

**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 IN SUPPORT OF AN
ORDER PERMITTING THE FILING OF ADDITIONAL AUTHORITY IN
SUPPORT OF ITS MOTION TO DISMISS**

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Attorneys for Industrial Energy Users-Ohio

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On August 19, 2014, Industrial Energy Users-Ohio (“IEU-Ohio”) filed a Motion to Dismiss Ohio Power Company’s (“AEP-Ohio”) application in the above-captioned matter on grounds that the Public Utilities Commission of Ohio (“Commission”) lacked jurisdiction to approve AEP-Ohio’s application on both state and federal grounds. In a Memorandum Contra filed on September 3, 2014, AEP-Ohio expressed its opposition to IEU-Ohio’s Motion to Dismiss. After IEU-Ohio filed its Reply in Support of its Motion to Dismiss, the United States Third Circuit Court of Appeals affirmed the decision of the United States District Court for the District of New Jersey, finding that a state commission was preempted by the Federal Power Act (“FPA”) from increasing the compensation of a generation owner for the provision of wholesale capacity.¹ Because the Commission’s rules do not expressly allow or prohibit the filing of additional authority in support of a motion, IEU-Ohio filed a Motion for an Order Permitting the Filing of Additional Authority in Support of its Motion to Dismiss (“Additional Authority Motion”) and attached the additional authority to its motion.

¹ *PPL Energy Plus, LLC v. Solomon*, Case No. 13-4330 (3d Cir. Sept. 11, 2014) (“*Solomon*”).

On October 2, 2014, AEP-Ohio filed a Memorandum Contra to IEU-Ohio's Additional Authority Motion ("Memo Contra"). AEP-Ohio argues that the Additional Authority Motion should be denied because it contains surreply arguments which are not permitted by Rule 4901-1-12, Ohio Administrative Code ("O.A.C."). It also repeats three arguments previously raised in its Memorandum Contra IEU-Ohio's Motion to Dismiss: that the preemption argument supported by the additional authority has already been litigated and the doctrine of *res judicata* prevents the Commission from considering that argument in this case; that the Federal Energy Regulatory Commission ("FERC") has already approved the Commission's actions and thus FERC's approval defeats a preemption claim; and that if the Commission allows the additional authority to be filed it should be ignored as inapposite. Because none of AEP-Ohio's arguments has merit, IEU-Ohio's Additional Authority Motion should be granted.

Initially, AEP-Ohio argues that the Additional Authority Motion should be denied because it contains surreply arguments. Clearly, IEU-Ohio has not sought to file a surreply. Rather, it is aware of additional authority in support of its motion that it seeks to assure is before the Commission so that it can decide the Motion to Dismiss properly.

Further, IEU-Ohio's Motion and Memorandum in Support do not constitute an additional reply to the arguments advanced by AEP-Ohio. Rather, they explain the context and relevance for seeking to file additional authority in support of its Motion to Dismiss. In IEU-Ohio's Memorandum in Support of the Additional Authority Motion, IEU-Ohio included a reference to its preemption argument and a brief description of the New Jersey District Court decision cited by IEU-Ohio in its Motion to Dismiss in order to lay the background as to why the additional authority (*Solomon*) is relevant to the

Motion to Dismiss.² IEU-Ohio's reference to this relevant background material can hardly be considered surreply arguments, and the explanation is consistent with Commission rules that require a supporting memorandum.³ IEU-Ohio's Memorandum in Support is limited to the background facts necessary to demonstrate that the additional authority is relevant to IEU-Ohio's Motion to Dismiss.

AEP-Ohio's substantive arguments against allowing IEU-Ohio to file the additional authority are also meritless. Initially, AEP-Ohio argues that the Additional Authority Motion should be denied because the doctrine of *res judicata* precludes IEU-Ohio from arguing that the Commission lacks jurisdiction to approve AEP-Ohio's application in this case because the Commission is preempted by the FPA.⁴ As shown in IEU-Ohio's Reply in Support of its Motion to Dismiss, *res judicata* does not apply to the Motion to Dismiss since the motion goes to whether the Commission has subject matter jurisdiction to address the merits of AEP-Ohio's application for authorization to impose the Capacity Shopping Tax.⁵ Once again, AEP-Ohio's argument is without merit.

Additionally, AEP-Ohio again repeats its incorrect assertion that FERC approved the state compensation mechanism approved by the Commission.⁶ FERC did nothing

² Commission Staff has also recently relied on that decision in its Merit Brief opposing the Purchased Power Agreement Rider in AEP-Ohio's pending electric security plan ("ESP") application. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 15-17 (July 23, 2014).

³ Rule 4901-1-12(A), O.A.C.

⁴ AEP-Ohio Memo Contra at 2-3.

⁵ IEU-Ohio Reply to the Memorandum in Opposition to the Motion to Dismiss at 5-6 (*citing State v. Wilson*, 73 Ohio St.3d 40, 45 n.6 (1995)); *see also 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).

⁶ AEP-Ohio Memo Contra at 4.

of the sort. Following the *Capacity Case*,⁷ AEP Service Corp. (“AEPSC”), on behalf of AEP-Ohio, sought FERC approval of an appendix to the Reliability Assurance Agreement (“RAA”) that referenced the \$188/megawatt-day (“MW-day”) price that included both retail and wholesale compensation.⁸ Various parties filed protests at FERC, which prompted AEPSC to voluntarily agree to accept a modified appendix.⁹ As part of AEP-Ohio’s voluntary acceptance of the modified appendix, AEPSC asserted:

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).¹⁰

In approving the modified appendix, FERC only confirmed that the wholesale price that competitive retail electric service (“CRES”) providers would pay for capacity was the Reliability Pricing Model (“RPM”) Price. AEP-Ohio’s assertion that FERC approved the state compensation mechanism approved by the Commission is plainly false¹¹ and is contradicted by AEPSC’s assertions in the FERC proceeding and by AEP-Ohio’s Memo Contra in this case where AEP-Ohio correctly identifies that FERC accepted “an

⁷ *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.

⁸ *American Electric Power Service Corporation*, FERC Docket No. ER13-1164-000, Order Accepting Appendix to Reliability Assurance Agreement Subject to Compliance Filing at 1 (May 23, 2013), available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13265974> (last accessed Oct. 8, 2014).

⁹ *Id.* at 6-7.

¹⁰ *American Electric Power Service Corporation*, FERC Docket No. ER13-1164-000, Response of American Electric Power Service Corporation at 4 (Apr. 30, 2013). This pleading was attached to IEU-Ohio’s Reply to the Memorandum in Opposition to the Motion to Dismiss.

¹¹ For a longer discussion of AEP-Ohio’s incorrect argument, IEU-Ohio’s Reply to the Memorandum in Opposition to the Motion to Dismiss at 15-17.

appendix to the RAA that expressly set out the wholesale component of the state compensation mechanism adopted by the Commission.”¹²

Finally, AEP-Ohio argues that even if the Commission accepts the filing of the additional authority, the Commission should ignore it because it is inapposite.¹³ AEP-Ohio attempts to distinguish *Solomon* by arguing that the Capacity Shopping Tax is a retail rate and the FPA does not preempt state regulation of retail rates.¹⁴ As the court in *Solomon* held, New Jersey’s regulation was preempted because under the New Jersey regulation “generators will both receive the federal price for interstate capacity sales [*i.e.* the RPM Price] and also receive an additional amount fixed by the [Board of Public Utilities].”¹⁵ As is the case here, the Commission has authorized AEP-Ohio to collect the RPM Price for capacity from CRES providers and the difference up to \$188.88/MW-day from retail customers. The compensation structures authorized by the New Jersey Board and this Commission are functionally identical. Because “only FERC has the authority to set interstate capacity prices,” however, the Commission is preempted from approving AEP-Ohio’s application in this matter.¹⁶

¹² AEP-Ohio Memo Contra at 4 (emphasis added).

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Solomon* at 24.

¹⁶ *Id.* at 26 (citing *N.J. Bd. of Pub. Utils. v. F.E.R.C.*, 744 F.3d 74, 97 (3d Cir. 2014)).

For these reasons, the Commission should grant IEU-Ohio's Additional Authority Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission'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 in Support of an Order Permitting the Filing of Additional Authority in Support of its Motion to Dismiss* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 9th day of October 2014, via electronic transmission.

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Summary: Reply in Support of an Order Permitting the Filing of Additional Authority in Support of its Motion to Dismiss electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio