BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider.	)	Case No. 14-1693-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 14-1694-EL-AAM

INITIAL BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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TABLE OF CONTENTS

I. Introduction

With the passage of S.B. 3, the General Assembly declared in unmistakable terms that generating units should be on their own in the competitive market. This enactment resulted in a decisive shift away from traditional cost-of-service principles in favor of an approach that harnesses the power of market forces to set the price of generation services. The Ohio manufacturing sector has benefited from this deregulatory approach. Electricity is a critical cost component for manufacturers in producing their products. By allowing manufacturers to shop for their electricity supply, and having suppliers compete to provide that electricity, the cost component compared to what would otherwise be available to manufacturers under the utilities' tariffed rates has come down. The downward pressure on prices created by a competitive market should be fostered. The importance of competitive markets and their development free from anticompetitive subsidies is embedded in the policy of the state of Ohio: "It is the policy of this state to * * * [e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."[1]

The stipulation adopting the application that is presented to the Public Utilities Commission of Ohio (Commission) for approval by the Ohio Power Company (AEP-Ohio or the Company) and others, unfortunately, stands in the way of building on the positive results of a

[1] R.C. 4928.02(H).

competitive market.[2] If accepted, the Power Purchase Agreement Rider (PPA Rider) adopted by the Stipulation will saddle distribution customers with the generation costs of a fleet of aging and expensive coal units and threaten to erase the gains made by Ohio manufacturers and other consumers in the competitive market. That outcome is unfaithful to the General Assembly's unambiguous market-based directive and will thwart the state's effectiveness in the global economy. Indeed, as one of the top generators of electricity in the nation, the harms to Ohio could be especially painful.[3] Given the interconnectedness of the electrical grid and the competitive markets, these harms will have ripple effects beyond Ohio's borders.[4]

AEP-Ohio euphemistically refers to the PPA Rider as a "hedge" that will temper market volatility and bring hundreds of millions of dollars in credits to customers' bills due to a long-term surge in wholesale-market revenues, but this rosy portrayal depicted by AEP-Ohio is a narrative at war with itself. At the same time that AEP-Ohio touts these purported benefits, it laments that the units are on the "economic bubble" and in dire need of Commission assistance. If AEP-Ohio truly believed that these uneconomic and inefficient units were well positioned to capture market revenues, there would be no need for its bailout request. An economically-rational firm would seek to capture these long-term gains for itself, not pass them on. The gulf between AEP-Ohio's two narratives goes to show that it has very little faith in its own forecasts

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[2] Joint Stipulation and Recommendation (December 14, 2015) (Stipulation). The signatories to the Stipulation are: AEP-Ohio; Staff; Ohio Energy Group (OEG); Ohio Hospital Association (OHA); Mid-Atlantic Renewable Energy Coalition (MAREC); Direct Energy; Ohio Partners for Affordable Energy; FirstEnergy Solutions Corp. (FES); Buckeye Power, Inc.; Interstate Gas Supply, Inc. (IGS); and Sierra Club.

[3] OMAEG Ex. 29 at 12 (Dr. Hill Supp. Direct).

[4] Id.

which purport to show the PPA Rider's (and, hence, the generating plants') future profitability. Indeed, it is a tacit admission that customers could end up paying dearly in the long run.

But whether these generating units ultimately sink or swim should be up to the wholesale markets operated by the regional transmission organization, PJM Interconnection LLC (PJM), and regulated by the Federal Energy Regulatory Commission (FERC), not this Commission. FERC alone has the power to oversee the operation of the wholesale markets and any Commission decision authorizing cost recovery through the PPA Rider would have the effect of setting a wholesale rate, thereby usurping FERC's exclusive authority. No less than eight federal judges have found that similar proposals in Maryland and New Jersey were preempted. That precedent alone defeats the PPA Rider's cost recovery mechanism.

Even if the Commission had the authority to approve cost recovery through the PPA Rider, AEP-Ohio has not met the factors articulated by the Commission in its Opinion and Order that modified and approved AEP-Ohio's application for its third electric security plan (the *ESP 3 Order*). First, there has been no showing of a financial need of the generating units. Nothing shows that the generating units subject to the PPA would actually close if not subsidized by ratepayers. In fact, AEP-Ohio could not retire most of these units even if it wanted to or if it was necessary. Second, AEP-Ohio's dire warnings about threats to reliability if the plants close are plainly meritless. The results from the recent series of PJM base residual auctions (BRAs), coupled with new entry from natural-gas fired generating units, show that there is sufficient resource adequacy in the PJM region. Third, the increasingly-stringent environmental controls imposed by the Clean Power Plan will significantly raise the coal units' costs of compliance going into the future, thereby making them even less economic than they already are. Finally, after correcting for the litany of errors that pervade AEP-Ohio's forecasts, the proposal shows

that it could cost billions of dollars to customers, all to the detriment of economic development in the state of Ohio.

But the problems do not end with the PPA Rider. The Stipulation cobbles together a host of disparate provisions wholly unrelated to the PPA Rider that will benefit very few at the expense of all other ratepayers. Each of the signatories to the Stipulation—many of whom were originally opposed to the concept of a PPA Rider—received an inducement to join the Stipulation in return for, among other things, rate discounts, subsidies, energy efficiency pledges, and renewable resource investments. The overwhelmingly majority of costs associated with implementing these provisions, most of which are currently unknown, will ultimately get shifted to non-signatory parties and consumers as a whole. The end result of all this will result in the violation of several longstanding regulatory principles. Customer classes will be cross-subsidized, cost-causers will not bear the costs associated with their behavior, pricing signals will be distorted, and worst of all, rates will almost certainly go up, thereby resulting in a diminution of economic activity.

At bottom, no amount of artful labeling by AEP-Ohio can alter the essential character of the Stipulation. It is a bailout request that seeks to commandeer captive customers into securing the economic fortunes of 20 generating units through re-regulation of generation services. Packaging the bailout request together with a litany of unrelated provisions to be enjoyed by a narrow class of beneficiaries to the exclusion of all other customers only makes things worse. In sum, to the extent the Commission's jurisdiction is not otherwise preempted by federal law, the Stipulation adopting AEP-Ohio's application should be denied.

II. Background

A. The Commission's *ESP 3 Order*.

This case has its roots in AEP-Ohio's third electric security plan proceeding (ESP 3).[5] In that case, AEP-Ohio sought Commission approval to establish a nonbypassable PPA Rider based on its contractual entitlement to the output from the Kyger Creek and Clifty Creek plants, which are owned by the Ohio Valley Electric Cooperative (OVEC).[6] Under that proposal, AEP-Ohio would purchase the output—capacity, energy, and ancillary services—and sell it into the wholesale markets operated by PJM.[7] If the market revenues exceeded the costs to produce the output, AEP-Ohio would flow the difference back to customers as a credit.[8] On the other hand, if the costs to produce the output exceeded the market revenues, AEP-Ohio would flow the difference back as a charge.

In its *ESP 3 Order*, the Commission explained that it was not persuaded based on the record evidence that the proposal would sufficiently benefit customers.[9] For this reason, the Commission denied AEP-Ohio's request for cost recovery through the PPA Rider. The Commission instead established a placeholder PPA Rider at an initial rate of zero and explained that AEP-Ohio would be required to justify its request for cost recovery in a future filing.[10] The Commission set out the following non-exhaustive list of factors that it said it would consider, but not be bound by, in addressing AEP-Ohio's future filing:

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[5] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.13 in the Form of an Electric Security Plan, et al.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order at 25 (Feb. 25, 2015).

[6] Id. at 5.

[7] Id.

[8] Id.

[9] Id. at 25.

[10] Id.

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity
- A description of how the generating plant is compliant with all pertinent environmental regulations and a compliance plan for pending environmental regulations; and
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.[11]

The Commission also emphasized that any future PPA Rider proposal must:

- Provide for rigorous Commission oversight and include a process for a periodic substantive review and audit;
- Commit to full information sharing with the Commission and its Staff;
- Include an alternative plan to allocate the rider's financial risk between itself and its customers; and
- Include a severability clause in the event that a court of competent jurisdiction renders the rider invalid in any way.[12]

Several parties, including OMAEG, filed applications for rehearing critiquing certain aspects of the Commission's ruling on AEP-Ohio's application and recommending that the Commission consider other relevant factors.[13] In a Second Entry on Rehearing, the Commission stated that it would "defer ruling on the assignments of error related to the PPA at this time."[14] The rehearing requests are still pending.

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[11] Id.

[12] Id. at 25-26.

[13] OMAEG Application for Rehearing at 12-13 (March 27, 2015).

[14] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, et al.*, Case No. 13-2385, et al., Second Entry on Rehearing at 5 (May 28, 2015).

B. AEP-Ohio's Amended Application and terms of the proposal.

On May 15, 2015, AEP-Ohio filed an Amended Application seeking Commission approval of a PPA between itself and its unregulated generation affiliate, AEP Generation Resources, Inc. (AEPGR).[15] Under this proposal, known as the Affiliate PPA, AEP-Ohio would purchase on a cost-plus basis the output of certain generating units (the Affiliate PPA units) owned by AEPGR and liquidate that output into the PJM wholesale market.[16]

The AEPGR generating units at issue are: Cardinal unit 1; Conesville Units 4, 5, and 6; Stuart Units 1, 2, 3, and 4; and Zimmer Unit 1.[17] AEPGR owns: 100% of Cardinal Unit 1 and Conesville Units 5 and 6; 43.5% of Conesville Unit 4; 26.0% of Stuart Units 1 to 4; and 25.4% of Zimmer Unit 1.[18]

AEP-Ohio also renewed its request to include the OVEC units in the PPA Rider under the same terms proposed in its ESP 3 application,[19] which was rejected by the Commission.[20] The OVEC units under review are: Kyger Creek Units 1, 2, 3, 4, and 5; and Clifty Creek Units 1, 2, 3, 4, 5, and 6.[21] In accordance with the Inter-Company Power Agreement that AEP-Ohio has with OVEC, AEP-Ohio is entitled to a 19.93% share of the output from these OVEC units.[22]

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[15] AEP-Ohio Ex. 13 at 1 (Amended Application).

[16] AEP-Ohio Ex. 1 at 11-12 (Vegas Direct).

[17] AEP-Ohio Ex. 2, KDP-1 at 7 (Dr. Pearce Direct).

[18] Id.

[19] AEP-Ohio Ex. 13 at 1 (Amended Application).

[20] *ESP 3 Order* at 25.

[21] AEP-Ohio Ex. 1 at 12 (Vegas Direct).

[22] AEP-Ohio Ex. 10 at 4-5 (Allen Direct).

Collectively, these 20 units produce over 3,100 MWs, which is over a third of AEP-Ohio's retail load.[23] The units are all coal-fired.[24]

In accordance with the Amended Application, AEP-Ohio proposed to make monthly payments to AEPGR based on a formulaic rate for: fuel costs; operations and maintenance costs; depreciation expenses; a capacity payment; a tax reimbursement payment; and other miscellaneous payments.[25] Legacy costs would have been included in the cost calculation, which include the Affiliate PPA units' existing capital costs, debt, net book value, labor contracts fuel contracts, and associated retirement costs.[26] The rate of return was based on a fixed capital structure of 50% debt and 50% equity.[27] The cost of debt was proposed to start at 4.74% based on the Moody's Baa Corporate Bond Index (Moody's Index).[28] The cost of equity was based on the monthly average of the Moody's Index plus 650 basis points, which would set the initial return on equity (ROE) at 11.24%.[29] AEP-Ohio also proposed a bounded range for the ROE, which would not go below 8.90% nor above 15.90%.[30]

C. The December 14, 2015 Joint Stipulation and Recommendation.

After weeks of hearing on the Amended Application and following the conclusion of the proceedings, AEP-Ohio filed a Stipulation on December 14, 2015 that requested approval of the

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[23] AEP-Ohio Ex. 1 at 13 (Vegas Direct).

[24] Vol. I, Tr. at 122.

[25] Sierra Club Ex. 2 at 14-15 (Power Purchase and Sale Agreement).

[26] Vol. VII, Tr. at 1852.

[27] AEP-Ohio Ex. 8 at 5 (Hawkins Direct).

[28] Id.

[29] Id. at 6-7.

[30] Id. at 7.

Amended Application subject to the modifications described in the Stipulation.[31] Under the Stipulation, the PPA Rider would continue through May 31, 2024 and be subject to an ROE of 10.38%.[32]

AEP-Ohio proposes to flow all revenues and costs of the PPA units through the PPA Rider.[33] AEP-Ohio requests imposition of the PPA Rider on a nonbypassable basis.[34] The PPA Rider rate would "be set based on annual forecasted values subject to quarterly true-ups to reflect actual values, with the initial rider rate being based on a projected $4 million credit for 2016 (annualized) subject to reconciliation."[35] PPA Rider credits and charges would be allocated to rate classes/voltage levels based on the PJM five monthly peak demands for the previous year.[36] Customers would be billed on a per kWh charge for each rate class/voltage level.[37] None of the capacity or energy bid into the PJM market would serve AEP-Ohio's standard service offer (SSO) load.[38]

The Stipulation vastly expanded the scope of the Amended Application by adding several new features, including, inter alia, proposals to: extend the length of its ESP 3 through 2024; extend riders and tariffs related to the expansion of the ESP term, including the extension of the distribution investment rider (DIR); extend the IRP tariff and credit through 2024 for current IRP tariff customers and make 250 MW of additional interruptible load available to the Signatories

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[31] Joint Ex. 1 at 4.

[32] AEP-Ohio Ex. 52 at 3 (Allen Direct in Support of Stip.).

[33] Joint Ex. 1 at 6.

[34] AEP-Ohio Ex. 10 at 8 (Allen Direct).

[35] Joint Ex. 1 at 6.

[36] Id.

[37] Id.

[38] AEP-Ohio Ex.10 at 6 (Allen Direct).

and non-opposing parties; and increase the credit provided to IRP customers that will be collected from other ratepayers.[39]

The Stipulation also provides funding to the Ohio Hospital Association's (OHA) members and Ohio Partners for Affordable Energy (OPAE); commits AEP-Ohio to maintain a nexus of operations in Ohio and maintain corporate headquarters in Columbus, Ohio for the term of the PPA Rider; creates pilot programs for certain competitive retail electric service (CRES) providers (paid for in part by ratepayers); commits AEP-Ohio to seek approval to obtain cost recovery for and to modify the operational characteristics of Conesville Units 5 and 6 and Cardinal Unit 1; requires AEP-Ohio to open a docket to address, inter alia, barriers to retiring Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC units; seeks approval of a variety of terms in its 2017-2019 EE/PDR plan; requires AEP-Ohio to file a carbon emission reduction plan; requires AEP-Ohio to implement programs to promote fuel diversification; requires AEP-Ohio to explore grid modernization initiatives; requires AEP-Ohio to include battery resources in future filings to aid in the provision of distribution services if AEP-Ohio obtains approval to recover associated costs in base rates; and requires AEP-Ohio and its affiliates to develop wind and solar projects if AEP-Ohio obtains retail cost recovery associated with each project.[40]

III. Standard of Review

R.C. 4905.22 provides that:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and

[39] Joint Ex. 1 at 10-11.

[40] Id. at 13-26, 28-31.

> reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

IV. Discussion

This case suffers from both procedural and substantive flaws. Procedurally, the evidentiary hearing was scheduled in such a way as to deprive the parties of their rights to a fair hearing. Given the ample rights of discovery granted by statute and rule,[41] the Commission should have continued this proceeding to ensure that the parties could avail themselves of these rights. Moreover, the decision to prohibit PJM from intervening and filing testimony in this proceeding deprived the Commission of an important perspective concerning the impact of the PPA Rider on the wholesale markets.

Substantively, the Commission should reject the Stipulation and deny the Amended Application. To begin with, insofar as the PPA Rider is concerned, the Commission is preempted from acting because Congress has granted exclusive authority to FERC to regulate the wholesale markets. Any Commission decision authorizing cost recovery under the PPA Rider would have the effect of setting a wholesale rate, thereby impermissibly intruding on FERC's authority. But even if the Commission was not preempted here, it should still deny the request. As shown by the chorus of opposition from various stakeholders with different perspectives, the proposal to burden customers with the costs of an aging and expensive fleet of coal plants is antithetical to the deregulatory approach heralded by the passage of S.B. 3, falls woefully short of meeting the factors articulated in the Commission's *ESP 3 Order*, and will damage Ohio's

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[41] R.C. 4903.082; Ohio Adm. Code 4901-1-16(A).

economy. Moreover, the profusion of unrelated provisions in the Stipulation that aid a narrow class of beneficiaries to the exclusion of all other customers will exacerbate the harms caused by the PPA Rider.

A. The Commission should have continued the hearing to allow the parties adequate time to prepare.

On no less than two occasions, the Commission scheduled this proceeding in such a way as to deprive the parties of a fair opportunity to adequately prepare their case. The first phase of this proceeding was scheduled at the same time that FirstEnergy's fourth electric security plan was being held. The problem with this is that many of the intervening parties in this case are also participants in the FirstEnergy case. On the first day of the first phase of the hearing in this case, OMAEG sought to minimize these harms by asking for a continuance until the conclusion of the FirstEnergy hearing.[42] In addition to citing the pendency of the FirstEnergy hearing, OMAEG also cited the fact that AEP-Ohio had served supplemental discovery responses only a few days before the start of the hearing.[43] Additionally, OMAEG cited the scheduling difficulty that one expert witness encountered in trying to prepare for both the AEP-Ohio and FirstEnergy proceedings.[44] In response to OMAEG's oral motion for a continuance, the attorney examiner explained that the evidentiary hearing would proceed as scheduled.[45]

The second phase of this proceeding, which was held to address the terms of the late-filed Stipulation, was similarly flawed. As with the first phase, the schedule establishing the second phase was inattentive to the strains it placed on the parties' resources. It established a two-week

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[42] Vol. I, Tr. at 14.

[43] Id. at 14-15.

[44] Id. at 15.

[45] Id. at 17.

timeline over the Christmas and New Year's holidays to conduct discovery, engage expert witnesses, analyze the myriad of issues reflected in the Stipulation, and compile testimony.[46] Additionally, while many of the parties were preparing for hearing on this Stipulation, they were also preparing for hearing on the latest stipulation filed by FirstEnergy.[47] On the first day of hearing on the second phase of this proceeding, OMAEG again raised the unreasonableness and unjustness of the established procedural schedule that was prejudicial to the non-signatory parties in the proceeding.[48] During that colloquy with the Attorney Examiners, OMAEG requested a continuance of the hearing to afford parties adequate preparation time. As before, the oral motion for a continuance was denied.[49]

On both occasions, the Attorney Examiners erred in orally denying the motion for continuance requested by OMAEG. By statute, intervening parties are "granted ample rights of discovery."[50] Further, the Commission's rules authorize the use of discovery "in order to facilitate thorough and adequate preparation for participation in commission proceedings."[51] The procedural schedules established in both the first and second phases of this proceeding severely hampered the parties' ability to avail themselves of these rights. By scheduling this case and the FirstEnergy case at, or, around the same time, the Commission put a severe strain on the parties' resources, narrowed the scope of their discovery rights, and limited their ability to thoroughly

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[46] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, et al., Entry at 4 (December 15, 2015).

[47] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry at 4 (December 9, 2015).

[48] Vol. XVIII, Tr. at 4461-4463.

[49] Id. at 4465.

[50] R.C. 4903.082.

[51] Ohio Adm. Code 4901-1-16(A).

and adequately prepare. The decision to establish a two-week timeline over the Christmas and New Year's holidays only served to aggravate these concerns.

Under Ohio Adm. Code 4901-1-15(F), a party adversely affected by an oral ruling may raise the propriety of that ruling in its initial brief as a distinct issue for the Commission's consideration. Accordingly, OMAEG respectfully requests that the Commission find that the Attorney Examiners erred in denying the motions for a continuance as such rulings were unjust, unreasonable, and prejudicial because they deprived the parties, in contravention of their due process rights, of the right to be heard in a "meaningful manner."[52]

The next procedural error rests with the decision to deny PJM the opportunity to intervene and offer testimony in this proceeding.[53] After the Stipulation was filed, which included provisions concerning oversight over how the PPA Units would be bid into the PJM wholesale markets, PJM filed a motion seeking limited intervention.[54] To this end, PJM proposed to offer testimony from its Senior Vice President of Markets. AEP-Ohio and the Office of the Ohio Consumers' Counsel (OCC) opposed PJM's intervention and AEP-Ohio moved to strike PJM's testimony.[55]

An entry was issued unreasonably denying PJM the opportunity to fully participate in this proceeding.[56] First, the argument that PJM sought untimely intervention ignores the fact that

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[52] *State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶ 45.

[53] OMAEG noted at the hearing that it objected to this outcome and that it would appeal the issue to the Commission. Vol. XX, Tr. at 4904. In the interests of administrative economy, OMAEG is pursuing the issue in this brief as permitted by Ohio Adm. Code 4901-1-15(F) rather than filing an interlocutory appeal.

[54] PJM Motion for Limited Intervention at 4-5 (December 28, 2015).

[55] AEP-Ohio Memo Contra at 1, 4 (December 29, 2015); OCC Memo Contra at 1 (January 4, 2016); and AEP-Ohio Motion to Strike at 1 (December 31, 2015).

[56] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, et al., Entry at 9 (January 7, 2016).

the Stipulation was filed well after the evidentiary hearing began in this case. While the entry states that PJM should have known that oversight about bidding would be at issue in this proceeding, there is no way that PJM could have known the exact language included in the Stipulation that addressed this issue and how that language would impact PJM and how it operates the region's wholesale markets. If this entry is allowed to stand, its logic will encourage parties to intervene in cases that are only marginally related to their interests simply on the offhand chance that a stipulation may at some later point get filed which directly impacts their interests. This outcome would needlessly clog the Commission's docket with motions to intervene and undermine the interests of administrative economy. It could also have the effect of encouraging parties to intervene when their interests are not concrete, but rather merely precedential in nature.[57]

The entry also reasons that PJM's interests are sufficiently represented by the Independent Market Monitor (IMM) given the IMM's public interest function in monitoring the PJM markets.[58] PJM's functions, however, are not coextensive with the IMM's functions. PJM is the sole entity that administers the tariffs through which AEP-Ohio and others bid their resources into the wholesale market. While the IMM certainly performs a valuable function in *monitoring* the market, it is not the entity that actually *operates* the market. Moreoever, the IMM testimony that was filed in opposition to the Stipulation does not address PJM's concerns relating to Section III(A)(5)(a) of the Stipulation; thus, the IMM's presence in this proceeding

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[57] *In the Matter of the Complaint of Whitt v. Nationwide Energy Partners*, LLC, Case No. 15-697-EL-CSS, Entry at 5 (November 18, 2015) ("We have long held that an interest in the precedential value of a case is not sufficient reason for intervention."); *In the Matter of Power4Schools v. FES*, Case No. 14-1182-EL-CSS, Entry at 4 (September 4, 2014) (a "legitimate interest in the precedent that [a] case sets * * * is not a sufficient reason for intervention.").

[58] Id. at 7-8.

does not provide an adequate substitute for what would otherwise have been addressed by PJM. Participation via an amicus brief filing does not permit PJM to develop the record any further. Testimony from PJM would have made a valuable contribution to the Commission's understanding of the Stipulation's provision in Section III(A)(5)(a) which addresses annual compliance reviews. In short, OMAEG respectfully requests that the Commission find that the entry was unreasonable, unjust, and prejudicial. As such, the Commission should accept the testimony of PJM witness Bresler as evidence in the record.

B. FERC's exclusive authority to oversee the wholesale power markets preempts the Commission from approving cost recovery through the PPA Rider.

The Commission cannot approve the Stipulation's provisions addressing cost recovery under the PPA Rider because it would usurp FERC's exclusive power to regulate the wholesale power markets. The Federal Power Act makes "the transmission of electric energy in interstate commerce" and "the sale of such electric energy at wholesale in interstate commerce" subject to federal control.[59] Although the Act speaks in terms of wholesale energy sales, the Act also embraces wholesale capacity sales.[60]

FERC is charged with administering the Act and it alone "must ensure that wholesale rates are just and reasonable."[61] But FERC's authority is not merely limited to overseeing the propriety of wholesale rates. As the U.S. Supreme Court recently declared, "FERC has the authority—and, indeed, the duty—to ensure that rules or practices '*affecting*' wholesale rates are just and reasonable."[62] Given this exclusive grant of power, a subject that is committed to

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[59] 16 U.S.C. 824(b)(1). See also 16 U.S.C. 824d(a).

[60] See *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3rd Cir. 2014).

[61] *Entergy La., Inc. v. La. Pub. Serv. Comm.*, 539 U.S. 39, 41 (2003) (quotations omitted).

[62] *FERC v. EPSA*, Case No. 14-840, et al., Slip Opinion at 15 (January 25, 2016) (emphasis added).

FERC's jurisdiction means that the States cannot assert jurisdiction over that same subject.[63] Because federal law is supreme, any Commission action that attempts to thwart FERC's exclusive authority to oversee the wholesale markets is invalid under the Supremacy Clause.[64]

Two unanimous federal appellate decisions perfectly illustrate these principles and show why the Commission is preempted from approving AEP-Ohio's proposal. In *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014),[65] the court held that the Maryland Public Service Commission's (MPSC) program to incent construction of a new generating plant was both field and conflict preempted. The program guaranteed a fixed, 20-year revenue stream to the plant's owner pursuant to a contract for differences (CFDs) with the local utilities.[66] The CFDs required the owner to bid its energy and capacity into the PJM market.[67] If the market revenues from the output cleared above the contract price, the owner passed that gain back as a credit to the local utilities.[68] Conversely, if market revenues cleared below the contract price, the loss was passed back as a charge.[69] Costs ultimately fell to customers.[70] The court unanimously held that the MPSC's program was "field preempted because it functionally sets the rate that [the owner] receives for its sales in the PJM auction."[71] The court reasoned that the program intruded on FERC's exclusive jurisdiction over the wholesale markets because the program effectively

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[63] See *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment).

[64] See U.S. Const. art. VI, cl. 2.

[65] On October 19, 2015, the U.S. Supreme Court granted a petition for writ of certiorari to review this case. See 2015 WL 6112868.

[66] *Nazarian*, 753 F.3d at 473.

[67] Id. at 473-474.

[68] Id.

[69] Id.

[70] Id. at 474.

[71] Id. at 476.

displaced the rates that would otherwise be paid in the PJM markets.[72] The court's rationale for finding conflict preemption was of a similar character. It noted that the program stood as an obstacle to achieving Congressional purposes and objectives by, among other things, threatening "to seriously distort the PJM auction's price signals" which "[m]arket participants rely on * * * in determining whether to construct new capacity or expand existing resources."[73]

A proposal similar to that featured in *Nazarian* was later struck down in *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014). There a New Jersey statute, the Long Term Capacity Pilot Program Act (LCAPP), guaranteed payments for 15 years from local utilities to new generators for capacity that the generators were able to clear in the PJM market.[74] Much like in *Nazarian*, the payment structure was set up as a contract for differences. Capacity market revenues above the contract price were flowed back to the utilities as a credit and market revenues below the contract price were flowed back as a charge.[75] Costs were ultimately born by ratepayers.[76] The court held that the LCAPP statute was invalid under a field preemption theory because it "attempt[ed] to regulate the same subject matter that FERC has regulated through PJM's Reliability Pricing Model."[77] Continuing, the court reasoned that "[b]ecause FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand."[78]

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[72] Id.

[73] Id. at 478-479.

[74] *Solomon*, 766 F.3d at 248-249.

[75] Id. at 252.

[76] Id. at 246.

[77] Id.

[78] Id. at 253.

Nazarian and *Solomon* foreclose the Commission's ability to approve cost recovery under the PPA Rider.[79] Like in those cases, AEPGR and OVEC would receive guaranteed recovery for the output that AEP-Ohio purchases and bids into the PJM markets. Any differences between the revenues that AEP-Ohio receives and the contract price it has with AEPGR and OVEC would ultimately be borne by customers. This arrangement would directly intrude upon the federal field overseen by FERC, and administered by PJM, which sets wholesale prices according to market forces. If approved, the Commission would be supplanting federal control over the markets by setting the functional equivalent of a wholesale rate.[80] This arrangement would also conflict with the attainment of Congressional aims by distorting wholesale price signals. The prospect of guaranteed recovery would make AEP-Ohio agnostic to revenues received in the PJM markets because any shortfalls would be made up by customers. Insulated from the discipline of the market, AEP-Ohio would therefore be in a position to bid the output in at a level that is indifferent to the economic constraints faced by other market participants.

Arguments that the only thing AEP-Ohio is seeking from this Commission is the approval of retail rate recovery are illusory. AEP-Ohio is asking the Commission to collect from (or credit) ratepayers costs associated with a wholesale affiliate contract and wholesale transactions. Put simply, whether viewed through the lens of conflict or field preemption, the

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[79] The Commission declined on ultra vires grounds to address the preemption issue in its *ESP 3 Order*. See *ESP Order* at 26. OMAEG raises the issue here because the issue is now squarely presented. To the extent the Commission declines to address the preemption issue again, OMAEG raises the issue to preserve it for appeal.

[80] *Nazarian*, 753 F.3d at 476.

Commission's acceptance of AEP-Ohio's proposal would "strike[] at the heart of [FERC's] power to establish rates" at wholesale and thus cannot stand under the Supremacy Clause.[81]

C. The Stipulation does not meet the Commission's three-part test for analyzing the reasonableness of a stipulation.

Even if the Commission had the power to authorize cost recovery under the PPA Rider, the Stipulation adopting the Amended Application (as modified) should be denied in its entirety because it does not meet the Commission's three-part test for analyzing the reasonableness of a stipulation. Ohio Adm. Code 4901-1-30 permits parties to enter into stipulations for review by the Commission. In numerous cases,[82] the Commission has used the following criteria to evaluate whether a stipulation is reasonable and merits adoption:

1. Is the stipulation a product of serious bargaining among capable, knowledgeable parties?
2. Does the stipulation, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?

As explained below, the Stipulation fails each part of the test.

1. The Stipulation is not the product of serious bargaining among capable, knowledgeable parties.

The Stipulation falls short of meeting the first prong of the test in numerous ways. First, contrary to the assertion of AEP-Ohio witness Allen, the Signatories do not "represent a variety of diverse interests * * * ."[83] The Signatories are an "ad hoc, collection of corporate and

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[81] Id. at 478.

[82] See, e.g., *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Alternative Rate Plan for Continuation of its Distribution Replacement Rider*, Case No. 13-1571-GA-ALT, Opinion and Order at 9 (February 19, 2014).

[83] AEP-Ohio Ex. 52 at 2 (Allen Direct in Support of Stip.).

institutional interests that represent only themselves and provide a façade of representational diversity."[84] Moreover, residential customers are not signatories.[85] While proponents of the Stipulation will likely point to OPAE and Staff as representing residential interests, neither of these signatories advocate solely on behalf of residential customers or represent the entirety of the residential class. OPAE provides weatherization services to low-income customers. Staff monitors impacts to all customer classes, but its core focus is not on residential customers.

Second, parties (including signatory parties) were not privy to side-agreements that arose out of the bargaining process. It is axiomatic that for parties to be able to seriously negotiate over the terms of a deal, there must be transparency about the terms of that deal. This did not happen here. Through discovery, it came to light that AEP-Ohio reached a side deal with IEU-Ohio and that AEPGR reached a side deal with Sierra Club. In a global settlement agreement between IEU-Ohio and AEP-Ohio, AEP-Ohio agreed to make an $8 million irrevocable payment to IEU-Ohio and, in exchange, IEU-Ohio agreed to not oppose the Stipulation.[86] The agreement between Sierra Club and AEPGR binds Sierra Club to agree to certain provisions of the Stipulation and binds AEPGR to undertake certain commitments associated with the future operations of the PPA units.[87] The terms of these deals were not disclosed to any parties during the bargaining process, which thereby deprived all parties (including the signatory parties) of valuable information that could have been used to evaluate the impact of the Stipulation on their respective interests and could have affected the parties' decision making process. As the Supreme Court of Ohio previously held, the lack of knowledge regarding the "existence of side

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[84] OMAEG Ex. 29 at 5 (Dr. Hill Supp. Direct).

[85] OCC Ex. 33 at 7 (Haugh Direct).

[86] P3/EPSA Ex. 11 at 1-2.

[87] OMAEG Ex. 26.

agreements between [utility] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process."[88]

Third, many of the commitments made by AEP-Ohio in the Stipulation depend on "suppositions that lack any preliminary analysis, feasibility assessment, or cost assessment whatsoever."[89] For example, the Stipulation provides no estimates on the expected costs of: converting Conesville Units 5 and 6 to natural gas co-firing; retiring, refueling, or repowering Conesville Units 5 and 6 and Cardinal Unit 1; implementing the Competition Incentive Rider (CIR); implementing the carbon emissions reduction plan; implementing the fuel diversification plan; implementing the grid modernization plan; deploying battery technology; and developing wind and solar generating resources.[90] Given the complete absence of any expected cost assessments related to these commitments, there is no way the parties could have engaged in serious bargaining over such an opaque proposal.[91]

Finally, the Stipulation is unfit for adoption given the proliferation of footnotes and carve outs that pervade the document. Sierra Club, IGS, and Direct Energy do not join the Stipulation's recital that it meets the three-part test, do not join the recital that it would be prudent for AEP-Ohio to revise the terms of its Affiliate PPA, and do not join the recital that the PPA Rider should recover through retail rates the costs or credits of the Affiliate PPA.[92] FES supports the Stipulation only insofar as it relates to the legal and policy implications of the PPA

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[88] See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 85.

[89] OCC Ex. 36 at 3 (Dr. Dormady Supp. Direct).

[90] Id. at 19.

[91] Id. at 2-3.

[92] Joint Ex. 1 at fn. 4, 5, and 14.

Rider.[93] Buckeye Power is not a participant to the provisions addressing retiring, refueling, or repowering Cardinal unit 1, the so-called "Retirement Readiness" docket, and the so-called "Generation Transition" docket.[94] OPAE is not a participant to the provision addressing certain EE/PDR provisions.[95] The balkanized nature of the Stipulation makes it virtually impossible to know the "package" of purported benefits that the Signatories are requesting for approval. Without the affirmative support of these parties to each feature in the Stipulation, the Commission cannot reach the conclusion that serious bargaining occurred.[96]

Given the lack of knowledge regarding the existence of side agreements, the lack of knowledge regarding the expected cost assessments related to the various provisions in the Stipulation, and the lack of knowledge regarding the bargained-for "package" and which party supports which feature, the Stipulation cannot be deemed to be a product of serious bargaining among capable, knowledgeable parties, and thus, fails the first prong of the test.

2. The Stipulation, as a package, does not benefit ratepayers or the public interest.

Approval of the Stipulation, which adopts the Amended Application as modified, will harm ratepayers and the public interest. Indeed, "[t]he major beneficiaries from the [Stipulation] are AEP Corporation, its stockholders, AEP-Ohio, its unregulated affiliates, and other entities that own portions of the power plants in question."[97] Though providing a veneer of inclusion and the image of universal support, the redistributive coalition that signed the Stipulation

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[93] Id. at fn. 20.

[94] Id. at fn. 12.

[95] Id. at fn. 11.

[96] OCC Ex. 32 at 8 (Haugh Direct).

[97] OMAEG Ex. 29 at 6 (Dr. Hill Supp. Direct).

extracted benefits that redound to the interests of each Signatory, not ratepayers as a whole or the public interest.[98] The unfortunate effect of this is that the redistributive coalition has managed to shift business risk away from itself and onto customers.[99]

The subsidies arising out of the Stipulation will be damaging in two central ways. First, "losses incurred in the operation of the plants covered by the PPA are passed on to all electricity users in AEP-Ohio's service territory."[100] Second, the costs associated with the negotiated rate discounts, subsidies, and energy efficiency commitments "are not born by [AEP-Ohio], but instead * * * passed on to ratepayers that do not directly benefit."[101] Beyond this, the harms to the competitive markets could be substantial. By trying to use the PUCO's "regulatory power to offset market-determined outcomes in the generation market," the Stipulation could deter new entry and prevent a "completely free market from evolving [which] is not in the public interest."[102] As the Independent Market Monitor testified, this is "inconsistent with competition in the PJM wholesale power market."[103] A subsidy like the PPA Rider could have a price suppressive effect, which makes it difficult for unaffiliated generating units to compete.[104] Without proper market incentives, generating units without subsidies may never get built.[105]

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[98] Id at 19.

[99] Id. at 6.

[100] Id.

[101] Id.

[102] Id. at 8.

[103] IMM Ex. 2 at 4 (Dr. Bowring Supp. Direct).

[104] Id. at 5.

[105] Id.

While AEP-Ohio promises to initiate a federal advocacy campaign before PJM and FERC with the goal of achieving market improvements, the contours of this proposal are vague.[106] Moreover, given that the Independent Market Monitor and so many others view the PPA Rider as posing a threat to the health of the competitive markets, it remains to be seen whether AEP-Ohio will take positions that truly have the best interests of the markets in mind. If the proposals put forth in this proceeding are any guide, parties would be more than justified in remaining skeptical of AEP-Ohio's federal advocacy commitments.

The following discussion explores the damage caused by the Stipulation in greater detail. The first part explains how the construct of the PPA Rider fails to follow the factors articulated in the *ESP 3 Order* which the Commission said it would look to in evaluating future PPA Rider proposals. It follows that if the central feature of the Stipulation is incongruent with Commission precedent, the Stipulation cannot be approved. The second part shows how the multitude of other unrelated provisions in the Stipulation will compound the harms imposed by the PPA Rider. Each issue will be addressed in turn.

a. AEP-Ohio cannot show a financial need to continue the generating units' operations.

The Commission's first factor from the *ESP 3 Order* calls for an evaluation of the financial need of the generating plant.[107] At the outset, the first factor asks the wrong question. The Commission lacks authority to evaluate the financial need of a generating unit. With the passage of S.B. 3, electric generation became an unregulated service.[108] This deregulatory

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[106] Joint Ex. 1 at 9.

[107] *ESP 3 Order* at 25.

[108] *IEU-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 6.

approach "provides for competition in the supply of electric generation services * * * ."[109] Given this market construct, financial need must be assessed based on the revenues a generating unit receives in the competitive markets operated by PJM. If a generating unit cannot clear its output, it will be replaced by a more efficient unit.[110] Robust competition of this sort squarely matches up with R.C. 4928.38's directive that a generating unit must be "fully on its own in the competitive market." The Commission's question is also at odds with the plain language of the state's policy: "Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa."[111] In short, market forces—not the Commission—should decide financial need.

Nonetheless, if this factor is considered, AEP-Ohio has not demonstrated a financial need to continue the PPA generating units' operations. When the value of the generating units is discussed by AEP-Ohio's parent company, the valuation transforms, depending on the audience. At an April 2015 presentation to the investment community, it stated that AEPGR's generating units are "well-positioned from a cost and operational perspective to participate in the competitive market."[112] This optimistic picture painted by AEP-Ohio's parent to its investors clashes with the claim presented to the Commission alleging that the units are on the economic bubble.[113] This gulf between what AEP-Ohio and its parent says to its investors and what it tells

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[109] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, ¶ 2.

[110] OCC Ex. 11 at 21 (Dr. Rose Direct).

[111] R.C. 4928.02(H).

[112] IEU-Ohio Ex. 1 at 17-18 (Dr. Lesser Direct).

[113] AEP-Ohio Ex. 1 at 16 (Vegas Direct).

the Commission raises doubts about its candor and ought to give the Commission pause before crediting the asserted justifications for authorizing cost recovery through the PPA Rider.

To support its position that the PPA units are on the economic bubble and in need of financial assistance, AEP-Ohio resorts to faulting PJM's capacity market design.[114] The influence of this factor, however, is not unique to the PPA units. Any generator within the PJM footprint must operate within this paradigm. Glaringly absent from AEP-Ohio's story is any inward-looking assessment of whether the vulnerability of these units is due to factors within the control of OVEC and AEPGR. A financial need driven by no more than a "natural and expected consequence" of the units' inefficient and uneconomic operations is not a legitimate basis for authorizing cost recovery.[115] It would set a dangerous precedent if an inability to compete in the marketplace was all it took to receive Commission approval of a proposal to boost the financial performance of a generating unit.[116]

Mr. Vegas points to low capacity prices created by a flawed PJM capacity market construct.[117] But the FERC recently addressed many of these concerns through its adoption of PJM's Capacity Performance proposal, thereby removing one of the central pillars of AEP-Ohio's argument.[118] Among its many features, Capacity Performance raises the penalty for non-performing resources, transfers these penalty payments to over-performing resources, creates a new class of resources that are expected to perform under emergency conditions, and allows

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[114] Id.

[115] OCC Ex. 12 at 25-26 (Sioshansi Direct).

[116] Id. at 26.

[117] AEP-Ohio Ex. 1 at 16 (Vegas Direct).

[118] *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015).

sellers to offer in at a price that includes the costs of firm fuel supplies together with a risk component.[119] Commenting on these collective features, the FERC opined:[120]

> In fact, it is this expectation, and the likely higher clearing price for the Capacity Performance product that will result, that will help incent investments in maintenance, dual or firm fuel, or weatherization to improve capacity resource performance, particularly during summer and winter peak periods. If capacity resources price their performance risk into their capacity offers and obtain a capacity commitment, they will, in fact, be assured of compensation commensurate with the performance risk that they assume.

The results from the 2018/2019 BRA—the first to include Capacity Performance—bear FERC's predictions out. Compared with the 2017/2018 BRA, the 2018/2019 BRA witnessed a 25% increase in the clearing price for non-Capacity Performance resources in the Rest-of-RTO region.[121] Capacity Performance resources saw a 37% increase.[122] Further, PJM exceeded its target reserve margin of 15.7% by 4.1%.[123] In short, faulting the capacity market is no longer a valid option for AEP-Ohio.

Moreover, given the magnitude of AEP-Ohio's ownership in some of the units subject to the PPA, AEP-Ohio does not control the overall financial viability of those plants under the PPA. Thus, even if AEP-Ohio could demonstrate that those plants were on the economic bubble, financially supporting AEP-Ohio's ownership interest will likely have little effect, if at all, on the overall financial viability of the PPA units.

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[119] Id.

[120] Id. at ¶ 466.

[121] IEU-Ohio Ex. 1 at 29 (Dr. Lesser Direct).

[122] Id.

[123] OMAEG Ex. 19 at Attachment EWH-5 (2018/2019 RPM Base Residual Auction Results).

In sum, as OMAEG witness Dr. Hill explained, AEP-Ohio cannot show a legitimate financial need: "AEP-Ohio has not argued that there has been any market failure; instead, AEP-Ohio merely asserts that these generating units need subsidies in the near term in order to remain competitive pending an anticipated rise in energy costs."[124]

b. AEP-Ohio cannot demonstrate that the generating units are necessary for reliability concerns.

The second factor calls for an analysis of the necessity of the generating facility, in light of future reliability concerns, including supply diversity.[125] Lest there be any doubt, there is sufficient resource adequacy in the PJM region. In the recent 2018/2019 BRA capacity auction, PJM found that the auction cleared 166,836.9 MWs of unforced capacity plus a 19.8% reserve margin, or 4.1% higher than the target reserve margin of 15.7%.[126]

The Commission should rely on the expertise of PJM to alleviate any perceived concerns of future reliability of the electric grid in the state of Ohio. PJM has the responsibility to ensure system reliability for the region that encompasses Ohio.[127] As one federal court recently explained, "PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions." *PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372, 384 (D. N.J. 2013). Decisions about system reliability should be made regionally by PJM, not on a plant-by-plant basis by the Commission.[128] Paradoxically, by asking a state Commission to pick winners and losers in a competitive market, AEP-Ohio's request for a financial lifeline could have the effect of limiting new supply entry, which could

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[124] OMAEG Ex. 19 at 27 (Dr. Hill Direct).

[125] *ESP 3 Order* at 25.

[126] OMAEG Ex. 19 at Attachment EWH-5 (2018/2019 RPM Base Residual Auction Results).

[127] IEU-Ohio Ex. 1 at 28 (Dr. Lesser Direct).

[128] OCC Ex. 11 at 22 (Dr. Rose Direct).

threaten the very thing that the proposal seeks to ensure: reliability.[129] But even granting the validity of this second factor, AEP-Ohio cannot meet it.

At the outset, there is no realistic prospect that the PPA units are about to retire. Before deciding to retire a unit, the owner of a generating unit must give notice to PJM.[130] This enables PJM to study transmission-system impacts resulting from the unit's impending closure and authorize any needed upgrades. To date, AEPGR has not given notice to PJM about planned future retirements of any of the Affiliate PPA units.[131] OVEC has likewise not advised PJM about planned future retirements of the OVEC PPA units. The absence of any planned future retirements is a telling indicator that AEP-Ohio cannot meet this factor.

The Commission should not give credence to AEP-Ohio's threats about the harms that would be inflicted on reliability if the proposal was disapproved. First, AEP-Ohio exaggerates the amount of capacity that is at risk of retirement. Mr. Vegas claims that Commission approval "would leverage support for continued operation of the 6,800 MW in Ohio."[132] That figure, however, is misleading because it represents the total amount of capacity at issue without regard to ownership.[133] Of the 6,800 MWs cited by Mr. Vegas, AEPGR and AEP-Ohio own or co-own units that are responsible for only 3,100 MWs.[134] Moreover, of that 3,100 MWs, only 1,400 MWs could unilaterally be retired because retirement decisions on jointly-owned units must be unanimous.[135]

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[129] Id.

[130] Vol. I, Tr. at 97.

[131] Id.

[132] AEP-Ohio Ex. 1 at 11 (Vegas Direct).

[133] Dynegy Ex. 1 at 10-11 (Ellis Direct).

[134] Id. at 11.

[135] Id.

AEP-Ohio witness Bradish compounds these errors in asserting an estimated cost of $1.6 billion for minimum transmission upgrades.[136] The problem with this estimate is that it assumes that all the Affiliate PPA units would retire.[137] As explained previously, AEPGR cannot unilaterally retire all of the Affiliate PPA units, thus the $1.6 billion estimate is vastly overstated. Moreover, the estimate does not account for the following generation projects that have been added to the PJM queue: Carroll County Energy; Oregon Clean Energy Center; Clean Energy Future-Lordstown; and Middletown Energy Center.[138] With the exception of Clean Energy Future-Lordstown, all of these projects have executed interconnection agreements with PJM,[139] which historically has meant that there is a better than 50% chance these projects will go into service.[140] In September 2015, the Ohio Power Siting Board approved the application of Clean Energy Future-Lordstown.[141] Combined, these four projects could add 3,000 MWs of Ohio-sited generating capacity.[142] Accounting for these project additions would bring down Mr. Bradish's already over-stated estimate even further.

Even if the record showed the existence of a pending unit closure, PJM's reliability must-run (RMR) arrangement is a tool that can be used to mitigate system impacts and capacity shortfalls caused by a closure.[143] Once a generator notifies PJM of its intent to close a unit, PJM can enter into an RMR contract with the generator to provide specified payments for a fixed

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[136] AEP-Ohio Ex. 1 at 7 (Bradish Direct).

[137] Id. at 6.

[138] Vol VI, Tr. at 1582-1585.

[139] Vol. VIII, Tr. at 2098-2099, 2103.

[140] Id. at 2091.

[141] Id. at 2096.

[142] AEP Ohio Ex. 11 at 10-12 (Wittine Direct).

[143] Dynegy Ex. 1 at 13 (Ellis Direct).

period of time to keep the unit running while the reliability need is addressed.[144] While a generator is not required to agree to an RMR contract, Mr. Bradish was unaware of any instance where a generator had turned down the opportunity to sign such a contract.[145] An RMR is not the only means to address a potential reliability issue. As stated above, new generation assets are projected to come online soon. Moreover, the Commission can incent energy efficiency projects and distributed generation.[146] These programs all can serve to reduce load, which reduces the need for transmission upgrades.[147]

At bottom, reliability is in good shape in the PJM region. In the most recent BRA, PJM exceeded its target operating reserve margin of 15.7 by 4.1%.[148] And in spite of recent retirements, replacement capacity has been acquired for 99.5% of these scheduled retirements.[149] Moreover, over 10,000 MWs of additional power plants that have never before cleared are eligible to offer in should the need for additional capacity arise.[150] Simply put, the Commission should reject AEP-Ohio's bluster about threats to system reliability that could arise from potential retirements if and when they ever occur.

In addition to focusing on reliability concerns, the Commission's second factor addresses supply diversity. Any decision to subsidize an uneconomic generating unit simply for the sake of supply diversity is fundamentally incompatible with Ohio's commitment to harness the power

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[144] Vol VI, Tr. at 1607-1608.

[145] Id. at 1608-1609.

[146] Sierra Club Ex. 37 at 73 (Chernick Direct).

[147] Id.

[148] OCC. Ex. 12 at 28 (Sioshansi Direct).

[149] OCC Ex. 15 at 21 (Wilson Direct).

[150] Id. at 22.

of market forces to procure generation services.[151] Markets are the economically rational way to set the appropriate level of fuel diversity.[152] An administratively-imposed fuel-diversity rule is inconsistent with this dynamic.[153] Moreover, supply diversity should be determined on a regional level by PJM, not locally by the Commission.[154] If it so desires, PJM could identify performance characteristics for various types of resources and require procurement of these resources in wholesale auctions.[155]

In any event, preserving the life of the PPA units will not promote fuel diversity.[156] Diversity means of or relating to different types.[157] On this understanding, the PPA units will not promote fuel diversity because they are all coal-fired.[158] In 2013, Ohio's generation mix was 58% coal and 29% natural gas.[159] If the Affiliate PPA units retired and were replaced by natural gas units, this mix would be 50% coal and 38% natural gas.[160] So the reality is that allowing these coal units to be replaced by cleaner, more efficient natural-gas units would actually enhance supply diversity.[161] Under AEP-Ohio's proposal, however, the homogeneity brought by the coal-fired PPA units will continue to make Ohio heavily dependent on one source of fuel

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[151] Vol. XII, Tr. at 3083.

[152] Id. at 3091.

[153] Id. at 3091.

[154] EDF and OEC Ex. 1 at 7 (Finnigan Direct).

[155] Id.

[156] OMAEG Ex. 19 at 28 (Dr. Hill Direct).

[157] Id.

[158] Vol. I, Tr. at 121-122.

[159] OCC Ex. 12 at 28 (Sioshansi Direct).

[160] Id.

[161] Id.

above all others: coal. This outcome cannot be squared with the Commission's stated interest of achieving supply diversity.

c. Requiring ratepayers to bear the risks of current and future environmental compliance costs would lead to unjust and unreasonable charges.

The Commission's third factor calls for a description of how the generating plant is compliant with pertinent environmental regulations as well as a compliance plan for pending environmental regulations.[162] The Commission, however, can only exercise those powers granted by statute.[163] The lack of any statutory authority on the part of the Commission to ensure that electric distribution utilities meet current and pending state and federal environmental regulations therefore renders this factor suspect. Nonetheless, the Commission is empowered to ensure the State's effectiveness in the global economy and to protect against unjust or unreasonable charges.[164] Viewing the environmental inquiry through these two powers, the Commission should ensure that the environmental compliance costs associated with AEP-Ohio's proposal do not diminish the State's effectiveness and do not lead to unjust and unreasonable charges. AEP-Ohio's proposal does little to safeguard either of these two concerns.

On August 3, 2015, the U.S. Environmental Protection Agency (EPA) issued its Clean Power Plan (CPP) final rule, which sets emission guidelines for states to follow as they develop plans to reduce greenhouse gas emissions from existing fossil-fuel fired generating plants.[165]

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[162] *ESP 3 Order* at 25.

[163] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

[164] R.C. 4928.02(N) and R.C. 4905.22.

[165] OMAEG Ex. 19 at 15 (Dr. Hill Direct). The CPP is just one of a host of environmental regulations that the plants are subject to. For further detail on these other regulations see the direct testimony of OCC witness Jackson.

That same day the EPA proposed a federal plan for implementation of the CPP.[166] The CPP strives to reduce plant emissions by improving the heat rates of coal units, shifting generation away from coal and oil-fired generation to gas-fired generation, and integrating generation from renewable resources.[167]

The increasingly-stringent environmental controls imposed by the CPP will significantly raise the PPA units' costs of compliance going into the future, thereby making them even less economic than they already are.[168] Given the hard constraints that the CPP imposes on fossil-fuel emitters like the PPA units, the CPP could possibly reduce generation from coal-fired power plants.[169] Reduced generation will in turn lead to lower market revenues, which will in turn lead to higher customer costs under the PPA Rider.[170] Moreover, if any of the Affiliate PPA units retire early, customers would bear the costs of any capital investments undertaken to comply with environmental regulations.[171] This will have the effect of redistributing economic activity away from Ohio to other states because of Ohio's heavy reliance on coal-fired generation.[172] Some of the nimbler industries may be able to pick up and leave the State, but there will be others that will be left behind.[173] The Commission should not risk the possibility of harming

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[166] Id.

[167] OCC Ex. 13 at 30 (Jackson Direct).

[168] Id. at 35.

[169] IEU-Ohio Ex. 1 at 47 (Dr. Lesser Direct).

[170] Id.

[171] OCC Ex. 13 at 30 (Jackson Direct).

[172] OMAEG Ex. 19 at 16 (Dr. Hill Direct).

[173] Id.

Ohio's economic future in this fashion. Indeed, it has a statutory mission to prevent this from occurring.[174]

d. Prolonging the life of aging and expensive coal plants would raise the price of electricity and harm economic development.

The Commission's fourth factor calls for an assessment of the impact that a plant closure would have on electric prices and the resulting effect on economic development in Ohio.[175] No analysis of this factor would be complete without also addressing the costs of keeping the plants open, as well as the economic benefits that could come from the entry of new generating units or transmission assets. AEP-Ohio's reassurances about the promise of future customer credits and economic development benefits that would flow from the proposal's approval are unconvincing. Neither claim is supported by credible evidence, and in fact, the evidence shows quite the opposite to be true. OMAEG has shown that the proposal will harm economic development. OCC also presented a study showing that the proposal could raise customers' aggregate electricity costs by $1.5 billion on a net present value basis.[176] As with the other factors, this one weighs heavily in favor of denying AEP-Ohio's proposal.

i. AEP-Ohio's forecasts are flawed and should not be relied upon.

AEP-Ohio's portrayal of what the electric industry's price structure will look like in the future is a narrative at war with itself. On the one hand, if market prices eventually aligned with AEP-Ohio's forecasts, then the PPA units would be economic.[177] In one set of predictions (the one AEP-Ohio touts the most), AEP-Ohio states that from 2016 to May 31, 2024, customers

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[174] R.C. 4928.02(N) and R.C. 4905.22.

[175] *ESP 3 Order* at 25.

[176] OCC Ex. 34 at 5 (Wilson Supp. Direct).

[177] Sierra Club Ex. 37 at 7 (Chernick Direct).

should expect an aggregate credit of $721 million.[178] If true, an economically rational firm would do all it could to reap these predicted long-term gains rather than pass them back to someone else.[179] Under this rosy scenario—a scenario drawn right from AEP-Ohio's own testimony and workpapers—the proposal would be unnecessary and captive customers would no longer be needed to bear the risk of failure. In contradiction to that scenario, however, AEP-Ohio asserts that the plants are on the "economic bubble" and that the PPA Rider is necessary to secure their economic future. These two statements from AEP-Ohio are irreconcilable; indeed, AEP-Ohio makes no coherent attempt to mesh them together. What can fairly be deduced from these competing positions is that AEP-Ohio's predictions are not as promising as they appear—put another way, AEP-Ohio is being less than candid about the future costs that it expects its customers to bear.[180]

Nowhere better does this lack of candor illustrate itself than with the revelation that AEP-Ohio withheld a more recent fundamentals forecast which shows that its original projections were even worse than expected. AEP-Ohio's original projections were based on a fundamentals forecast from 2013. On September 16, 2015, however, it came to light that AEP-Ohio was in possession of an April 24, 2015 fundamentals forecast which showed that the magnitude of customer losses could be worse than originally thought.[181] Strikingly, the more recent fundamentals forecast shows that energy market prices for the PJM generation hub are expected to be on average 24% lower than AEP-Ohio's 2013 forecast.[182] Given the profound drop in

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[178] AEP-Ohio Ex. 52 at 15 (Allen Direct in Support of Stip.).

[179] OMAEG Ex. 19 at 29-30 (Dr. Hill Direct); OCC Ex. 15 at 40 (Wilson Direct).

[180] OCC Ex. 15 at 40 (Wilson Direct).

[181] Sierra Club Ex. 40 at 5 (Chernick Supp. Direct).

[182] Id. at 1.

expected energy market revenues, it is no wonder AEP-Ohio tried to keep this forecast bottled up for so long.

Furthermore, the Commission should not rely upon AEP-Ohio's forecasted PPA Rider impacts. Of the four forecasts which are based on AEP-Ohio's load (base, high, low, high/low), AEP-Ohio trumpets its average of high/low load forecast which shows that from early 2016 to May 31, 2024 customers should expect an aggregate credit of $721 million.[183] But focusing on the high/low case is a mistake because of the upward bias that results from the asymmetrical distribution of price risk.[184] Most forecasters credit the base case as having a higher probability than the extremes presented in the other three cases.[185]

As OMAEG witness Seryak explained, the load forecasts that AEP-Ohio relied on to generate the PPA Rider impacts are most likely overstated. PJM recently reduced its load forecasts by 3.5-5%.[186] All of the forecast years are within the proposed term of the PPA Rider.[187] Applying these reductions to AEP-Ohio's own estimates would result in costs to customers for each year of the PPA Rider's eight-year term.[188] In addition to PJM, the U.S. Department of Energy's (USDOE) Energy Information Administration (EIA) produced a retrospective on its Annual Energy Outlook which shows that, since 2000, the EIA has overestimated its 5-year forecast load by over 6.5% and overestimated its 7-year forecast load by 8.3%.[189] Collectively, the studies prepared by PJM and the USDOE's EIA supply strong

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[183] AEP-Ohio Ex. 52 at Settlement Ex. WAA-2.

[184] Sierra Club Ex. 37 at 11 (Chernick Direct).

[185] Id.

[186] OMAEG Ex. 31 at 6 (Seryak Direct).

[187] Id.

[188] Id.

[189] Id. at 6-7.

grounds to question the validity of AEP-Ohio's load forecasts and, worse, raise the likelihood that the PPA Rider will do nothing but increase customers' costs.[190]

The next flaw stems from AEP-Ohio's presentment of its forecasts in nominal dollars rather than real dollars.[191] This type of calculation is inherently misleading because it ignores the effects of inflation and the time value of money.[192] No economically rational actor—not even a utility—bases an investment decision on the summation of nominal dollars.[193] Even AEP-Ohio witness Pearce accepts that.[194]

AEP-Ohio's predictions about the energy market are flawed too. First, the geographic scope of AEP-Ohio's forecasts covers almost all of Canada and the United States, but only the Eastern Interconnection would have a material effect on prices.[195] Second, the energy market forecasts are dramatically higher than the forwards for 2020 and 2024.[196] Forward prices represent what buyers and sellers consider a fair price in future delivery months.[197] If market participants credited the reliability of these forecasts, the forward prices would be much higher and AEP-Ohio would be buying up large quantities of forward energy for its own sake.[198] Third, AEP-Ohio predicts that the PPA units will be producing much more energy than they have in the

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[190] Id. at 7-8.

[191] Sierra Club Ex. 37 at 11 (Chernick Direct).

[192] Id.

[193] Id. at 12.

[194] Vol. II, Tr. at 408.

[195] Sierra Club Ex. 37 at 22 (Chernick Direct).

[196] Id. at 26.

[197] OCC Ex. 15 at 45 (Wilson Direct).

[198] Sierra Club Ex. 37 at 26 (Chernick Direct).

past five years. But it is difficult to credit this claim given that the PPA units' average capacity factor has fallen off in recent years.[199]

AEP-Ohio's capacity market forecasts are no less flawed than its energy market forecasts. To support its capacity market forecast, AEP-Ohio states that capacity prices should be expected to clear at the net CONE level.[200] But the BRA auction clearing prices for the 2015/2016 through 2018/2019 delivery years have been significantly less than PJM's prescribed net CONE value.[201] In particular, natural-gas fired generation has shown a willingness to bid in at significantly less than net CONE, which shows that AEP-Ohio's projections are much higher than the market deems necessary to support the construction of natural-gas fired generation.[202]

Interestingly, AEP-Ohio does not even trust its own forecasts. When discussing potential benefits of the PPA Rider, AEP-Ohio trumpets its average of high/low load forecast and concludes that customers should expect an aggregate credit of $721 million.[203] However, when setting the initial PPA Rider rate that would provide a credit to customers until the PPA Rider is reconciled to actual costs, AEP-Ohio relies on a different forecast. It relies on its weather normalized forecast to project a starting credit of $4 million instead of the $92 million projection included in the average of high/low load forecast.[204] If AEP-Ohio truly believed that customers would reap an aggregate credit of $721 million over the term of the PPA Rider, then AEP-Ohio would have utilized the same forecast to establish an initial credit to customers of $92 million.

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[199] Id. at 30.

[200] Id. at 36.

[201] Id. at 38-39.

[202] Id. at 39, 46.

[203] AEP-Ohio Ex. 52 at Settlement Ex. WAA-2.

[204] AEP-Ohio Ex. 52 at Settlement Ex. WAA-2; AEP-Ohio Ex. 52 at 3, 15 (Allen Direct in Support of Stipulation); Vol. XIX, Tr. at 4853-4854.

The litany of errors that pervade AEP-Ohio's forecasts and the selective use of the multiple forecasts are telling indicators that customers will see their electricity bills rise substantially over the coming years. A study prepared by OCC witness Wilson shows that the proposal will end up costing customers $1.5 billion on a net present value basis even after accounting for $100 in possible credits offered by AEP-Ohio during the last four planning years.[205]

It bears emphasizing that the inherently speculative nature of the predictions is yet another illustration of why this proposal is such a bad deal. No one is clairvoyant. AEP-Ohio's proposal could turn out to be better or worse than it predicts; the same goes for the intervenors' forecasts. Given the inherently fluid nature of the markets, it is almost a certainty that no one's forecast will come out exactly as expected. With this much uncertainty on the line, and with this much money on the line, the Commission should not risk customers' pocketbooks to secure AEP-Ohio's economic fortunes. Consistent with the Commission's previous ruling on AEP's proposed PPA Rider in its ESP 3 application, OMAEG respectfully requests that the Commission find:[206]

> In light of the uncertainty and speculation inherent in the process of projecting the net impact of the proposed PPA rider, which is evident in AEP Ohio's own projections ranging from a [$690 million] net cost to [a $721 million] net benefit, the Commission is unable to reasonably determine the rate impact of the rider.

ii. Requiring customers to pay for the plants' operating risks and legacy costs threatens to raise electricity prices above and beyond the multibillion-dollar losses projected by OCC's forecasts.

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[205] OCC Ex. 34 at 5 (Wilson Supp. Direct).

[206] *ESP 3 Order* at 24 (amended for AEP-Ohio's proposed range in this proceeding: see AEP-Ohio Ex. 52 at Settlement Ex. WAA-2).

Asking customers to pay for these units while they are operational is bad enough, but asking them to pay for the units when they are not even running is even more pernicious. Under the cost-plus recovery mechanism proposed by AEP-Ohio, customers are on the hook for virtually every operating risk facing the plants. If a unit does not run, customers still must pay for capital and operations and maintenance costs.[207] If a unit suffers a prolonged outage, customers still pay for the fixed costs.[208] If environmental regulations necessitate expensive retrofits or the purchase of expensive emission allowances, customers will pay for those costs.[209] The weak cost-control incentives that result from guaranteed cost recovery only heighten the risk that any of these contingencies could materialize.[210]

Worse, the draft of the contract between AEP-Ohio and AEPGR places the entirety of the Affiliate PPA units' legacy costs squarely on customers.[211] Legacy costs include the units': existing capital costs; existing debt; existing net book value; existing labor contracts; and existing fuel contracts.[212] AEP-Ohio asks the Commission to make a one-time, upfront prudence review of these costs.[213] While AEP-Ohio admits that these costs are a "major component" of its forecasts, there is not one single document that compiles these costs.[214] The lack of transparency about the legacy costs at issue should trouble the Commission. Certainly, the Commission

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[207] Vol. I, Tr. at 111.

[208] Id.

[209] Sierra Club Ex. 37 at 49 (Chernick Direct).

[210] Id. at 51.

[211] P3/EPSA Ex. 10 at 14-15.

[212] Vol. VII, Tr. at 1852.

[213] Id. at 1850-1851.

[214] Id. at 1853-1854.

should have a clear picture of what is at issue before moving forward with a decision to approve the proposal's reasonableness.

On top of all this, if AEPGR sells a generating unit to a non-affiliate, this does not automatically stop the costs and attributes associated with that unit from being included in the PPA Rider.[215] While the Commission is granted authority to exclude the unit from the PPA Rider, the Commission must affirmatively act to trigger that exclusion.[216] Similarly, there is no provision in the Stipulation that requires a generating unit to be removed from the PPA Rider if a decision is made to retire the unit.[217] Any costs associated with the retirement of a generating unit could flow through the PPA Rider if the Commission determines that the decision to retire was reasonable.[218] Moreover, nothing in the Stipulation restricts AEP-Ohio from seeking an extension of the PPA Rider, nor does it restrict AEP-Ohio from agreeing to extend the PPA with AEPGR.[219] The draft contract between AEP-Ohio and AEPGR likewise contemplates that the delivery period under which AEP-Ohio would be required to purchase AEPGR's output may be extended if they both "mutually agree in writing upon an alternative" ending date.[220]

As for the termination fee outlined in the draft contract between AEP-Ohio and AEPGR, nothing in the Stipulation prohibits AEP-Ohio from making a filing to recover the costs of that

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[215] Vol. XIX, Tr. at 4726.

[216] Id.

[217] Id.

[218] Id.

[219] Vol. XVIII, Tr. at 4479.

[220] P3/EPSA Ex. 10 at 10.

fee.[221] Additionally, when asked whether AEP-Ohio would make such a cost-recovery filing in the future, AEP-Ohio witness Allen did not rule out that possibility.[222]

Collectively, the aggregation of costs and risks associated with these various elements only serves to heighten the chance that customers could pay far more than what has already been forecasted under OCC's $1.5 billion estimate.

iii. The proposed PPA Rider does not resemble an insurance product and will not act as a significant financial hedge.[223]

AEP-Ohio's proposed PPA Rider is not reasonable and will not act as an insurance-like product to provide a significant financial hedge against market volatility as required.[224] No amount of imaginative labeling can alter the fundamental reality that this proposal will guarantee the profitability of the AEPGR- and OVEC-owned units and provide a return on equity to shareholders, all while transferring the risk of these units' failures to captive customers. AEP-Ohio's insistence on calling this proposal something it is not only serves to reinforce that it does not understand how insurance works. Moreover, the proposal's promise to tamp down market volatility is a solution in search of a problem. Competitive SSO auctions for non-shopping customers, coupled with fixed-price contracts offered by CRES providers for those customers who choose to shop, offer ample protections against market volatility.

As conceived, AEP-Ohio's proposed PPA Rider is not analogous to an insurance product. Unlike insurance, customers have no freedom to elect the PPA Rider and the costs to customers

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[221] Vol. XVIII, Tr. at 4508; P3/EPSA Ex. 10 at 16.

[222] Vol. XVIII, Tr. at 4508.

[223] *ESP 3 Order* at 25.

[224] Id.

from the PPA Rider are unknown.[225] Furthermore, for a hedge to work, there must be price certainty at the time the deal becomes effective.[226] Here, there is massive uncertainty about how effectively the plants' costs can be controlled, how much output will be bid into the markets, and how successful the plants will be in the market. The contingent nature of this proposal negates AEP-Ohio's promise of a hedge. If at all, the only beneficiaries of this so-called insurance product are AEP-Ohio, AEPGR, and OVEC, all of whom are completely hedged from any market volatility and operational and performance risks.

The Commission should likewise not give credit to AEP-Ohio's claims about market volatility. To begin with, AEP-Ohio does not even bother to quantify the volatility that it claims its customers are exposed to.[227] Worse, AEP-Ohio exaggerates what little evidence there is about market volatility. The centerpiece of AEP-Ohio's volatility argument rests on the 2014 Polar Vortex.[228] But it cannot conclusively show that the Polar Vortex was the direct cause of an increase in the bills of its SSO customers.[229] In fact, to the extent the Polar Vortex contributed to price volatility in the *wholesale* markets, it appears that the PPA units share the blame for this as Clifty Creek 3, Cardinal 1, Zimmer, and Stuart 3 were all either partially or wholly offline during this time.[230]

Even if volatility was a concern, there are several tools available to address it. First, the laddering and staggering mechanisms found in the Commission's SSO auctions serve to mitigate

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[225] Vol. I, Tr. at 118-120.

[226] Sierra Club Ex. 37 at 62 (Chernick Direct).

[227] IEU-Ohio Ex. 1 at 34 (Dr. Lesser Direct).

[228] AEP-Ohio Ex. 1 at 8 (Vegas Direct).

[229] Sierra Club Ex. 37 at 58 (Chernick Direct).

[230] Id.

price fluctuations.[231] Under this system, customers pay a blended rate resulting from a mix of one- to three-year products that are fixed well in advance of the delivery year.[232] The rate reflects forward prices at the time of the auction plus a markup.[233] Because these rates are set months or years in advance of delivery, SSO customers are shielded from the price spikes associated with exceptional weather events.[234] Staff witness Choueiki agrees that the staggering and laddering approach that the Commission has adopted in administering past SSO procurement auctions" is a useful tool "for mitigating price volatility." [235] Second, customers can sign up with a CRES provider to receive generation services under a fixed-price contract. Last year, the Commission's Apples-to-Apples list showed 56 CRES providers that offered a fixed-price contract with a term of a year or more customers.[236] 16 of those offered a fixed-price contract of at least two years.[237] There were also five offers of three years.[238] Given that SSO customers and CRES customers on fixed-price contracts are already hedged against price fluctuations in the market, there is no need to layer on a generation charge that would effectively nullify the predictability valued by these customers, particularly customers that actively shopped for a long-term fixed-price contract with terms and conditions that satisfied their specific needs.

iv. The PPA Rider will harm economic development, particularly in the manufacturing sector.

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[231] Id. at 57.

[232] OCC Ex. 15 at 61 (Wilson Direct).

[233] Id.

[234] Sierra Club Ex. 37 at 57 (Chernick Direct).

[235] Staff Ex. 1 at 16 (Dr. Choueiki Direct).

[236] P3/EPSA Ex. 8 at 10 (Cavicchi Direct).

[237] Id.

[238] Id. at 10-11.

AEP-Ohio's projected impacts on economic development are flawed. AEP-Ohio witness Allen's studies purport to show the economic benefits that would accrue from the preservation of the OVEC and Affiliate PPA units.[239] But Mr. Allen lacks the requisite expertise to make reliable economic judgments about what effects the plant closures might have on the economy. He does not have an economics degree.[240] He has not taken any classes on economic development and has never studied specific economic impact methodologies.[241] He has never created economic development models.[242] He is not an expert in the base economic theory model, which provides the foundation for his analysis.[243] And he did not personally prepare the economic reports and exhibits attached to his testimony.[244] Given Mr. Allen's lack of economic expertise, the economic development assessment sponsored by Mr. Allen should be given absolutely zero weight by the Commission.

AEP-Ohio's economic development methodology is also deeply flawed. First, the analyses are based on regional impacts, whereas the Commission's directive asks for impacts throughout Ohio.[245] Second, the base economic theory model that the Company uses is not respected among economists, it is the least sophisticated and most error-prone economic model there is.[246] One of the principal flaws with the model is that it simplistically assigns all economic activity to either a basic or non-basic sector, thereby leaving out the details regarding a litany of

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[239] AEP-Ohio Ex.10 at 11 (Allen Direct).

[240] Vol. VII, Tr. at 1740.

[241] Id. at 1742.

[242] Id. at 1743.

[243] Id. at 1754.

[244] Id. at 1745.

[245] OCC Ex. 10 at 3 (Dr. Dormady Direct).

[246] Id. at 5-6.

economic transactions, including stocks and flows of capital and labor.[247] This rudimentary approach cannot capture the dynamism and complexity that characterizes our modern economy. Third, AEP-Ohio errs in assuming that all coal workers in Ohio that supply coal to the PPA plants would retire if the plants closed.[248] There is no basis for assuming that the plant closures would completely eliminate all markets for the coal that these workers produce.[249] Even with the plant closures, the coal could still be sold to other coal plants in Ohio or across state lines.[250] Fourth, the model ignores the potential economic benefits that could result from the closure of a plant.[251] While AEP-Ohio portrays a doomsday scenario, a plant closure could prompt the construction of a new, more efficient generating asset, which could create jobs, spur economic development, provide a strong tax base, and obviate the need for a ratepayer-funded subsidy.[252]

Indeed, the evidence shows that contrary to AEP-Ohio's claims, preserving these coal plants will actually harm economic development, and that these harms will be felt most acutely in the manufacturing sector. Manufacturing industries are a critical part of Ohio's economic base. "Steel manufacturing * * * is about three times more important in Ohio than it is nationally, foundries and glass manufacturing about 2.5 times, and chemicals nearly twice."[253] These industries, along with others, "export their products from Ohio in return for dollars that are brought into the state, resulting in job creation."[254] Recall that the forecasts prepared by OCC

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[247] Id. at 7.

[248] Id. at 15.

[249] Id.

[250] Id.

[251] OCC Ex.12 at 30 (Sioshansi Direct).

[252] Id.

[253] OMAEG Ex. 19 at 10 (Dr. Hill Direct).

[254] Id.

witness Wilson show that the proposal could end up costing customers $1.5 billion. If this grim scenario materializes, Ohio's manufacturers will face some tough choices.

Ohio's manufacturing sector is an energy-intensive industry.[255] Electricity is one of the key inputs to the production process and its price plays a critical role in where manufacturers decide to site their locations and when they decide to ramp up their scale of operations.[256] Research shows that "higher electricity prices have had a statistically significant negative effect on manufacturing productivity in Ohio, as well as in four neighboring states."[257] In fact, "an increase of one cent per kilowatt-hour correlated to a decrease in gross product generated of about $2,257 per employee, a total of 2.2%."[258]

Ohio's manufacturers will be placed at a competitive disadvantage if AEP-Ohio's proposal ends up costing as much as some are predicting. Some industries may be able to pick up and leave the State, but others cannot.[259] The Commission should safeguard Ohio's economic future and competitiveness in the global economy.[260] Mindful of this obligation, the Commission should deny the proposal.

e. The other considerations articulated in the *ESP 3 Order* are also not met and, therefore, the Stipulation is not in the public interest.

The preceding discussion shows why AEP-Ohio's PPR Rider proposal thoroughly fails to meet the four factors articulated by the Commission in its *ESP 3 Order*. For this reason alone the PPA Rider adopted by the Stipulation should be denied. Nonetheless, the proposed PPA

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[255] Id. at 8-9.

[256] Id. at 9.

[257] Id. at 11.

[258] Id.

[259] Id.

[260] R.C. 4928.02(N).

Rider does not satisfy the other criteria the Commission said AEP-Ohio "must" address in order to justify cost recovery through the PPA Rider.[261] AEP-Ohio's inability to meet these additional criteria provides yet another compelling reason why the Commission should deny this misguided attempt to transfer the risk of aging and expensive coal plants onto the backs of ratepayers.

First, AEP-Ohio does little to comply with the Commission's stated expectation that the PPA Rider proposal allow for rigorous Commission oversight of the PPA Rider and provide a process for review and audit. AEP-Ohio proposes an exclusionary process that bars any intervenors from participating and offering input during the review and audit.[262] The bilateral process envisioned by AEP-Ohio would entail participation by the Commission and no one else.[263] Worse still, AEP-Ohio has elected against making the review and audit subject to a hearing.[264] The opacity of AEP-Ohio's proposed audit and review process is decidedly against the public interest. The magnitude of the proposal is enormous. Further, given that ratepayers will ultimately bear any costs associated with the PPA Rider, it is eminently sensible to allow representatives of these ratepayer classes—residential, commercial, and industrial—to participate in the process by allowing them to analyze AEP-Ohio's data and offer input about whether the PPA Rider is actually flowing through to customers in a manner permitted by law. Shrouding the review and audit process in secrecy by foreclosing participation by ratepayer representatives is hardly the type of rigorous oversight contemplated by the Commission's *ESP 3 Order*.[265]

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[261] *ESP 3 Order* at 25.

[262] Vol. I, Tr. at 74.

[263] Id.

[264] Id.

[265] *ESP 3 Order* at 25.

Second, AEP-Ohio's proposal offers little more than a lukewarm commitment to share information with the Commission and Staff. Mr. Vegas[266] and Mr. Allen[267] promise that information will be made available on a variety of different categories, however, the underlying documents that memorialize the terms of the Affiliate PPA and the OVEC PPA make no such representation. The updated draft of the Power Purchase and Sale Agreement between AEP-Ohio and AEPGR provides that AEPG shall keep the books and records and that AEP-Ohio has the right to examine those books and records to the extent "reasonably necessary."[268] No mention is made of information-access rights granted to the Commission or Staff. The OVEC PPA documentation applicable to information sharing is substantively the same. The Inter-Company Power Agreement between OVEC and the sponsoring companies makes no provision for the Commission or Staff to access information pertaining to the OVEC PPA.[269] The Stipulation gives the veneer of a commitment to share information, but the so-called "Full Information Sharing" provision is hardly that. That provision seeks to label the information with the utmost level of confidentiality, avoid Ohio's public records law, and deny other parties access to the information.[270] If customers will ultimately be responsible for paying the PPA Rider, they should be afforded the opportunity to examine the underlying data associated with the PPA units (subject, if necessary, to reasonable confidentiality agreements) to ensure that no unauthorized costs are being recovered.

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[266] AEP Ohio Ex. 1 at 27-29 (Vegas Direct).

[267] AEP Ohio Ex. 10 at 10-11 (Allen Direct).

[268] P3/EPSA Ex. 10 at 17 (P3 Set 1 RPD 5).

[269] Sierra Club Ex. 3 at 18.

[270] Joint Ex. 1 at 8.

Third, the Commission's directive for AEP-Ohio to allocate the rider's risk between itself and ratepayers is wholly unmet here.[271] Ratepayers bear all the risk under AEP-Ohio's PPA Rider proposal.[272] This is especially problematic because customers are least able to manage the risk.[273] They do not own plants; they do not operate the plants; and they are not responsible for bidding the plants' output into wholesale market. Those duties fall squarely on the shoulders of AEP-Ohio, AEPGR, or OVEC, as the case may be. The Stipulation's "commitment" to provide credits, under certain conditions, under the last four planning years is not a real commitment and does not alter the conclusion that ratepayers are solely responsible for bearing the risk. The credits are not guaranteed and any potential credits offered under the Stipulation simply reduce the costs to customers, not the allocation of those costs. For example, if, in planning year 2020/2021, there is a charge of $20 million, then the $10 million credit would merely be an offset, and customers would ultimately still be responsible for paying $10 million in charges.[274] Moreover, even though AEP-Ohio' commits to initially populate the PPA Rider with a $4 million credit, it is possible that customers could see a charge after the first rider true-up proceeding.[275]

An economically efficient plan would fundamentally restructure the proposal by allocating risk to those best positioned to evaluate and manage it.[276] This avoids the moral hazard scenario, which can arise when a firm takes on more risk than it rationally should because

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[271] *ESP 3 Order* at 25.

[272] OMAEG Ex. 19 at 33 (Dr. Hill Direct).

[273] IEU-Ohio Ex.1 at 5 (Dr. Lesser Direct).

[274] Vol. XIX, Tr. at 4728.

[275] Id. at 4725.

[276] Id. at 46.

it bears none of the adverse consequences of that risk.[277] In this context, a moral hazard could manifest itself in the strategies undertaken by AEP-Ohio or its agents to bid the plants' output into the wholesale markets. As the Independent Market Monitor explained, "[t]he logical offer price for these resources in the PJM Capacity Market, under these conditions, would be zero."[278] With the expectation of a guaranteed recovery and no risk of loss, the output could be bid-in in a way that is indifferent to market forces, thereby distorting the price signals sent to other market participants and giving AEP-Ohio a competitive advantage.[279] Another illustration of this would be in the way that the plants are operated. An economically efficient arrangement would incent the plants' operators to reduce fixed costs, which would have the effect of increasing the plants' profitability.[280] But here, the prospect of a guaranteed revenue stream means that the plants' operators have no incentive to undertake such cost-cutting measures.[281] In fact, the incentive for gold-plating is heightened under the cost-plus formula rate structure contemplated by the proposal. Simply put, AEP-Ohio's proposal to insulate itself from any risk whatsoever is incompatible with the ideals underlying the competitive markets.

A final example that highlights the lack of oversight accompanying this proposal rests with AEP-Ohio's assertion that the Affiliate PPA contract will not be filed with the Commission because it is beyond the Commission's jurisdiction to approve.[282] Thus, regardless of any non-binding sign-off the Commission may give about the prudence of the contract, the fact remains

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[277] Id. at 45.

[278] IMM Ex. 2 at 5 (Dr. Bowring Supp. Direct).

[279] OCC Ex. 15 at 65-66 (Wilson Direct).

[280] Id. at 64.

[281] Id.

[282] Vol. 1, Tr. at 275-276.

that AEP-Ohio can move forward with executing the contract in the absence of Commission authorization.[283]

f. Other features embodied in the Stipulation will exacerbate the harms imposed by the PPA Rider.

Standing alone, the PPA Rider will injure customers, the competitive markets, and economic development. Layering on top of the PPA Rider the web of disparate provisions that the Stipulation hastily cobbles together will only compound these injuries. Ratepayers as a whole and the public interest are not the beneficiaries of these disparate provisions. To the contrary, the redistributive coalition that joined the Stipulation constitutes a narrow subset of customers that represent their own corporate or organizational interests.[284] The extractions obtained by the Signatories redound to the benefit of their organization or their members at the expense of other customers or other classes of customers.[285] The following discussion illustrates the many ways in which ratepayers as a whole and the general public will suffer if the Stipulation's additional features are adopted.

i. Modifications to Conesville Units 5 and 6.

The provisions associated with Conesville Units 5 and 6 are ill-advised in numerous ways. First, costs associated with converting these units to natural gas co-firing should not be recovered from captive customers but from the competitive markets.[286] Just like the PPA Rider, this provision is antithetical to the General Assembly's deregulation of Ohio's generating sector

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[283] In point of fact, the contract is not required to be filed at FERC either due to the waiver on affiliate power sales restrictions granted to AEPGR. See *AEP Energy Partners, Inc.*, FERC Docket Nos. ER14-593-000, et al., Letter at 2 (February 5, 2014). A complaint was recently filed seeking to rescind this waiver. *See EPSA, et al. v. AEPGR, et al.*, FERC Docket No. EL16-33-000, Complaint at 2 (January 27, 2016).

[284] OMAEG Ex. 29 at 4-5 (Dr. Hill Supp. Direct).

[285] Id. at 17.

[286] OCC Ex. 36 at 8 (Dr. Dormady Supp. Direct).

and could have the effect of thwarting new entry. Second, the costs of implementing this provision are unknown. Customers should know upfront what they are being asked to pay for. The lack of transparency associated with this provision should give the Commission pause. Third, as Dynegy witness Ellis explains, units that were originally designed and built to operate on coal are most efficient and cost effective while burning coal.[287] Operating these units on natural gas will put them at a competitive disadvantage in the wholesale markets.[288] Finally, the pledge to limit the coal heat input of these units is largely illusory. The coal heat input of these units has been steadily declining over the past eight years.[289] If the trend continues, AEP-Ohio's pledge will fall in line with the trend—in other words, AEP-Ohio has given up nothing in exchange for its commitment to limit the coal heat input.[290]

ii. Supplier Consolidated Billing Program.

The Supplier Consolidated Billing Program commandeers distribution customers into supporting initiatives that will only benefit CRES signatories and customers of those CRES signatories.[291] All costs associated with this program should be borne by the beneficiaries of the program, not spread, in part, across all customer classes. Moreover, given that CRES providers already have the ability to bill through AEP-Ohio's system or to bill separately, the additional billing option proposed in the Stipulation appears to be a solution in search of a problem. As with many provisions in the Stipulation, the costs of this program are unknown.

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[287] Dynegy Ex. 2 at 12 (Ellis Supp. Direct).

[288] Id.

[289] Id. at 15.

[290] Id.

[291] OCC Ex. 32 at 10-11 (Haugh Direct).

iii. Provisions addressing renewable resources and energy efficiency.

The Stipulation's provisions that address renewable resources and energy efficiency measures are deleterious in numerous ways. First, the development of the projects are contingent on a AEP-Ohio receiving full cost recovery for developing 500 MWs of wind resources and 400 MWs of solar resources through a PPA Rider. Although the exact details are unknown, including ownership of the resources, subsidizing the construction of generation resources to be owned by an unregulated affiliate is inconsistent with the ideals embodied in the state's policy.[292] Second, the addition of 900 MWs of renewable resources together with an as-yet unknown level of battery resources and a 1.33% reduction in energy use will have the effect of suppressing the revenue that the PPA Units earn in the PJM markets.[293] Studies by Staff and others show that renewable resources and energy efficiency measures have the effect of suppressing energy and capacity prices.[294] Less revenue earned by these PPA Units means higher costs passed back to customers.[295]

Third, the side deal reached between AEP-Ohio and IEU-Ohio, wherein AEP-Ohio commits to support expansion of the streamlined opt-out provision to all mercantile users, will greatly handicap AEP-Ohio's ability to deliver substantial energy-efficiency savings.[296] In AEP-Ohio's latest EE/PDR portfolio filing, its business programs covering the mercantile class accounted for 65% of its planned energy savings, 71% of its planned demand savings, and 59%

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[292] OCC Ex. 36 at 16 (Dr. Dormady Supp. Direct); R.C. 4928.02(H).

[293] OMAEG Ex. 31 at 9 (Seryak Direct).

[294] Id. at 9-10.

[295] Id.

[296] Id. at 13.

of its budget.[297] If AEP-Ohio's efforts in expanding streamlined opt-out are successful, it is possible that a significant percentage of its load will opt-out which will reduce the magnitude of deliverable energy savings.[298] Indeed, over the eight-year term of the PPA Rider, the side deal could risk up to 490 MWs of reduced energy efficiency savings.

iv. OPAE and OHA provisions.

The Stipulation grants OPAE a 5% management fee to administer the Community Assistance Program, which has an annual budget of up to $8 million.[299] This $400,000 fee was not competitively bid so it is impossible to know whether other organizations could have underbid this figure.[300] A provision opening this program up to competitive bidding may have resulted in a lower management fee, which would have at least freed up additional funding for customer programs.[301]

Under the Stipulation, OHA receives $400,000 per year in funding to promote and obtain energy/demand savings and $600,000 per year for additional incentives related to EE/PDR projects.[302] The energy efficiency and peak demand reduction program funds should be made available equally to all qualifying projects.[303]

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[297] Id.

[298] Id. at 13-14.

[299] Joint Ex. 1 at 16.

[300] OCC Ex. 32 at 16 (Haugh Direct).

[301] Id.

[302] Joint Ex. 1 at 14.

[303] Id.

v. Expansion of the IRP tariff.

As part of an updated ESP filing, the Stipulation proposes to expand the IRP tariff and credit to current IRP tariff customers through 2024.[304] Next, it proposes to extend the IRP tariff to 250 MWs of additional interruptible load to Signatories and non-opposing parties.[305] If 100 MWs of additional interruptible load subscribes to the IRP tariff during the 12 months immediately following approval of the Stipulation, then AEP-Ohio promises to increase the amount of interruptible load eligible to Signatories by 25 MWs.[306] Without any record support, the Stipulation also increases the credit provided to all IRP customers that will be collected from other ratepayers starting in June 2018.[307]

Other than an enticement to join the Stipulation, there is no logical reason for why AEP-Ohio proposes to broaden IRP-tariff eligibility and increase the credits provided to a narrow class of beneficiaries. Non-signatory parties are every bit as capable of instituting demand response programs, such as load curtailment, as the Signatories and the non-opposing parties. But because the opposing parties did not sign the Stipulation, they miss out on AEP-Ohio's largesse. Moreover, demand response programs benefit grid reliability regardless of whether the load curtailments are made by Signatories, non-opposing parties, or anyone else. Selectively granting benefits in this way is anticompetitive because it subsidizes the operations of a narrow class of customers to the exclusion of everyone else.

While there may be some justification for grandfathering or continuing a similar type of demand response program for economic development purposes, limiting the eligibility of the

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[304] Joint Ex. 1 at 10.

[305] Id. at 10-11.

[306] Id. at 11

[307] Id.

expanded amount of additional load to only signatory or non-opposing parties is anticompetitive. The Stipulation increases the $8.21/kW-month credit payment to a $9/kW-month credit payment, significantly increasing the costs that other customers would have to pay.[308] AEP-Ohio agreed that the expansion of the IRP tariff and increase in credit amount would result in up to $27.1 million of additional credits.[309] The total amount of credits that will be provided to certain customers under the Stipulation over the eight year period equate to up to $178.2 million.[310] Increasing the credit payment amount provided to IRP customers that AEP-Ohio will recover from other customers to fund is also inconsistent with the Commission's recent decision in AEP-Ohio's ESP 3 Case, as well as AEP-Ohio's own position.[311] Although it is unknown how many customers will take service pursuant to the expanded IRP provisions, currently there are only two customers in AEP-Ohio's interruptible program.[312] The significant cost associated with expanding the IRP tariff and credit greatly outweighs the economic benefits for only a handful of customers eligible to participate in AEP-Ohio's interruptible program. The interruptible benefits, and the resultant discounted rates participating companies have received, have been wholly funded by other AEP-Ohio ratepayers, at a significant cost.

An increase in the amount of interruptible credit payments is also unnecessary in light of the recent Supreme Court decision which upheld FERC's demand response rule, allowing

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[308] Joint Ex. 1 at 11.

[309] Vol. XIX, Tr. at 4751.

[310] Id. at 4760.

[311] *ESP 3 Case*, Case No. 13-2385-EL-SSO et al., Second Entry on Rehearing at 8-9 (May 28, 2015) (The Commission cited AEP-Ohio as arguing that the limit on the amount of MW offered for interruptible load should be maintained "in order to prevent an unreasonable and excessive cost burden on firm customers.").

[312] ESP 3 Case, Tr. Vol. X at 2342.

customers to be compensated for their demand response capabilities in the PJM capacity market.[313] The Court confirmed that consumers who bid their demand response commitments into the wholesale energy markets will receive the locational marginal price (LMP) of energy from wholesale market operators.[314] LMP is the same price that generators receive in the wholesale markets to produce energy.[315] Accordingly, customers may monetize their demand response capabilities in the PJM capacity auctions by participating in PJM's base residual auctions or by bidding their demand response resources into PJM incremental auctions. Interruptible customers may participate in PJM's demand response programs either on their own, or through a third-party curtailment service provider.

The suggestion through the Stipulation provision seeking an increase in the credit payments that the benefits AEP-Ohio's current IRP customers receive under its IRP program are insufficient seems unreasonable to those customers who have subsidized the benefits received under the IRP tariff. This is particularly true given that another demand response program exists that will compensate these companies for their interruptible load without forcing other ratepayers to fund such compensation.

If the Commission finds that there is a benefit associated with the expansion of the IRP tariff and credit, the Commission should afford the opportunity to all eligible customers, not just signatory parties' members and non-opposing parties' members. The Commission should retain the current level of credit payments as to minimize the cost burden on other customers. Finally, the Commission should require AEP-Ohio to bid the interruptible load as a capacity resource into

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[313] *FERC v. EPSA*, Case No. 14-840, et al., Slip Opinion at 2 (January 25, 2016) (emphasis added).

[314] Id. at 10.

[315] Id.

PJM's capacity auctions and any revenues received from bidding the interruptible load into the capacity market should offset the cost of providing any IRP program and should be flowed through to customers.

vi. ESP versus MRO test.

As part of its approval and modification to AEP-Ohio's ESP 3 plan, the Commission explained that the "the ESP, as modified, results in a total of $53,064,000 in quantifiable benefits over the ESP term that would not be possible under an MRO."[316] That analysis, however, did not attempt to quantify the impact the PPA Rider would have on the ESP versus MRO test.[317] The Commission should take the opportunity to evaluate the PPA Rider's impact on that test. According to the analysis prepared by OCC witness Wilson, the forecasted cost of the PPA Rider for the current term of the ESP 3, which ends on May 31, 2018, is $580 million.[318] Incorporating this analysis into the ESP versus MRO test shows that the costs to customers under the current ESP 3 from the PPA Rider alone would be $527 million.[319] As a result, the ESP 3 would not be more favorable than an MRO.

3. The Stipulation violates several important regulatory principles.

In plain violation of several important regulatory principles, adoption of the Stipulation would have the effect of:

- Thwarting competition and deterring new entry;
- Harming interstate commerce and out-of-state investment;

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[316] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, et al.*, Case No. 13-2385-EL-SSO, et al., Second Entry on Rehearing at 52 (May 28, 2015).

[317] Id. at 56.

[318] OCC Ex. 32 at 19 (Haugh Direct).

[319] Id. at 20.

- Establishing an opaque system of income transfers and cross-subsidies among consumers;
- Distorting economic incentives of pricing mechanisms;
- Denying customer protections; and
- Undermining certainty in Commission orders.

The following examples illustrate the ways in which these violations will occur if the Stipulation is adopted.

Thwarting competition and deterring new entry.[320] By guaranteeing a cost-plus revenue stream to the PPA Units, the Stipulation insulates these units from the discipline of the market.[321] This outcome is contrary to Ohio's policy decision to require market participants in the electric generating sector to "compete for sales and bear the risk of lost revenues if they do not competitively price their generation output."[322] By advantaging the PPA Units over other market participants, the Stipulation will not only distort the competitive markets, but place the jobs and tax revenues associated with non-subsidized generating units at risk.[323] Moreover, the subsidies granted to the PPA Units will have the effect of deterring new entry. Market participants considering locating in Ohio may decide, in view of the subsidies, that they cannot compete with the PPA Units and thus locate their operations elsewhere.[324]

Harming Interstate Commerce and Out-of-State Investment.[325] Given the interconnectedness of the grid, the Stipulation could cause adverse ripple effects beyond Ohio's

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[320] OMAEG Ex. 29 at 6 (Dr. Hill Supp. Direct).

[321] Dynegy Ex. 2 at 7-8 (Ellis Supp. Direct).

[322] Id. at 4.

[323] Id. at

[324] Id. at 5.

[325] OMAEG Ex. 29 at 12 (Dr. Hill Supp. Direct).

borders. For example, placing a large amount of Ohio's generating capacity under the protection of a state-sponsored PPA "will provide a disincentive to invest in new generating capacity across PJM's footprint resulting in regulatory impingement on interstate commerce and national energy policy."[326] Further, the construct set forth in the Stipulation could lead to a copycat phenomenon, whereby neighboring states try to mimic Ohio and try to boost the competitiveness of their own local distribution utilities through similar PPA measures.[327]

Establishing an opaque system of income transfers and cross-subsidies among consumers.[328] The Stipulation violates cost-causation principles by passing costs along to customers that do not directly benefit. Under the Stipulation's structure, "[i]f you are a member of the club that negotiated benefits to support the PPA politically, then you receive the benefits of membership and others pay for the privilege."[329] For example, the redistributive coalition that signed the Stipulation will force customers to pay for half of the costs of the CRES Supplier Billing Program, the costs of which are unknown at this point.[330] Customers are obliged to assist in funding a management fee that could reach up to $400,000 to support OPAE's administration of the Community Assistance Program.[331] Similarly, customers will be compelled to assist OHA with $1 million per year over the life of the Affiliate PPA for EE/PDR programs that solely benefit OHA's members.[332] Customers will pay for the IRP-tariff credits that are granted to a

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[326] Id. at 11.

[327] Id. at 13-14.

[328] Id. at 6.

[329] Id. at 6-7.

[330] Id. at 21.

[331] Id. at 22.

[332] Id. at 23.

select class of beneficiaries.[333] Environmental advocacy groups received commitments from AEP-Ohio under the Stipulation to develop 900 MWs of renewable resources, but none of these costs are known at this point.[334] Worse, these projects could lead to future PPA Riders. Finally, IEU-Ohio received an $8 million payment that is linked to settling a number of legal disputes between itself and AEP-Ohio.[335]

The Commission has stated that direct payments to the signatories of a stipulation are "strongly disfavored" and further explained that such provisions are "highly likely to be stricken from any future stipulation submitted" for Commission approval.[336] Under the unique circumstances of that case, the Commission only allowed payments to the signatory parties if the funds were refunded directly to customers.[337] This precedent raises considerable concerns about the legality of the provisions mentioned above. Using customer funds to pay parties to join the Stipulation is antithetical to sound ratemaking principles.

Distorting economic incentives of pricing mechanisms.[338] Markets function optimally with transparent pricing signals. The subsidy granted by the PPA Rider, however, would distort pricing signals and impose an impediment to the proper functioning of the wholesale power markets. As the PJM IMM explained, instead of bidding the PPA Units into the markets at prices that will cover operating costs and maximize margins, the PPA Rider creates a situation

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[333] Id. at 24.

[334] Id.

[335] Id.

[336] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Order on Remand at 11-12 (February 11, 2015).

[337] Id. at 8 (under the Stipulation, AEP-Ohio was required to pay specific "amounts to the listed Signatory Parties. Each listed Signatory Party will, in turn, distribute the entirety of the funds received to its members that the Signatory Party represents and shall not retain any portion of the funds.").

[338] OCC Ex. 36 at 3 (Dr. Dormady Supp. Direct).

where "[t]he logical offer price for these resources in the PJM Capacity Market * * * would be zero."[339] Offering in at zero "would be rational because this would maximize the revenue offset to the customers who would be required to pay 100 percent of the costs of this capacity and bear all of the performance risks."[340] Under this scenario, pricing signals would be distorted because market participants would be offering in at less than competitive levels, which in turn would have a price suppressive effect on the markets.[341] Over time, distortions to pricing signals caused by the PPA Rider could disincentivize both the retirement of aging and efficient units as well as investments in new units, all to the detriment of reliability.[342]

Denying customer protections. In addition to shifting enormous costs and risk onto ratepayers, the Stipulation provides that "[n]o amounts collected shall be refunded" in the event a court of competent jurisdiction invalidates the "PPA Rider proposal in whole or in part * * *."[343] This decidedly one-sided provision is antithetical to sound ratemaking principles. It stands to reason that if a rate or charge is unlawful as contemplated by R.C. 4905.22, then customers should not have to pay for it and AEP-Ohio should not be permitted to keep the benefits of the unlawful charge. A rate-design mechanism that permits a heads-I-win, tails-you-lose outcome should not be countenanced by the Commission.

The Ohio Supreme Court has already let AEP-Ohio keep $368 million in unjustified POLR charges on the theory that *Keco's* prohibition on retroactive ratemaking barred a refund.[344]

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[339] PJM IMM Ex.2 at 5 (Dr. Bowring Supp. Direct).

[340] Id.

[341] Id.

[342] Id.

[343] Joint Ex. 1 at 35.

[344] *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 56, citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

If a court of competent jurisdiction invalidates any part of the PPA Rider, AEP-Ohio should not be entitled to a similar windfall. To protect against this contingency, the Commission should strike the Stipulation's attempt to prohibit a refund. Additionally, the Commission should make its order in this proceeding subject to refund.

While it is anticipated that AEP-Ohio, on the basis of *Keco*, would object to refunding customers' money in this situation, the Ohio Supreme Court's decision in *River Gas v. Pub. Util. Comm.* explains that the prohibition against retroactive ratemaking does not apply in a rider true-up case. Indeed, the Commission has made this very argument to the Ohio Supreme Court in two pending cases.[345] Because the PPA rider is proposed to be trued-up on a quarterly basis, it thus would not be subject to *Keco* and customers would be entitled to a refund if a court of competent jurisdiction invalidated the PPA Rider.

Undermining certainty in Commission orders. The Stipulation proposes to alter several features from AEP-Ohio's ESP 3 plan that was modified and approved. For example, the Stipulation proposes to vastly expand the scope of the IRP tariff and credit as well as dramatically lengthen the duration of the DIR.[346] Parties worked hard over many weeks advocating for and against these and many other proposals put forth during the ESP 3 proceeding. By altering many of these features, the Stipulation destabilizes the certainty that comes along with that Commission order and, if this case is a harbinger of things to come, threatens to undermine the predictability of future Commission orders. Parties should not be

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[345] *In the Matter of the Review of the Alternative Energy rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 2013-2026, Commission's Brief at 8-9 (October 22, 2014); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et al.*, Case No. 2014-328, Commission's Brief at 2-4 (August 12, 2014).

[346] Joint Ex. 1 at 12.

able to "stipulate" their way around prior orders from different dockets. For the sake of certainty and predictability for all stakeholders, any adjustments to the features of AEP-Ohio's ESP 3 should be made in that docket, not here.

V. Conclusion

AEP-Ohio's proposed Stipulation and adopted Amended Application (as modified) which will saddle its captive distribution customers with the generation costs of a fleet of aging and uneconomic coal plants is antithetical to the market-based approach of S.B. 3, unresponsive to the factors articulated in the *ESP 3 Order*, would undermine the Commission's mission to safeguard Ohio's competitiveness in the global economy, and is not in the public interest. Even if FERC's exclusive jurisdiction to oversee the wholesale market did not preempt the Commission's ability to authorize AEP-Ohio's bailout request, the Commission should emphatically deny what could end up costing customers billions of dollars. An administratively-imposed construct that picks winners and losers in the marketplace is the wrong way to assess a plant's financial need, the wrong way to address system reliability, and the wrong way to ensure that economic development remains vibrant in Ohio. Moreover, the multitude of unrelated provisions in the Stipulation that AEP-Ohio used to entice the Signatories to join will benefit a very narrow subset of customers to the exclusion of everyone else. To the extent the Commission is not otherwise preempted by federal law from authorizing cost recovery under the PPA Rider, the Commission should deny the Stipulation and Amended Application in their entirety. The Stipulation is not the product of serious bargaining; it will harm customers and the public interest; and it violates numerous regulatory principles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Initial Brief of the Ohio Manufacturers' Association Energy Group was served via email on February 1, 2016 upon the following parties of record:

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