BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan.	)))))	Case No. 13-2385-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 13-2386-EL-AAM

APPLICATION FOR REHEARING BY
THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund hereby file this application for rehearing of the February 25, 2015 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Commission's Order approved an Electric Security Plan ("ESP") proposed by Ohio Power Company ("AEP" or "Company") pursuant to R.C. 4928.143.

The Order is unlawful and unreasonable for the following reasons, as further explained in the accompanying Memorandum in Support:

1. The Order erroneously concluded that the Commission has authority under R.C. 4928.143(B)(2)(d) to approve a rider proposed by AEP ("the PPA rider") that would allow the Company to require its customers to subsidize AEP-owned generation.

2. The Order unreasonably approved imposition of the PPA rider as a non-bypassable charge on both shopping and non-shopping customers.

3. The Order set forth factors for the Commission's consideration of whether to allow recovery of the costs of any future power purchase agreements proposed in

connection with the PPA rider, but those factors do not adequately reflect the relevant statutory and legal considerations.

4. The Order unreasonably allowed for recovery of costs for AEP's interruptible power program, an economic development measure, through its energy efficiency rider.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

I. INTRODUCTION

The Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, "Environmental Advocates") seek rehearing of the February 25, 2015 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case. The Commission's Order approved an Electric Security Plan ("ESP") proposed by Ohio Power Company ("AEP" or "Company") pursuant to R.C. 4928.143.

The Commission rightly refused to allow AEP to require the Company's customers to pay the costs of a power purchase agreement ("PPA") for electricity from two Ohio Valley Electric Corporation ("OVEC") plants that AEP itself owns, since in return for those costs customers would receive only the uncertain benefit of a credit of the net proceeds of AEP's sale of that power on the wholesale market. However, the Order is unlawful and unreasonable because the Commission still approved the "PPA rider" proposed by AEP as a vehicle for the Company to burden its customers with similarly flawed PPAs in the future. As an initial matter,

the Order erroneously concluded that the Commission has legal authority to approve this "PPA rider" in principle. Even if the Commission had such authority, the Order is unlawful and unreasonable in two additional respects: first, in concluding that PPA rider costs should be imposed as a non-bypassable charge on shopping customers; and second, in setting forth factors for the consideration of future PPAs proposed for cost recovery under the PPA rider that do not adequately reflect the relevant statutory and legal considerations.

Finally, the Order is also unreasonable and unlawful because it provided for AEP to recover the costs of its interruptible rider – discretionary program ("IRP-D"), an economic development measure, through AEP's energy efficiency rider. That approach may negatively affect AEP's energy efficiency programs, and therefore the Commission should instead require AEP to shift the IRP-D costs to its economic development rider.

II. ARGUMENT

A. The PPA Rider Allows an Anticompetitive Subsidy in Contravention of R.C. 4928.02(H) by Authorizing AEP to Force All Distribution Customers to Cover the Costs of Its Own Generating Plants Even If Those Plants Are Uneconomic on the Competitive Market.

The Order held that the Commission has authority to approve the PPA rider under R.C. 4928.143(B)(2)(d), which provides that an ESP may include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

Specifically, the Commission reasoned that the PPA rider would qualify as a "charge," "relating to limitations on customer shopping for retail electric generation service," that "would have the effect of stabilizing or providing certainty regarding retail electric service."[1]

However, the Commission still lacked authority to approve the PPA rider because it provides an anticompetitive subsidy from AEP's distribution customers to its generation service. That result is irreconcilable R.C. 4928.02(H), which provides that it is state policy to:

> 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, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

R.C. 4928.06 requires the Commission to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated," and therefore the Commission's approval of the PPA rider in contravention of R.C. 4928.02(H) was unlawful and unreasonable regardless of the scope of its authority under R.C. 4928.143(B)(2)(d).

The Order stated that the PPA rider was permissible under R.C. 4928.02(H) because it "would not permit the recovery of generation-related costs through distribution or transmission rates."[2] But while the statutes prohibits anticompetitive subsidies "including by . . . the recovery of any generation-related costs through distribution or transmission rates," the word "including" demonstrates that this is not the only mechanism that might constitute an anticompetitive subsidy. Rather, it is a specific example of just one type of anticompetitive subsidy barred by state policy. The relevant inquiry should therefore center on whether the PPA rider affects an anti-competitive subsidy when it allows the transfer of money from a noncompetitive retail electric service to support AEP's retail electric services. The Commission failed to undertake

[1] Order at 20-22.
[2] Order at 26.

such an inquiry, simply stopping with the premise that R.C. 4928.02(H) is not relevant where a charge is not formally designated as a distribution or transmission rate.

Here, the Commission has approved application of the PPA rider to AEP's customers, both shopping and non-shopping, without the possibility for CRES providers to offer competing options to address price volatility.[3] Thus, the PPA rider's purported financial hedging service constitutes a noncompetitive service supplied to all AEP distribution customers.[4] Under the rider as approved, AEP will direct the revenue from that noncompetitive service to support its own generation exclusively, without any competitive process to ensure that its plants provide the best service to ratepayers at the least cost. Accordingly, the PPA rider does operate as an anticompetitive subsidy. The question of whether recovery of generation costs from all of a utility's distribution customers is specifically categorized as a distribution rate or rider is irrelevant to this conclusion.

Notably, the Ohio Supreme Court did not dwell on the precise labels for particular rate mechanisms in *Elyria Foundry Co. v. PUCO*, where it applied a prior version of R.C. 4928.02(H) (at that time codified at R.C. 4928.02(G)) that similarly established a state policy of ensuring "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."[5]

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[3] Order at 22.

[4] Although AEP cited reliability concerns as an alternative basis for the PPA rider, the Order approved the rider as "a financial hedging mechanism," Order at 21, not as a tool to ensure system reliability.

[5] *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 48.

In that case, the Court rejected a FirstEnergy[6] proposal to collect increases in generation-related fuel costs through its distribution rates as violating this policy, citing the requirement for each utility service component "to stand on its own" after Ohio's transition to unbundled electric service.[7] It is that substantive goal – ensuring that competitive and non-competitive retail electric services each "stand on their own" – that must drive the Commission's application of the statute. In this case, regardless of whether the PPA rider is denominated as a distribution or generation charge, as a non-bypassable rider funding only AEP plants it effectively allows AEP to treat those distribution customers as a captive audience forced to pay for a purported financial hedge resting only on AEP's own generation business. The resulting market distortions and disruption to Ohio's deregulation efforts are the same however the PPA rider is labeled, and violate the substantive policy of R.C. 4928.02(H).

The amendments to R.C. 4928.02(H) after *Elyria* do not alter this conclusion. In 2008, Senate Bill 221 added the following language to that provision's bar on anticompetitive subsidies between competitive and noncompetitive retail electric service: "including prohibiting the recovery of any generation-related costs through distribution or transmission rates." As noted above, the use of the term "including," along with the retention of the existing, broader language, shows that this addition was designed to expand the policy against cross-subsidization through an absolute bar on a particular type of cross-subsidy, not to restrict the expansive scope of R.C. 4928.02(H) as applied in *Elyria*.

Despite the broad scope of R.C. 4928.02(H), the Commission never confronted the fact that, as long as the PPA rider is structured an unavoidable charge effectively requiring AEP's

[6] "FirstEnergy" refers collectively to the distribution utilities Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company.
[7] *Elyria* (citing *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 4).

distribution customers to subsidize AEP's generation alone, it is a mechanism for anticompetitive subsidies from noncompetitive retail electric service to a competitive retail electric service.[8] The Order thus failed to carry out the Commission's obligation to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."[9] Accordingly, the Commission must reconsider its holding that it has statutory authority to approve the PPA rider.

B. The Order Did Not Adequately Justify the Approval of the PPA Rider as Non-Bypassable.

In the Order, the Commission cursorily concluded that the PPA rider should be non-bypassable because "both shopping and SSO customers may benefit from the PPA rider because it would have a stabilizing effect on the price of retail electric service, irrespective of whether the customer is served by a CRES provider or the SSO."[10] This rationale does not justify forcing ratepayers to accept a purported hedge against price volatility sourced only from AEP's affiliate plants in contravention of Ohio law favoring an open retail market. That is especially true given that the Commission itself has concluded that "there are already existing means, such as the laddering and staggering of SSO auction products and the availability of fixed price contracts in the market, that provide a significant hedge against price volatility."[11]

As an unavoidable charge, the PPA rider would deprive a customer of the option to choose not to hedge against volatile electricity prices in order to gain the full benefit of lower market prices when they do exist. And if a customer did wish to seek price stability through a financial hedge or fixed price arrangement with a CRES provider, being saddled with the PPA rider would force that customer to pay twice for the same service, and would potentially interfere

[8] *See* Order at 10 n.2 (noting that AEP considers OVEC to be an affiliate in the context of the proposed PPA).
[9] R.C. 4928.06(A).
[10] Order at 22.
[11] Order at 24.

with the overall effectiveness of either hedge. Indeed, that problem is likely to occur given that, as the Commission has recognized, shopping customers are already utilizing hedging mechanisms such as fixed price contracts.[12] AEP has itself tried to argue in this very case that CRES providers are better suited to providing innovative generation service rates, attempting to justify its proposal to stop offering time-of-use rates to customers by characterizing itself as a "wires only" business that should not be involved in providing generation service rate offerings at all.[13] Yet when it comes to the purported financial hedge provided by the PPA rider, AEP suggests it should be the exclusive source of this generation service offering.

There is no reason the PPA rider must be non-bypassable. Instead, it could be offered as part of AEP's default service, leaving customers the option to shop if they wish to seek an alternative hedging mechanism or simply do not wish to hedge at all.[14] This approach would promote Ohio policy as codified in R.C. 4928.02 in multiple respects. First, it would "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options *they elect* to meet their respective needs."[15] Second, making the PPA rider avoidable would likewise "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers," as provided in R.C. 4928.02(C), by allowing customers to seek and choose alternative financial hedging options from CRES providers rather than being stuck with AEP's chosen mechanism and all the risks it entails. Third, allowing customers to choose

[12] Order at 24.
[13] Order at 36.
[14] Even AEP's own rebuttal witness McDermott agreed in his testimony at the evidentiary hearing that the PPA rider could be offered as a bypassable rider, with AEP's shareholders undertaking the risks or rewards of the proportion of the PPA not covered by the Company's customers. Tr. XIII at 3090-3091.
[15] R.C. 4928.02(B) (emphasis added).

whether to accept AEP's financial hedging approach would "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service" by leaving room for CRES providers to offer alternative hedge options with different risks or other design features.

More fundamentally, the Commission has already recognized that it undercuts the "development of the competitive market for generation" to require customers to pay twice for a generation-related service like the PPA rider.[16] In a stipulation offered by Duke regarding its SSO pricing, Duke sought Commission approval of an unavoidable charge designed to recover generation-related costs stemming from its provider of last resort obligation from all of its customers, including costs of compliance with environmental, tax, and other laws.[17] The Commission concluded that this proposal "would result in shoppers paying for this category of expenses [legal compliance costs] twice" since the generation service they obtained from CRES providers would also incorporate compliance costs for the underlying plants.[18] Therefore, the Commission held that, "in order to continue encouraging the development of the competitive market for generation, . . . the environmental compliance, tax, and homeland security aspects of Duke's proposed POLR charge should be avoidable."[19] The same approach seems necessary here to ensure that price stability services remain part of the competitive retail market in Ohio, consistent with Senate Bills ("S.B.") 3 and 221.

The Commission approved the PPA rider as non-bypassable without ever addressing the many ways in which that approach is inconsistent with state policy and common sense. The

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[16] *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Pub. Util. Comm. No. 03-93-EL-ATA, 2007 Ohio PUC LEXIS 703, at 83 (Oct. 24, 2007).
[17] *Id.* at 82.
[18] *Id.* at 83.
[19] *Id.*

Commission must revisit this issue on rehearing and offer some adequate explanation as to why the PPA rider should be unavoidable for shopping customers despite the significant problems that would result.

C. The Factors Identified by the Commission for Its Consideration of Future PPAs Do Not Adequately Reflect the Relevant Statutory Considerations.

A key component of the Order is the Commission's description of factors that it will consider in future proceedings regarding potential implementation of the PPA rider to include specific generation resources:

> financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with 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.[20]

The Commission also required any future proposal to provide for "rigorous Commission oversight of the rider" and "full information sharing with the Commission and its Staff," and to "include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers."[21]

Although the Order indicates that this list is not necessarily complete or binding,[22] we urge the Commission to add two additional factors on rehearing in order to ensure that future proposals from AEP or other utilities are supported by the evidence necessary to show that they are consistent with the applicable statutory provisions. First, the Commission must fully implement its obligation to determine whether a utility has met its burden of proof under R.C. 4928.143(C)(1) by requiring the utility to address not only the "necessity of the generating

[20] Order at 25.
[21] *Id.*
[22] *Id.*

facility, in light of future reliability concerns,"[23] but also the necessity of the a PPA to address any other concerns relating to retail electric service stability or certainty. Second, the Commission must consider in future proceedings whether a utility's proposal for "stabilizing or providing certainty regarding retail electric service" is the result of a competitive procurement process that ensures a just and reasonable outcome for the utility's customers.

1. The Factors Must Require a Utility to Meet Its Burden of Proof to Provide Evidence to Support a Price Volatility Justification for a Proposed PPA, Not Only a Reliability Rationale.

R.C. 4928.143(C)(1) provides that "[t]he burden of proof in the [ESP] proceeding shall be on the electric distribution utility." The second factor listed in the Order appropriately implements that provision by requiring the utility to come forward with evidence about the "necessity of the generating facility, in light of future reliability concerns."[24] However, the same burden should apply when a utility argues that a PPA is necessary to address price volatility concerns, as AEP has in this proceeding. The Commission acknowledged the importance of analyzing both reliability and price volatility claims closely when it "reserve[d] the right to require a study by an independent third party, selected by the Commission, of reliability and pricing issues as they relate to the application."[25] On rehearing, the Commission should therefore amend the second factor in the Order to broadly require the utility to provide evidence regarding why its proposed PPA is necessary to address whatever concern regarding instability or uncertainty in retail electric service that the utility has offered as justification for its proposal.

[23] Order at 25.
[24] *Id.*
[25] *Id.*

2. The Commission Must Include a Factor Addressing the Method of Procurement of the Generation Resources in a Proposed PPA To Ensure that the Resulting Rate Does Not Violate Ohio Law.

It is notable that AEP as well as two other Ohio distribution utilities, Duke and FirstEnergy, have all proposed arrangements like the PPA rider that rest on power purchase agreements with their own affiliate generation companies.[26] The Commission did not address this aspect of the PPA rider in its Order given its conclusion that the OVEC PPA would not provide the benefits asserted by AEP. However, a number of intervenors in this case have raised the concern that approval of a PPA sourced solely from AEP's own generating plants, without any competitive process to evaluate other means of providing the desired price stability and reliability services, would contravene applicable Ohio law in multiple respects.

Given this substantial concern relevant to several pending cases (including one, Case No. 14-1297, where the evidentiary hearing is scheduled to commence in June 2015 and the attorney examiner has ordered supplemental discovery specifically relating to the considerations discussed in the Order in this case[27]), the Commission should utilize the opportunity on rehearing to clarify that future proposals must provide evidence directly addressing the question of whether the utility evaluated alternatives through a competitive procurement process. Such evidence is necessary for the Commission to weigh whether future proposals are consistent with R.C. 4928.02, R.C. 4928.17, and R.C. 4905.22.

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[26] *See* Case Nos. 14-1693-EL-RDR (AEP proposal to include additional PPAs under the PPA rider), 14-841-EL-SSO (Duke proposal for similar rider for recovery of costs of a PPA regarding its ownership stake in the OVEC plants), 14-1297-EL-SSO (FirstEnergy proposal for rider to cover PPA for purchase of power from two plants owned by its generation affiliate and its generation affiliate's interest in the OVEC plants).

[27] *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*, Pub. Util. Comm. No. 14-1297-EL-SSO, Entry at 1-3 (Mar. 23, 2015).

a. A competitive procurement process based on a consideration of all relevant resources is necessary to realize state policy of ensuring that customers receive reasonably priced retail electric service.

As discussed above, any ESP provision must be consistent with the state policies set forth in R.C. 4928.02, including "[e]nsur[ing] the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[28] The burden of proof on the utility under R.C. 4928.143(C)(1) to show that its ESP complies with this policy is even greater where an affiliate PPA raises the prospect of self-dealing that might sacrifice the interests of a distribution utility's customers. With respect to the sort of affiliate transaction proposed by AEP and other Ohio utilities, the best safeguard to ensure that consumers are receiving stable and certain retail electric service at a reasonable price is through a competitive process involving the evaluation of alternative means to achieve those goals. Ideally, that would involve a request for proposals seeking the necessary resources (including, if suitable, energy efficiency and demand reduction resources) at the best price and with the best terms possible.[29]

The General Assembly recognized the power of market forces to provide customers with reasonably priced retail electric service in enacting S.B. 3 and S.B. 221, and there is no reason for the Commission to retreat from that approach here. In this situation, a competitive procurement process will ensure a proposed PPA offers the best outcome for customers, for two reasons. First, if the utility is willing to undertake a PPA, or similar arrangement, even if the benefit of subsidizing its own generation affiliate outside the competitive marketplace is removed that will reinforce the credibility of the utility's arguments that the PPA is truly needed

[28] R.C. 4928.02(A).
[29] *See, e.g.*, Tr. XIII at 3093 (discussing possibility of issuing a request for proposals in order to arrange a PPA for price stability purposes); *see also* PUCO Staff Reply Br. at 24 (discussing other states that require competitive procurement processes for PPAs).

for stability or certainty of retail electric service. More importantly, a competitive procurement process offers a utility the opportunity to review alternative bids to identify the one with the terms and prices most beneficial to its customers, and also to leverage other offers in negotiating for the best possible deal.

The need for a competitive procurement approach to effectuate the intent underlying the policies laid out in R.C. 4928.02 is supported by the provisions of R.C. 4928.143 that address the procurement of electricity resources as part of an ESP. Both R.C. 4928.143(b) and (c) allow a utility to recover costs related to procurement of generation through an ESP: subsection (b) provides that a utility may recover "[a] reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009," while section (c) permits "[t]he establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility . . . and is newly used and useful on or after January 1, 2009."[30] In both cases, construction of the facility in question must have been "sourced through a competitive bid process."[31] It is thus clear that, even though the General Assembly authorized utilities to apply for an ESP option differing in some respects from a market rate offer, it still intended that generation procurement would be governed by a competitive process.

The Order already draws on these provisions, whether intentionally or not, in requiring AEP to address "the necessity of the generating facility [included in a PPA], in light of future

[30] R.C. 4928.143(b), (c).
[31] *Id.*

reliability concerns, including supply diversity."[32] That factor echoes the mandate in R.C. 4928.143(b) and (c) that an ESP cannot provide for recovery of costs related to the relevant generating facility "unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility."[33] The Order's incorporation of this principle in evaluating the PPA rider shows that the Commission recognizes the importance of rigorous evaluation of the need for a proposal to depart from a market-based approach by allowing a distribution utility to recover generation costs outside of its SSO. It only makes sense to extend this approach to the analysis of the merits of future proposed PPAs, through a factor addressing whether a utility has adhered to a competitive process to ensure that customers obtain the service sought at a reasonable price.

b. A competitive procurement process based on a consideration of all relevant resources will ensure compliance with the statutory requirement for just and reasonable rates.

R.C. 4905.22 requires that any utility charge approved by the Commission be "just and reasonable":

> All [utility] 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.

As with the state policy mandating reasonably priced retail electric service, the Commission should implement this requirement by making clear that any charge proposed by a utility along the lines of the PPA rider should include only services that have been obtained through an appropriate competitive procurement process, in order to prevent a distribution utility from favoring its generation affiliates at the expense of its customers' best interests.

[32] Order at 25.
[33] R.C. 4928.143(b), (c).

The Federal Energy Regulatory Commission ("FERC") has explained the importance of such measures in ensuring just and reasonable wholesale electric prices, in a decision considering whether to approve a proposed wholesale power purchase contract between a load-serving entity, Boston Edison Company, and its generation subsidiary, Edgar Electric Energy Company:

> In previous affiliate cases, which have involved the potential of unduly preferentially low market rates from the seller to its affiliate, the Commission has found that the mere opportunity for this type of affiliate abuse will lead to rejection of the proposed agreement. The same analysis applies to the facts here, where the rate may not be just and reasonable because the buyer potentially may have unduly favored the rates offered by its affiliate seller over lower rates offered by other nonaffiliate sellers. . . .
>
> Because the potential for self-dealing . . . is critical here, the Commission must ensure that the buyer has chosen the lowest cost supplier from among the options presented, taking into account both price and nonprice terms (i.e., that it has not preferred its affiliate without justification).
>
> Under the market value standard there may be several ways in which a utility could demonstrate lack of affiliate abuse. . . . One type of evidence that Boston Edison could offer would be evidence of direct head-to-head competition between Edgar and competing unaffiliated suppliers either in a formal solicitation or in an informal negotiation process.[34]

Similarly, in order to ensure the PPA rider represents a just and reasonable charge, the Commission must consider whether any candidate PPA results from a process incorporating adequate protections against affiliate self-dealing. The only way to ensure that a utility-affiliate PPA is the best deal for customers is through an open procurement process that allows non-affiliates a level playing field to compete.

[34] *Boston Edison Company Re: Edgar Electric Energy Company*, 55 FERC ¶ 61,382 (1991).

c. A competitive procurement process based on a consideration of all relevant resources will prevent anticompetitive subsidies in contravention of Ohio law.

As discussed above, the Environmental Advocates believe that the Commission lacks authority to approve the PPA rider because, in its current form, the rider is a channel for anticompetitive subsidies from AEP's distribution customers to its generation affiliate. This problem would no longer arise if the Commission were to clarify that any PPA included under the rider must result from a competitive procurement process. That result would be consistent with the Commission's established position that a distribution utility's generation affiliate may compete in the competitive bidding process ("CBP") for the utility's SSO, since that competitive framework ensures it is participating "in the same fair and nondiscriminatory manner as all other participants" on a level playing field.[35]

d. A competitive procurement process based on a consideration of all relevant resources will avoid the need to revisit AEP's corporate separation plan.

As part of Ohio's restructuring of its electric utility industry, the General Assembly enacted R.C. 4928.17 to address the potential for self-dealing between distribution utilities and their newly separate generation affiliates. Under this provision, no distribution utility:

> shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, . . . unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the

[35] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Pub. Util. Comm. No. 12-426-EL-SSO, 2013 Ohio PUC LEXIS 193, at 35 (Sept. 4, 2013).

> code of conduct as ordered by the commission . . ., and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
>
> (2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.
>
> (3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service. . . .[36]

AEP's and other Ohio utilities' proposals to award PPAs to their affiliates, to be paid for by their distribution customers through mechanisms such as the PPA rider, pose significant problems under this provision under all three of these prongs. As outlined above, the PPA rider as structured directly conflicts with the policies in R.C. 4928.02(A) and (H) because it provides an anticompetitive subsidy to AEP's affiliate generating plants and does not include any measures to ensure that self-dealing does not result in unreasonable prices for retail electric service. The limitation of the PPA rider to AEP's generation affiliate similarly suggests that it is receiving unfair competitive advantage and undue preference from AEP.[37]

The Commission should therefore make clear that in future proceedings it expects to see proposed PPAs that are consistent with R.C. 4928.17, either because they do not provide subsidies to a utility's affiliate or because any such arrangement results from a non-discriminatory competitive procurement process. Otherwise, it seems likely that the Commission will need to revisit the adequacy of AEP's and other utilities' corporate separation plans, since the recent evidence that existing corporate separation plans are not preventing the type of affiliate self-dealing evident in this case and Case Nos. 14-1693-EL-RDR, 14-841-EL-

[36] R.C. 4928.17(A).
[37] The Commission's rules implementing R.C. 4928.17 similarly provide that "[c]ross-subsidies between an electric utility and its affiliates are prohibited." Ohio Admin. Code 4901:1-37-04(A)(3).

SSO, and 14-1297-EL-SSO suggests that these existing plans are not adequate to comply with the substantive requirements of R.C. 4928.17.[38]

D. The Order Unreasonably Provides for Recovery of Costs for AEP's Interruptible Power Program, an Economic Development Measure, Through Its Energy Efficiency Rider.

The Commission approved the continuation of AEP's IRP-D as a measure that "offers numerous benefits, including the promotion of economic development and the retention of manufacturing jobs."[39] Despite recognizing that the IRP-D is in fact an economic development mechanism, the Commission nevertheless ordered that IRP-D costs should be recovered through AEP's energy efficiency and peak demand reduction ("EE/PDR") rider.[40] That holding is unreasonable given the nature of the IRP-D and the potential negative consequences for AEP's customers if its costs continue to be collected through the EE/PDR rider.

The same industrial customers that participate in AEP's IRP-D have the ability to opt out of the utility's EE and PDR programs – essentially giving up the ability to participate in utility EE and PDR programs (and receive relevant financial incentives) in return for not having to pay the utility's EE/PDR rider.[41] However, this opt out has not historically precluded the customer's participation in the IRP-D under the relevant tariff. Thus, a customer that opts out of the

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[38] Under R.C. 4928.17(D), "[a]ny party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances."

[39] Order at 40; *see also In the Matter of the Amendment of Chapters 4901:1-10 and 4901:1-21, Ohio Administrative Code, Regarding Electric Companies and Competitive Retail Electric Service, to Implement 2014 Sub.S.B. No. 310*, Pub. Util. Comm. No. 14-1411-EL-ORD, 2014 Ohio PUC LEXIS 305, at 36 (Dec. 17, 2014) ("[T]he Commission believes that interruptible tariff credits are primarily economic development costs that have EE and PDR impacts, rather than being primarily EE and PDR programs.").

[40] Order at 40.

[41] This opt-out can be accomplished through a reasonable arrangement under R.C. 4905.31 or through a new mechanism available under R.C. 4928.6611 and S.B. 310, Section 8.

EE/PDR rider will receive above-market compensation for its demand response resources through the IRP-D while leaving the costs of the IRP-D to be recovered by the EE/PDR rider. This will raise the EE/PDR rider costs for the remaining customers who have not opted out, especially where the opt-out customer had a significant load and paid a correspondingly significant share of EE/PDR rider costs. These higher EE/PDR rider costs are then likely to drive even more opt-outs by customers who do not want to pay the costs of the IRP-D program in addition to EE and PDR program costs when they only receive benefits from the latter. Even if this vicious circle does not eventually result in all industrial customers opting out of the EE/PDR rider, at the very least it will leave the industrial customers who continue to participate in the utility's EE/PDR programs saddled with the costs of providing economic development funding through the IRP-D to others who do not similarly share that burden. The Commission did not account for this problem in directing AEP to collect its IRP-D costs through its EE/PDR rider, and should reconsider this issue on rehearing.

III. CONCLUSION

For the reasons set forth above, the Environmental Advocates respectfully request that the Commission grant rehearing to ensure AEP's ESP complies with all applicable Ohio law.

Dated: March 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on March 27, 2015.

/s/ Madeline Fleisher
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Summary: App for Rehearing Application for Rehearing and Memorandum in Support by the Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center and Ohio Environmental Council and Environmental Defense Fund