model (RPM), in which PJM conducts forward auctions to secure capacity for future delivery years. The RAA contains an alternative method for meeting the PJM capacity obligation, the Fixed Resource Requirement (FRR) Alternative, for entities that choose not to participate in the RPM auctions (FRR Entities).

3. Schedule 8.1 of the RAA includes the provisions of the FRR Alternative. Section D.8 of Schedule 8.1 provides:

¹ PJM, Intra-PJM Tariffs, RAA, SCHEDULE 8.1 Appendix-Ohio Power FRR Capacity Ra (Appendix) (0.0.0).

² PJM, Intra-PJM Tariffs, RAA, SCHEDULE 8.1.D-FRR Capacity Plans (Schedule 8.1) (4.0.0).

In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs [that is, load serving entities]. In the case of load reflected in the FRR Capacity Plan that switches to an alternative 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.

Section D.8 further provides:

In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act [FPA] proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.

4. On November 24, 2010, AEP Ohio submitted a formula rate filing, in Docket No. ER11-2183-000, to change the rate of compensation for the capacity it provides on behalf of alternative LSEs under the FRR Alternative to a cost-based formula.³ On January 20, 2011, the Commission rejected the formula rate proposal by AEP Ohio to collect the costs of meeting the capacity obligation under the FRR Alternative on the grounds that Public Utilities Commission of Ohio (Ohio Commission) had established a state compensation mechanism.⁴ AEP Ohio has filed a request for rehearing of that order. On April 4, 2011, AEP Ohio also filed a complaint asserting that the January 2011 Order's interpretation of the RAA was inconsistent with the FPA and the original intent of the FRR Alternative provisions.

³ Alternative retail suppliers, or alternative LSEs, are known under Ohio state law as competitive retail electric service (CRES) providers.

⁴ *American Electric Power Serv. Corp.*, 134 FERC ¶ 61,039 (2011) (January 2011 Order), *rehearing pending*.

5. On July 2, 2012, the Ohio Commission issued a ruling establishing charges for a state compensation mechanism.⁵ On September 17, 2012, AEP Ohio notified the Commission that, in compliance with the Ohio Commission's orders and subject to any future rulings by the Ohio Commission or this Commission, AEP Ohio's FRR capacity would be available to Ohio LSEs in accordance with the state compensation mechanism adopted by the Ohio Commission, effective August 8, 2012.⁶

II. Filing

6. AEP Ohio asks that the Commission accept an Appendix to the RAA that sets forth the rate of compensation for the capacity it provides on behalf of alternative LSEs pursuant to the Ohio Commission's adoption of a state compensation mechanism, which AEP Ohio states is permitted under the RAA. Specifically, AEP Ohio's proposed Appendix provides:

The [Ohio Commission] in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a cost-based state compensation mechanism for load of alternative retail LSEs (a/k/a Competitive Retail Electric Service (CRES) providers) in Ohio Power Company's FRR Service Area, of \$188.88/MW-day for FRR capacity made available by Ohio Power Company under the RAA, effective as of August 8, 2012. For purposes of administering the state compensation mechanism, the Final Zonal Capacity Price will be the price applicable to the unconstrained region of PJM adjusted for the RPM Scaling factor, the Forecast Pool Requirement and Losses. Ohio Power has indicated that it expressly reserves its right to propose a revised capacity rate to include charges or assessments necessary to enable Ohio Power to fully recover the cost of the FRR capacity (as determined by the [Ohio Commission] in its July 2, 2012 order).

⁵ AEP Ohio Transmittal at 5, (citing Ohio Commission Case No. 10-2929-EL-UNC). AEP Ohio states that the Ohio Commission found that the record established in the state proceeding supported a cost-based charge of \$188.88/MW day. AEP Ohio further states that, on August 8, 2012, the Ohio Commission implemented a cost deferral recovery mechanism that is intended to enable AEP Ohio to recover a portion of its FRR capacity costs from retail customers. *Id.* at 5-6 (citing Ohio Commission Case No. 11-346-EL-SSO).

⁶ See September 17, 2012 Update on Status of Proceeding at 2 (Docket Nos. ER11-2183-001 and EL11-32-000).

AEP Ohio requests an effective date of August 8, 2012, the date that the Ohio state compensation mechanism became effective.

7. AEP Ohio states that once this filing is approved by the Commission and becomes final and non-appealable, it will withdraw both its request for rehearing of the January 2011 Order and its complaint in Docket No. EL11-32-000.

III. Notice of Filing, Comments, Protests and Responsive Pleadings

8. Notice of the AEP Ohio's filing was published in the *Federal Register*, 78 Fed. Reg. 19,700 (2013), with interventions and protests due on or before April 15, 2013.

9. The Ohio Commission filed a notice of intervention. Timely motions to intervene were filed by American Municipal Power, Inc; DPL Energy Resources, Inc.; Duke Energy Ohio, Inc. and Duke Energy Corporation (collectively, Duke); Exelon Corporation (Exelon); Industrial Energy Users-Ohio (IEU-Ohio);⁷ and the Retail Energy Supply Association (RESA).⁸ FirstEnergy Service Company (FirstEnergy);⁹ Office of Ohio Consumer Counsel (OCC); and PJM filed motions to intervene out of time.

10. The Ohio Commission filed comments. Exelon, IEU-Ohio, RESA, FirstEnergy and OCC filed protests, and Duke filed a limited protest. PJM, AEP Ohio,¹⁰ and IEU-Ohio filed answers.

A. Comments and Protests

11. The Ohio Commission urges the Commission to accept AEP Ohio's filing as proposed. The Ohio Commission affirms that it has adopted a state compensation

⁷ Energy Users-Ohio is an association of large Ohio-based energy consumers.

⁸ Retail Energy Supply Association's members include: Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd.; and TriEagle Energy, L.P.

⁹ On behalf of FirstEnergy Solutions Corp.

¹⁰ AEP Ohio filed answers on April 30, 2013 and May 16, 2013.

mechanism and that accepting AEP Ohio's proposed filing would avoid a jurisdictional dispute between the Ohio Commission and the Commission.¹¹

12. Protesters do not support AEP Ohio's proposed tariff language and argue that the Commission should reject the filing. Exelon states that AEP Ohio's proposed Appendix is not required, and the Commission should not approve it. Exelon notes that, in an order issued on July 2, 2012, the Ohio Commission adopted the state compensation mechanism to apply to AEP Ohio's capacity under the RAA.¹² Exelon states that this order is currently effective and alternative LSEs have been compensating AEP Ohio at the rate required by this order. Therefore, Exelon asserts that the Commission need not accept a capacity mechanism that has already been established by a state commission and which the RAA states takes precedence over any other proposal AEP Ohio may file.¹³ RESA and First Energy state that the Commission's January 2011 Order found that AEP Ohio did not have the right to make its filing given the existence of a state compensation mechanism in Ohio.¹⁴ RESA states that this finding also applies to AEP Ohio's filing in this proceeding given the continued existence of a state compensation mechanism in Ohio.¹⁵ RESA, FirstEnergy, and OCC contend that AEP Ohio has not met its burden to show that the rates are just and reasonable. RESA states that AEP Ohio's filing is unclear, and should be rejected for failing to provide any cost support.¹⁶

13. FirstEnergy and IEU-Ohio state that AEP Ohio's filing should be rejected because AEP Ohio does not have the authority to amend the RAA.¹⁷ IEU-Ohio argues that even if AEP Ohio's filing is authorized, the Commission cannot grant AEP Ohio's requested relief because it exceeds the Commission's jurisdiction. IEU-Ohio contends that the Commission only has the authority and responsibility to approve only the wholesale rate

¹¹ Ohio Commission Comments at 2-5.

¹² Exelon Comments at 2 (citing Ohio Commission's *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 on Rehearing, October 17, 2012).

¹³ Exelon Comments at 2-3.

¹⁴ RESA Protest at 8 (citing January 2011 Order, 134 FERC ¶ 61,039 at PP 8, 10).

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 14.

¹⁷ FirstEnergy Protest at 4-5; IEU-Ohio Protest at 12-15.

for capacity that is provided to alternative LSEs, which in this instance, is the PJM RPM clearing price.¹⁸

14. Protestors also raise issues that they assert the Commission should consider if the Commission does not reject AEP Ohio's filing in this proceeding. Exelon states that the proposed Appendix should be revised to remove the ambiguities as to the capacity rate established. First Energy proposes the following modifications to the proposed Appendix, which FirstEnergy asserts accurately reflect the Ohio Commission's finding:¹⁹

The Public Utilities Commission of Ohio (PUCO) in Case No. 10-2929-EL-UNC on July 2, 2012, issued an order approving a ~~cost-based~~ state compensation mechanism for load of alternative retail LSEs (a/k/a Competitive Retail Electric Service (CRES) providers) in Ohio Power Company's FRR Service Area, ~~of \$188.88/MW-day, for FRR capacity made available by Ohio Power Company under the RAA, effective as of August 8, 2012.~~ For purposes of administering the state compensation mechanism, the wholesale rate shall be equal to the adjusted final zonal PJM RPM rate in effect for the rest of the RTO region for the current PJM delivery year, and with the rate changing annually on June 1, 2013, and June 1, 2014, to match the then current adjusted final zonal PJM RPM rate in the rest of the RTO region. The Final Zonal Capacity Price will be the price applicable to the unconstrained region of PJM adjusted for the RPM Scaling Factor, the Forecast Pool Requirement and Losses. ~~Ohio Power has indicated that it expressly reserves its right to propose a revised capacity rate to include charges or assessments necessary to enable Ohio Power to fully~~

~~recover the cost of the FRR capacity (as determined by the PUCO in its July 2, 2012 order).~~

¹⁸ IEU-Ohio at 16-17. IEU-Ohio states that a portion of what AEP Ohio characterizes as the state compensation mechanism (specifically, the difference between the PJM RPM clearing price that applies to alternative LSEs and \$188.88/MW-day) is exclusively a retail rate.

¹⁹ FirstEnergy Protest at 6-7. In its protest, FirstEnergy provides its proposed revisions to AEP Ohio's proposed Appendix in redlined strike out, as reflected in the body of this order.

15. Further, FirstEnergy and RESA state that AEP Ohio's request for a retroactive effective date of August 8, 2012, for AEP Ohio's proposed rates must be denied as inconsistent with the filed rate doctrine.

B. Answers

16. PJM states the PJM Board of Directors (Board) authorized the filing of a revision to the RAA to incorporate an appendix to Schedule 8.1 in order to incorporate a capacity compensation rate for AEP Ohio.²⁰

17. In its April 30, 2013 answer, AEP Ohio asserts that the Commission should disregard commenters' requests to reject AEP Ohio's filing on the basis that AEP Ohio is either not authorized to make the filing or that the filing is not needed. AEP Ohio notes that PJM's comments clarify that PJM received the proper authorization to make this amendment to the RAA on AEP Ohio's behalf.

18. AEP Ohio asserts that this filing is not contrary to the Commission's January 2011 Order because AEP Ohio's filing is not proposing to establish its capacity compensation charge, rather its filing is seeking the Commission's acceptance of the wholesale FRR charges as reflected in the Ohio Commission-approved state compensation mechanism. Therefore, AEP Ohio states that the Commission's acceptance of this filing would ensure that the state compensation mechanism would prevail, as in accordance with section D.8 of Schedule 8.1 of the RAA. Finally, AEP Ohio disputes arguments that this filing is not needed, noting the Ohio Commission's comments urging the Commission to accept the filing.²¹

19. AEP Ohio clarifies that it is not requesting that the Commission approve the Ohio Commission's determination as to AEP Ohio's FRR capacity costs. AEP Ohio states that it, and the Ohio Commission, are requesting one limited ruling that the Ohio Commission's decision to adopt a two-part state compensation mechanism is fully consistent with the RAA, which was adopted pursuant to federal law.²²

20. AEP Ohio also agrees with FirstEnergy's proposed modifications and offers to submit a compliance filing to reflect these edits. AEP Ohio states that the only proposed modification that it objects to relates to removing the effective date (August 8, 2012),

²⁰ PJM Answer at 2-3.

²¹ AEP Ohio Answer at 7-8.

²² AEP Ohio Answer at 5.

because, according to AEP Ohio, that is in fact the date that the Ohio Commission adopted the state compensation mechanism.²³

21. IEU-Ohio asserts that AEP Ohio's answer does not adequately address the issues IEU-Ohio raises in its protest. In its May 16, 2013 answer, AEP Ohio asserts that IEU-Ohio's answer raises the same arguments that IEU-Ohio raised in its protest.

IV. Commission Determination

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely unopposed motions to intervene serve to make the entities filing them parties to the proceeding. Given the lack of undue prejudice or delay, the parties' interest, and the early stage of the proceeding, we find good cause to grant the unopposed, untimely motions to intervene of FirstEnergy, OCC, and PJM.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept PJM's, AEP Ohio's, and IEU-Ohio's answers because they have provided information that assisted us in our decision-making process.

B. Proposed Appendix

24. As discussed below, we will accept AEP Ohio's proposed Appendix, to become effective August 8, 2012, subject to a compliance filing to modify the proposed Appendix as AEP Ohio has agreed to. We also accept AEP Ohio's commitment to withdraw its request for rehearing of the January 2011 Order, and the complaint filed in Docket No. EL11-32-000 once this filing is approved by the Commission and becomes final and non-appealable.

25. Under Schedule 8.1, a state is permitted to establish the compensation mechanism in a state regulatory jurisdiction that has implemented retail choice. The Ohio Commission states in its comments that the proposed Appendix conforms to the state compensation mechanism it approved, and that it supports the filing, effective on August 8, 2012.

26. Several protestors contend that the proposed Appendix is unnecessary as the RAA governs. Protestors argue that the Commission need not approve a capacity mechanism that has already been established by the Ohio Commission pursuant to the RAA. While

²³ *Id.* at 6-7.

AEP Ohio was not obligated by the RAA to file the proposed Appendix, we find no basis for rejecting the filing since it is consistent with the RAA.

27. Several parties maintain that the filing is unauthorized because the RAA permits only PJM to make filings to amend the RAA. Parties assert that AEP Ohio has not demonstrated that it received approval from the PJM Board to make this filing, as required for any filing to amend the RAA. We reject these arguments. We find that the filing is permissible because, as PJM answers, the PJM Board has authorized AEP Ohio to make this type of filing, which only adds an appendix, but which does not amend the body of the RAA itself.

28. First Energy argues that the effective date should not be August 8, 2012 and should be removed from the RAA provision. However, the Ohio Commission adopted the state compensation mechanism effective August 8, 2012, which no party disputes, and we therefore find that date to be in accordance with the RAA.

29. Several parties raise a concern that the proposed Appendix is ambiguous and unclear, and is unjust and unreasonable. But the protests were filed prior to AEP Ohio's answer in which AEP Ohio agreed to certain revisions to the Appendix that address these parties' concerns.

30. Having established that the proposed Appendix accords with the RAA and the state compensation mechanism, as detailed above, we therefore, reject the protests.

The Commission orders:

AEP Ohio's Appendix to the RAA is hereby accepted for filing, to become effective August 8, 2012, subject to a compliance filing, within 30 days of the issuance of this order, to implement the revisions to the Appendix to which AEP Ohio has agreed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

ER13-1164-000.DOC.....1-9

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/10/2014 3:00:35 PM

in

Case No(s). 14-1186-EL-RDR

Summary: Reply of Industrial Energy Users-Ohio to the Memorandum in Opposition to the Motion to Dismiss of Ohio Power Company electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio