

**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)	Case No. 14-1693-EL-RDR
Purchase Agreement in the Power)	
Purchase Agreement Rider.)	
)	
In the Matter of the Application of Ohio)	
Power Company for Approval of Certain)	Case No. 14-1694-EL-AAM
Accounting Authority.)	

**INITIAL POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
APPALACHIAN PEACE AND JUSTICE NETWORK**

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**JOINT POST-HEARING BRIEF
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AND
APPALACHIAN PEACE AND JUSTICE NETWORK**

In a radical reversal of Ohio's progress toward electric markets, AEP Ohio offers up a settlement that could add \$700 (or much more) to 1.3 million Ohioans' electric bills to subsidize aging deregulated power plants. And as testament to what is possible using other people's money, this subsidy charge is just one settlement term among others that would cost hard-working Ohioans dearly. AEP Ohio's customers already pay the highest electric rates in the state.

PUCO Staff Witness Choueiki testified that Staff "believe[s] we are in a competitive market. It's a fully functionally competitive market in Ohio, a generation service, so there is no need for anything else on the generation side."¹

It gets worse for Ohioans. There is the testimony of the PJM Independent Market Monitor. He warned of his intention to prevent subsidized AEP power from harming the

¹ Hearing Transcript at Vol. XVI, p. 3915:17-22 (October 23, 2015).

nation's competitive electric markets. If the Market Monitor succeeds, Ohioans could bear charges much greater than \$700 each, because AEP's power plants might not clear in the market. And without clearing, the power plants would not receive revenue. Consumers would pay much more in subsidies.²

I. INTRODUCTION

Early in this proceeding, AEP Ohio ("AEP Ohio" or "Utility") asked the Public Utilities Commission of Ohio ("PUCO") to provide affiliated coal-fired generators ("PPA Units") with a predictable source of revenue. Unfortunately for Ohio consumers, they are the ones tapped to be this predictable source of revenue.

Oddly, AEP Ohio has made this "ask" of state government despite its recent and repeated representations that the PPA Units are well positioned from a cost and operational perspective to participate in the competitive market. Indeed, AEP Ohio has asked the PUCO to rely on an AEP Ohio forecast showing that the PPA Units will be profitable each year from 2016 to 2024. In light of the evidence, the PUCO finds itself in the position of having evidence from all the parties – AEP Ohio, the Office of the Ohio Consumers' Counsel ("OCC"), and others – that points in the same direction: Denial.

Later, AEP Ohio, in effect, acknowledged the overwhelming evidence supporting denial of the Amended Application. It filed a Joint Stipulation and Recommendation ("Joint Stipulation" or "settlement") with ten signatory parties ("Signatory Parties"). According to AEP Ohio, the Joint Stipulation is offered as a modification to the

² See First Supplemental Testimony of Joseph E. Bowring on behalf of the Independent Market Monitor for PJM (IMM Ex. 2) filed December 28, 2015 at p. 6:16-33.

Amended Application (“Modified Amended Application”) – though it still contains the PPA Rider that is too costly for consumers.³

But the Joint Stipulation is a vague, ambiguous hodgepodge of a document full of contingent promises that leaves implementation details for future resolution.⁴ It will plunge the PUCO and consumers of all kind into an endless wave of litigation. It contains little more than “commitments” to make future filings that may or may not result in actual programs. And were AEP Ohio’s own financial forecast of the Modified Amended Application to be believed, consumers would actually be *worse off* under the Modified Amended Application as a direct result of the Joint Stipulation. Accordingly, the Joint Stipulation should be rejected.

Regardless of whether the PUCO accepts the Joint Stipulation and decides this matter based on the Modified Amended Application, or rejects the Joint Stipulation and decides this matter based on the Amended Application, AEP Ohio’s proposal should be rejected. AEP Ohio’s own evidence confirms that the Amended Application, and the Modified Amended Application, should both be denied based on the factors the PUCO established in AEP Ohio’s ESP III case.⁵ That result is confirmed by, and independently justified by, OCC’s evidence. At the very least, the PUCO is in no better position now

³ See Hearing Transcript at Vol. XVIII, p. 4473:15-19.

⁴ In important respects, “debate” among the signatory parties about the Joint Stipulation’s meaning will be required. See *id.* at Vol. XIX, p. 4719:7-4720:1.

⁵ *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*, Case No. 13-2385-EL-SSO (“ESP III”), Opinion and Order at 25.

than when it originally denied cost recovery through the PPA Rider proposed in ESP III.⁶ It should therefore deny the Amended Application or, if the Joint Stipulation is approved, deny the Modified Amended Application.

II. EXECUTIVE SUMMARY

The PUCO must first confront the issue of whether it has jurisdiction to, among other things, grant this application and impose these charges on Ohioans. It does not. Federal law preempts the PUCO from setting the price received by the entity (AEP Ohio) participating in the wholesale market at the cost of the PPA. The PUCO's jurisdiction is also preempted by federal law because the PPA Rider proposal will distort competitive markets for wholesale power. Indeed, FERC last week requested comment on whether it should review the AEP Ohio and FirstEnergy power purchase agreements. For similar reasons, the PUCO is without jurisdiction under state law.

After the evidentiary hearing on the Amended Application, AEP Ohio filed a Joint Stipulation. Thus, the PUCO must first decide if it should approve the Joint Stipulation. If it does, the PUCO must then decide on the Modified Amended Application. If it does not, the PUCO must decide on the Amended Application.

The Joint Stipulation should not be approved based on AEP Ohio's own evidence. Were the PUCO to believe AEP Ohio's own testimony, consumers would be *worse off* due to provisions in the Joint Stipulation *other than* the PPA Rider. There is so much uncertainty about the Joint Stipulation that it could not have been the product of serious bargaining among knowledgeable parties or be in the public interest. Further, the Joint

⁶ *See id.* (in denying cost recovery, explained that "the Commission is not persuaded, based on the evidence of record in these proceedings, that AEP Ohio's PPA rider proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost.").

Stipulation is so vague and ambiguous that it could not have been the product of serious bargaining among knowledgeable parties or be in the public interest. Signatory Parties footnoted out of material provisions of the Joint Stipulation, which causes it to fail the three-prong test that the PUCO has historically applied to stipulations. The standards by which AEP Ohio's conduct under the Joint Stipulation will be measured are so hollow that it cannot pass that historical test. It will plunge the PUCO and consumers of all types into an endless wave of litigation. As a matter of regulatory principle and policy, the PUCO should require more certainty and clarity in a stipulation.

The Joint Stipulation is flush with "commitments" – contingent commitments, at that – and short on actually implementing programs. Such should not suffice as a matter of regulatory principle and policy and public interest considerations. And the Joint Stipulation is unnecessary to the purported benefits therein – the PPA Rider is not necessary to achieving alleged hedging benefits – which are otherwise overstated. Were this not enough, AEP Ohio has failed to meet its burden of showing that the PPA Rider is in the public interest under the factors established in the PUCO's ESP III Opinion and Order.

OCC's evidence confirms, and independently justifies, rejecting the Joint Stipulation under the PUCO's three-prong test. Its programs will cost consumers at least \$2 billion with no corresponding consumer benefit. It was not the product of serious bargaining among knowledgeable parties, it violates regulatory principles and practices, and is not in the public interest. The Joint Stipulation is a compilation of special interest handouts. Further, its rate design is fundamentally flawed. In addition to these considerations, approving the Joint Stipulation would necessitate rejecting the Modified

Amended Application because it would cause ESP III to fail the MRO v. ESP test to the detriment of consumers.

Irrespective of whether the PUCO examines the Amended Application or the Modified Amended Application, and irrespective of whose evidence the PUCO believes, only one result can be reached: Denial. The four factors the PUCO established in AEP ESP III cannot be met. The PPA Units are not in financial trouble. In fact, according to AEP, they are all profitable. The PPA Units are not necessary for reliability or fuel diversity. The system is already reliable, with a healthy reserve margin above what is necessary, and the market is diversifying fuel sources on its own. The environmental regulatory regime is so dynamic, and is in so much flux, that when it comes to the PPA Units' environmental compliance there is only one certainty: uncertainty. And there is no reliable evidence before the PUCO regarding the effect on electricity prices were the PPA Units to close or the corresponding impact on Ohio's economy. Additionally, the Amended Application and the Modified Amended Application would have to be rejected because they would cause ESP III to fail the MRO v. ESP test.

Though the record is sufficient to deny AEP Ohio's proposals, it is not sufficient to approve them. Material evidence was excluded from the record based on inappropriate rulings. Such rulings would have far-reaching, prejudicial impacts. The PUCO should reverse those rulings and re-open this matter so that it can reach a decision based on a full, complete, accurate record.

III. BACKGROUND

A. The Ohio General Assembly chose competition to protect consumers.

In Senate Bill 3 (“S.B. 3”), the Ohio General Assembly adopted a comprehensive statutory plan to facilitate and encourage competition in the retail electric market as a means to protect consumers from increasing electric rates.⁷ It also recognized that things could change as competition matured.

As competition evolved, the Ohio Supreme Court noted that things were not proceeding as expected.⁸ The PUCO and utilities responded with rate plans not expressly contemplated by statute.⁹ Having to review such plans, the Ohio Supreme Court acknowledged the primary role the Ohio General Assembly had to play (and intended to play) in connection with S.B. 3, and asserted that additional legislative action might be required.¹⁰

Affirming its intended role in making any adjustments to S.B. 3, the General Assembly responded with Senate Bill 221 (“S.B. 221”). Broadly speaking, it required electric distribution utilities to provide consumers with a standard service offer (“SSO”).¹¹ The Ohio General Assembly adhered to its belief in competition with S.B. 221 and provided that electric distribution utilities had to fulfill this requirement with a

⁷ See *AK Steel Corp. v. PUCO*, 95 Ohio St. 3d 81, 81 (2002); *OCC v. PUCO*, 114 Ohio St. 3d 340, 340 (2007).

⁸ See *OCC v. PUCO*, 114 Ohio St. 3d 340, 343 (2007).

⁹ See *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 513 (2011).

¹⁰ See *id.* (citations omitted).

¹¹ See *id.*; see also R.C. secs. 4928.141-4928.144.

market rate offer (“MRO”)¹² unless they could show that an electric security plan (“ESP”)¹³ is more favorable in the aggregate than a market rate offer.¹⁴

B. The PUCO denied AEP Ohio’s initial request for a PPA Rider because it was uncertain if the PPA Rider would provide consumer benefits commensurate with potential costs.

AEP Ohio first sought authority for a PPA Rider in its ESP III Application.¹⁵

Initially, the PPA Rider was based solely on AEP Ohio’s Ohio Valley Electric Corporation (“OVEC”) contractual entitlement from the Kyger Creek and Clifty Creek generating stations.¹⁶ Foreshadowing things to come, AEP Ohio reserved the right to include additional PPAs in the PPA Rider.¹⁷ As proposed in the ESP III case, AEP Ohio’s OVEC contractual entitlement, including energy, capacity, and ancillary services, would be sold into the PJM Interconnection, LLC (“PJM”) markets. And, after deducting all associated costs from the revenues, the proceeds from the OVEC contractual entitlement, whether a credit or a debit, would accrue to Ohio consumers.¹⁸

AEP Ohio asserted that the PPA Rider rates would rise and fall in a manner that is counter-cyclical to market prices, thereby creating a hedging effect for consumers.¹⁹ AEP Ohio’s estimated rate impact of the PPA Rider varied drastically. Its President estimated that the PPA Rider would cost ratepayers \$52 million over the course of the

¹² See R.C. 4928.142. An “MRO” sets “rates using a competitive-bidding process to harness market forces.” See *In re Columbus S. Power Co.*, 128 Ohio St. 3d at 514.

¹³ See R.C. 4928.143.

¹⁴ See R.C. 4928.143(C)(1). This test should be limited to considering quantitative factors.

¹⁵ See ESP III Opinion and Order at 8-27.

¹⁶ See *id.* at 8.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

three-year ESP.²⁰ Another AEP Ohio witness testified that the PPA Rider would result in an \$8.4 million benefit to ratepayers over the three-year ESP.²¹

All but one of the multitudes of Intervenors opposed the PPA Rider.²² Staff asserted that the PPA Rider was a step backwards in the PUCO's goal to transition to a fully competitive market with market based pricing.²³ Further, Staff asserted that PUCO oversight of the PPA Rider would be severely limited, if not non-existent, because the underlying PPA would be subject to Federal Energy Regulatory Commission ("FERC") jurisdiction and not the PUCO's jurisdiction.²⁴ In fact, it was argued that the PPA mechanism was preempted by the Federal Power Act ("FPA").²⁵

Staff also asserted that the costs for running OVEC, and thus the costs of the PPA Rider, could substantially increase as a result of, among other things, environmental regulations.²⁶ Consistent with the estimate of AEP Ohio's President, various Intervenors estimated that the PPA Rider would result in large costs to customers – from \$82 million to \$116 million.²⁷ Beyond just the negative rate impact of such costs, several Intervenors asserted that allowing AEP Ohio to recover such costs through the PPA Rider would constitute an anticompetitive subsidy, particularly given that AEP Ohio's customers would be ensuring recovery of the cost of generation with a return on and of AEP Ohio's

²⁰ *See id.*

²¹ *See id.* at 9.

²² *See id.* at 12.

²³ *See id.*

²⁴ *See id.* at 13.

²⁵ *See id.* at 13-14.

²⁶ *See id.* at 17.

²⁷ *See id.* at 16.

investment in OVEC.²⁸ Stated generally, Intervenors characterized AEP Ohio's PPA Rider proposal as a bailout paid for through customers' electric bills for aging coal plants and a means to insulate shareholders from the risks of the competitive market, costs of future carbon restraints, and other environmental regulations.²⁹

Although the PUCO found that the PPA Rider would, "in theory," have the effect of stabilizing prices, it rejected the PPA Rider as proposed.³⁰ The PUCO explained that "there is no question that the rider would impact customers' rates through the imposition of a new charge on their bills."³¹ What the PUCO found unclear was "how much the proposed PPA Rider would cost customers and whether customers would even benefit from the financial hedge."³² It emphasized that "[i]n 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 \$52 million net cost to an \$8.4 million net benefit, the Commission is unable to reasonably determine the rate impact of the rider."³³ At the same time, the PUCO agreed with various Intervenors that the evidence of record demonstrated that the PPA Rider may result in a net cost to customers – with little offsetting benefit from its intended purpose as a hedge against market volatility.³⁴

Ultimately, the PUCO determined that because there was "considerable uncertainty with respect to pending PJM market reform proposals, environmental

²⁸ See *id.* at 18.

²⁹ See *id.* at 19.

³⁰ See *id.* at 21.

³¹ See *id.* at 23.

³² See *id.*

³³ See *id.* at 24.

³⁴ See *id.*

regulations, and federal litigation, as AEP Ohio acknowledges, and, in light of this uncertainty, [it did] not believe that it is [was] appropriate to adopt the proposed PPA rider at this time.”³⁵ It was “not persuaded, based on the evidence of record in the[] proceedings, that AEP Ohio’s PPA rider proposal would provide customers with sufficient benefit from the rider’s financial hedging mechanism or any other benefit that is commensurate with the rider’s potential cost.”³⁶ Therefore, the PUCO authorized only a placeholder rider, at an initial rate of zero, and required AEP Ohio to show in a “future filing” justification for cost recovery.³⁷ Among the showings that the PUCO required AEP Ohio to make, “at a minimum,” were:

- 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.³⁸

The PUCO emphasized that it would balance, but not be bound by, the foregoing factors.³⁹

The PUCO also directed AEP Ohio to provide in the future filing:

³⁵ *See id.*

³⁶ *See id.* at 25.

³⁷ *See id.*

³⁸ *See id.*

³⁹ *See id.* As Staff explained in the initial phase of this case, AEP Ohio could satisfy all of these factors and the PUCO may still say “no” to its Amended Application/Modified Amended Application. *See* Hearing Transcript at Vol. XVI, p. 3893:6-16.

- Provision for rigorous PUCO oversight of the rider, including a proposed process for a periodic substantive review and audit;
- A commitment to full information sharing with the PUCO and its Staff;
- An alternative plan to allocate the rider's financial risk between it and its ratepayers; and
- A severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.⁴⁰

Before the PUCO's Opinion and Order in AEP Ohio's ESP III case, AEP Ohio filed an Application to include a new PPA in the PPA Rider.⁴¹ After the Opinion and Order in the ESP III case, AEP Ohio filed an Amended Application under which it attempted to address the PUCO requirements.⁴² A month-long evidentiary hearing was held on the Amended Application.

C. AEP Ohio files the Joint Stipulation.

After the evidentiary hearing on the Amended Application, AEP Ohio filed the Joint Stipulation. It purportedly addresses concerns raised by Staff and other parties.⁴³ A week-long evidentiary hearing was held on the Joint Stipulation.

⁴⁰ See ESP III Opinion and Order at 25-26.

⁴¹ See Application filed October 3, 2015.

⁴² See Amended Application filed May 15, 2015. A cover letter from AEP Ohio's President accompanied the Amended Application. In it, AEP Ohio's President said that AEP Ohio intends to continue "partnering" with the PUCO. See 5-15-15 Letter to Commission from Mr. Vegas (OCC Ex. 2, admitted at Hearing Transcript Vol. II, p. 365). AEP Ohio Witness Fetter, a former Michigan Public Service Commission Chairman, did not view his role as a regulator as being a "partner" with the utilities he regulated. See Hearing Transcript at Vol. III, p. 884:17-20. Nor should the PUCO.

⁴³ See Direct Testimony of William A. Allen in support of AEP Ohio's Settlement Agreement (AEP Ohio Ex. 52) filed December 14, 2015 at p. 2:18-21.

D. Matters for the PUCO's determination.

AEP Ohio now seeks approval of the Amended Application as modified by the Joint Stipulation.⁴⁴ The first matter for the PUCO's determination is whether to approve the Joint Stipulation. If the Joint Stipulation is approved, the PUCO must determine if the Modified Amended Application passes muster under its ESP III Opinion and Order and governing statutes. If the Joint Stipulation is not approved, the PUCO must determine if the Amended Application passes muster under its ESP III Opinion and Order and governing statutes.

IV. STANDARD OF REVIEW

The Ohio Supreme Court stated in *Duff v. Pub. Util. Comm.*⁴⁵ that a stipulation is merely a recommendation that is not legally binding upon the PUCO. The PUCO “may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.”⁴⁶

The Court in *Consumers' Counsel v. Pub. Util. Com.*⁴⁷ considered whether a just and reasonable result was achieved with reference to criteria adopted by the PUCO in evaluating settlements:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating parties?
2. Does the settlement package violate any important regulatory principle or practice?

⁴⁴ See Hearing Transcript at Vol. XVIII, p. 4473:15-19. As noted earlier, the Amended Application as modified by the Joint Stipulation is referred to herein as the Modified Amended Application.

⁴⁵ *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367 (1978); see also Ohio Adm. Code 4901-1-30(E).

⁴⁶ See *id.*

⁴⁷ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

3. Does the settlement, as a package, benefit ratepayers and the public interest?⁴⁸

The Consumers' Counsel is recommending that the PUCO not consider this hodgepodge of a settlement as a "package," as explained below.

In evaluating settlements in ESP cases, the PUCO should recognize the parties' asymmetrical bargaining positions, where the utility possesses superior bargaining power.⁴⁹ As Commissioner Roberto noted in FirstEnergy's initial ESP case filed in 2008:

When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.

In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all

⁴⁸ As described in detail earlier, in its ESP III Opinion and Order the PUCO could not conclude based on the record before it that AEP Ohio's PPA Rider proposal was in the public interest. *See* IIIB, *supra*. It therefore required that AEP Ohio make various showings in a future filing. *See id.* Thus, the PUCO has already decided what AEP Ohio must show before it will find that AEP Ohio's PPA Rider proposal is in the public interest. Accordingly, the showings announced in ESP III that AEP Ohio must make are necessary showings that AEP Ohio must make in connection with the "public interest" prong of the three-prong test. As a result, the evidentiary record from the initial stage of this proceeding and the discussion herein based on that evidentiary record are applicable not only to the PUCO's determination on the Amended Application or, if the Joint Stipulation is approved, the Modified Amended Application, but equally to the PUCO's public interest analysis of the Joint Stipulation, itself, under the three-prong test.

⁴⁹ As described below, and in the testimony of OCC Witnesses Hixon (OCC Ex. 9) filed September 11, 2015, and Haugh (OCC Ex. 33) filed December 28, 2015, the PUCO's ESP III analysis was not, and could not have been, complete because the PPA Rider had not been populated. Accordingly, the PUCO should evaluate AEP Ohio's proposals here in light of the requirements governing ESPs.

modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.⁵⁰

Commissioners Centolella and Lemmie expressed similar concerns.⁵¹ As reflected in Commissioner Roberto's opinion, the bargaining position of an electric distribution utility relative to other parties in an ESP proceeding is strengthened by the ability of the electric distribution utility to reject the results from a fully litigated ESP proceeding. And the utility's advantage is further increased by the utility's ability to offer inducements, including inducements funded by other people's money, to gain signatures. These utility advantages should prompt a wary eye by regulators considering the terms of a settlement that the utility negotiated.

The ultimate question to be answered is whether, in light of the record, AEP Ohio's proposals are reasonable, comply with Ohio law, and are in the public interest. As OCC shows below, AEP Ohio does not meet this standard.

In addition, the PUCO must ensure that the Amended Application or, if the Joint Stipulation is approved, the Modified Amended Application, meets the provisions of the Ohio Revised Code governing ESPs. The standard of review for ESP cases is found in R.C. 4928.143(C)(1), which states in pertinent part:

⁵⁰ *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2 (citations omitted).

⁵¹ *See id.*, Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring (Mar. 25, 2009) at 2 (the ability of an electric distribution utility to withdraw (and its prior withdrawal)" need to be taken into account when considering the weight to be given to this stipulation" and "The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of issues.").

[T]he commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

Further, R.C. 4905.22 requires that every public utility furnish necessary and adequate service and facilities, and that all charges for any service must be just and reasonable. Of course, AEP Ohio as the applicant bears the burden of proof.⁵²

V. RECOMMENDATIONS

A. The core responsibility of FERC, not the PUCO, is to protect consumers by overseeing the nation's wholesale electric markets; the PUCO is without jurisdiction under federal law and state law to approve the PPA Rider.

1. It is necessary and appropriate for the PUCO to decide if it has jurisdiction in the first instance.

The PUCO is an administrative agency with the power to determine its own jurisdiction.⁵³ It has recognized that before addressing the merits of a case, it must first

⁵² See, e.g., R.C. 4928.143(C)(1); *In the Matter of the Application of The Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations*, 1985 Ohio PUC Lexis 7, 91 (PUCO Case No. 84-1435-TP-AIR); *In the Matter of the Application of the Otterville Mutual Telephone Company for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16 Revised Code*, 1973 Ohio PUC Lexis 3, 4 (PUCO Case No. 73-356-Y) (“Although the applicant must shoulder the burden of proof in every application proceeding before the Commission, this burden takes on an added dimension in the context of an emergency rate case.”).

⁵³ See, e.g., *In the Matter of the Complaint of Mentor Trailer Park, Inc.*, 1985 Ohio PUC Lexis 574, 14 (PUCO Case No. 84-757-WW-CSS).

determine the extent of its jurisdiction, if any.⁵⁴ It has also recognized that it will not address the merits of a case, even after hearing, where further review of jurisdictional issues leads to a finding of no jurisdiction.⁵⁵ As the Ohio Supreme Court has explained, it is “necessary and appropriate” for the PUCO to consider germane law to decide its own jurisdiction in the first instance.⁵⁶ Upon such consideration here, the PUCO can come to but one conclusion: It lacks jurisdiction.⁵⁷

2. FERC has exclusive jurisdiction over wholesale energy transactions as a matter of federal law.

The PUCO’s jurisdiction over AEP Ohio’s proposed PPA Rider is field and conflict preempted under the FPA.⁵⁸ The FPA vests FERC with exclusive jurisdiction over the “transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce.”⁵⁹ Under the FPA, a wholesale sale is simply a sale for resale.⁶⁰ Rather than directly setting rates, FERC has chosen to achieve

⁵⁴ See, e.g., *In the Matter of the Commission Investigation into the Operations and Service of Lake Erie Utilities Company*, 1988 Ohio PUC Lexis 958, 4 (PUCO Case No. 86-1561-WS-COI).

⁵⁵ See, e.g., *In the Matter of the Complaint of Chatham v. Lakeside Utilities Corp.*, 1984 Ohio PUC Lexis 458, 17-18 (PUCO Case No. 83-413-WS-CSS).

⁵⁶ See *In re Complaint of Residents of Struthers*, 45 Ohio St. 3d 227, 231 (1989). Stated differently in an analogous context, when trial courts’ subject matter jurisdiction is challenged by way of a motion under Ohio Civil Rule 12(B)(1), appellate courts have explained that “the trial court *must decide* whether the plaintiff has alleged any cause of action which the court has the authority to decide.” *Westside Cellular v. Northern Ohio Cellular Tel. Co.*, 100 Ohio App. 3d 768, 770 (Cuyahoga 1995) (*italics added*).

⁵⁷ To date, the PUCO has deferred ruling on the preemption issue. It has made clear, however, that it reserved the right to revisit the issue. See, e.g., ESP III Second Entry on Rehearing at 6. As the authority discussed here confirms, it is necessary and appropriate for the PUCO to decide if it has jurisdiction.

⁵⁸ 16 U.S.C. 824d (2006).

⁵⁹ 16 U.S.C. 824(b)(1); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); see also *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 251 (3rd Cir. 2014) (“the wholesale price for capacity . . . is squarely, and indeed exclusively, within FERC’s jurisdiction.”) (citation omitted).

⁶⁰ 16 U.S.C. 824(d).

its regulatory aims by “protecting the integrity of interstate markets.”⁶¹ To do so, FERC has authorized the creation of regional transmission organizations to oversee certain multistate markets – including PJM.⁶² PJM operates energy and capacity markets.⁶³ Both markets “are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incenting the construction of new power plants when necessary[]” via price signals.⁶⁴ They represent “a comprehensive program of regulation that is quite sensitive to external tampering.”⁶⁵

a. Field preemption under the Federal Power Act.

Field preemption occurs when “Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.”⁶⁶ Actual conflict between a state enactment and federal law is not necessary to a finding of field preemption – “it is the mere fact of intrusion that offends the Supremacy Clause.”⁶⁷ “A wealth of case law confirms FERC’s exclusive power to regulate wholesale sales of energy in interstate commerce, . . .”⁶⁸ The FPA “leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result.”⁶⁹ States cannot “rely on

⁶¹ *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014); *see also Solomon*, 766 F.3d at 248 (“FERC favors using market mechanisms to produce competitive rates for interstate sales and transmissions of energy.”).

⁶² *Nazarian*, 753 F.3d at 472.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 474.

⁶⁷ *Id.*

⁶⁸ *Id.* at 475 (citations omitted).

⁶⁹ *Id.* (citation omitted).

mere formal distinction in ‘an attempt’ to evade preemption and ‘regulate matters within FERC’s exclusive jurisdiction.’”⁷⁰

Accordingly, a state program under which a participant in the PJM markets receives a fixed sum for every unit of capacity and energy that it clears, *even if the state program does not fix the rate paid by PJM to the market participant*, is preempted.⁷¹ So is a state program under which a PJM market participant receives the rate paid by PJM to the market participant plus an additional amount.⁷² “The fact that [a state program] does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same.”⁷³ Nor is a state program saved where it incorporates, rather than repudiates, PJM clearing prices.⁷⁴

b. Conflict preemption under the Federal Power Act.

Conflict preemption applies “where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷⁵ A state program that has the potential to distort PJM auction price signals has been held conflict preempted.⁷⁶

⁷⁰ *Id.* at 476.

⁷¹ *See id.* at 476-77.

⁷² *See Solomon*, 766 F.3d at 252.

⁷³ *Nazarain*, 753 F.3d at 477. Importantly, whether a state program functionally sets the price received by the PJM market participant for energy and capacity at a just and reasonable rate is immaterial to the preemption analysis. *Solomon*, 766 F.3d at 253.

⁷⁴ *Solomon*, 766 F.3d at 254.

⁷⁵ *Nazarian*, 753 F.3d at 478 (citation omitted).

⁷⁶ *Id.* at 478-79.

3. The PUCO's jurisdiction is field preempted because, under the PPA Rider, the PJM market participant (AEP Ohio) would receive a fixed sum for energy and capacity sold on the PJM markets.

Under AEP Ohio's Amended Application/Modified Amended Application, the proposed sale from AEP Ohio into the PJM markets is a wholesale transaction.⁷⁷ That transaction would be revenue neutral to AEP Ohio.⁷⁸ This results from how the PPA Rider will function. When the revenues accruing to AEP Ohio from the sale of PPA entitlements into the PJM markets exceed all costs associated with the PPA, AEP Ohio will credit customers the difference through the PPA Rider.⁷⁹ When the revenues accruing to AEP Ohio resulting from the sale of PPA entitlements into the PJM markets are less than all costs associated with the PPA, AEP Ohio will charge customers the difference through the PPA Rider.⁸⁰

Accordingly, the revenues received by AEP Ohio from the sale of the capacity, energy, and ancillary services associated with both the Affiliate PPA and the OVEC entitlements combined with the net PPA Rider credit or charge will equal AEP Ohio's expenses associated with the Affiliate PPA and OVEC entitlements.⁸¹ In short, AEP Ohio's proposal in its Amended Application/Modified Amended Application would fix the amount received by the PJM market participant – AEP Ohio – for the indisputably

⁷⁷ See Hearing Transcript at Vol. VII, p. 1951:18-24.

⁷⁸ See Hearing Transcript at Vol. I, p. 211:6-11; Vol. VI, p. 1706:2-1707:6.

⁷⁹ See OCC Request for Admission 3-015 (OCC Ex. 22, admitted at Hearing Transcript Vol. XVII, p. 4413).

⁸⁰ See OCC Request for Admission 3-016 (OCC Ex. 23, admitted at Hearing Transcript Vol. XVII, p. 4413).

⁸¹ See OCC Request for Admission 3-017 (OCC Ex. 24, admitted at Hearing Transcript Vol. XVII, p. 4413).

wholesale transaction – sale of energy, capacity, and ancillary services on the PJM markets – at the contract price for the PPAs.

The annual (or quarterly, if the Joint Stipulation is approved) adjustment process⁸² proposed by AEP Ohio confirms this. If there were a deviation of actual weather from “normal” weather, upon which AEP Ohio’s PPA Rider forecasts would be based, there would be a true-up due to actual weather and actual market prices resulting therefrom.⁸³ If there was a deviation regarding projected energy revenues from actual energy revenues, that would be adjusted in the PPA Rider’s over- or under-recovery mechanism.⁸⁴ If there were a deviation in the amount of capacity revenues realized from the market, that would be adjusted in the PPA Rider’s over- or under-recovery mechanism.⁸⁵ If there were a deviation in energy charges, for whatever reason, that would be adjusted in the PPA Rider’s over- or under-recovery mechanism.⁸⁶ Any deviation between forecasted and actual debt rate, equity rate, tax rates, depreciation rates, operation and maintenance expenses, and “other charges” would be adjusted in the PPA Rider’s over- or under-recovery mechanism.⁸⁷

There is no dispute but that AEP Ohio’s proposed sale of the capacity, energy, and ancillary services in the PJM markets is a wholesale transaction. That sale is under federal jurisdiction as a matter of law.⁸⁸ The amount received by AEP Ohio, the PJM market participant, for the sale is revenue neutral to AEP Ohio. There is one and only

⁸² See, e.g., Hearing Transcript at Vol. VII, p. 1977:3-8.

⁸³ See *id.* at p. 1977:14-1978:1.

⁸⁴ See *id.* at p. 1978:6-10.

⁸⁵ See *id.* at p. 1978:11-15.

⁸⁶ See *id.* at p. 1978:16-20.

⁸⁷ See *id.* at p. 1980:3-20; 1981:14-25; 1982:1-8.

⁸⁸ See VA2, *supra*.

one way that the sale could be revenue neutral – if the amount received by AEP Ohio for the sale is fixed at the costs of the sale. As AEP Ohio itself has explained, that is exactly how the credit/charge of the PPA Rider, and the PPA Rider’s adjustment mechanism, will work. Because AEP Ohio’s proposals in the Amended Application/Modified Amended Application will fix the amount it receives for capacity, energy, and ancillary services wholesaled on the PJM markets, its proposals are field preempted by federal law. The PUCO should therefore dismiss this case.

4. The PUCO’s jurisdiction is conflict preempted because AEP Ohio’s proposal would distort PJM’s auction price signals.

The PPA Units currently operate in a competitive market.⁸⁹ They do so as a result of S.B. 3 and S.B. 221.⁹⁰ In a competitive market, there is no predictable source of revenue.⁹¹ In point of fact, inherent in a competitive market is that there are *no* predictable sources of revenue.⁹² But under the proposals in the Amended Application/Modified Amended Application, the PPA Units will have a predictable source of revenue.⁹³ And they will have a predictable return on equity (profit) for their entire useful lives (or, if the Joint Stipulation is approved, eight and a half years) – that which is defined in the PPAs.⁹⁴

Further, if the Amended Application/Modified Amended Application is rejected, capital-cost expenditures on the PPA Units will have to be made in light of the available

⁸⁹ See Hearing Transcript at Vol. I, p. 187:24-188:1.

⁹⁰ See *id.* at p. 188:2-5.

⁹¹ See *id.* at p. 188:6-10.

⁹² See *id.* at p. 188:11-14; see also *id.* at Vol. VII, p. 1947:11-17 (PJM revenue available to AEP Ohio from OVEC under governing PUCO orders).

⁹³ See *id.* at Vol. I, p. 188:15-18.

⁹⁴ See *id.* at p. 165:12-16.

market-based revenue.⁹⁵ With that there is the associated risk that market-based revenue will not cover capital-cost expenditures.⁹⁶ Were revenue not sufficient, the PPA Units would have to engage in efficiency enhancing cost-cutting.⁹⁷ But under the Amended Application's/Modified Amended Application's proposals, the PPA Units would face no risk regarding generating revenue or earning revenue sufficient to cover capital expenditures, or market-based price signals to engage in efficiency enhancing cost-cutting.⁹⁸

AEP Ohio's President admits that AEPGR's profit or loss will *not* be determined by the market if the PPA Rider proposals in the Amended Application/Modified Amended Application are approved.⁹⁹ AEP Ohio does not dispute that the proposed PPAs are *not* warranted by market-driven principles – it would not enter into the PPAs if its revenues were determined by the market.¹⁰⁰

“The proposed PPA Rider would constitute a subsidy analogous to the subsidies previously proposed in New Jersey and Maryland, both of which were found to be inconsistent with competition in the wholesale power markets.”¹⁰¹ Generation sold into PJM that is insulated from the competitive forces that all other generation faces

⁹⁵ See *id.* at Vol. IV, p. 1234:17-22.

⁹⁶ See *id.* at p. 1234:23-1235:2.

⁹⁷ See *id.* at p. 1235:3-6.

⁹⁸ See *id.* at p. 1235:7-14. Importantly, the history of AEP Generation Resources (“AEPGR”) over the last several years proves the point that the market is working. AEPGR is, and has been, engaging in efficiency enhancing cost-cutting. See *id.* at p. 1238:15-1239:12. It will continue doing so if the Amended Application/Modified Amended Application is denied. See *id.* at p. 1239:13-16.

⁹⁹ See *id.* at Vol. I, p. 147:10-15.

¹⁰⁰ See *id.* at Vol. III, p. 799:9-19; Vol. VII, p. 2023:15-22.

¹⁰¹ First Supplemental Testimony of Joseph E. Bowring on behalf of the Independent Market Monitor for PJM (IMM Ex. 2) filed December 28, 2015 at 4:25-27.

inherently distorts PJM's auction price signals.¹⁰² AEP Ohio's proposals are therefore conflict preempted by federal law. The PUCO should therefore dismiss this case.

5. The PUCO also lacks jurisdiction under state law.

As another threshold matter, the PUCO must determine if it has subject matter jurisdiction here under *state* law.¹⁰³ To do so, it must determine if such jurisdiction is expressly granted by statute. The PUCO has and can exercise only the authority conferred upon it by the General Assembly.¹⁰⁴ If the PUCO were to approve the PPA Rider, it would supplement the PJM wholesale auction clearing price and functionally set the "wholesale" prices for the PPA Units. Because R.C. Title 49 limits the PUCO's subject matter jurisdiction to "retail" electric service, the Amended Application/Modified Amended Application must be denied because the PUCO lacks jurisdiction to set wholesale prices.

Further, the Ohio General Assembly intended for it, and it alone, to make any adjustments to the competitive environment established by S.B. 3 as and when necessary. If the PUCO were to approve the PPA Rider, it would fundamentally change the competitive environment established by S.B. 3 to the detriment of Ohio's consumers. As a creature of statute with limited and defined powers, the PUCO cannot do so by way of an Order.

¹⁰² See sec. D (3)-(6), *infra* p. 106-112.

¹⁰³ *Ohio Edison Co. v. Pub. Util. Comm.*, 52 Ohio St.2d 123 (1977).

¹⁰⁴ *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153 (1981); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St. 2d 302 (1980).

- a. **The PUCO lacks jurisdiction to approve the PPA Rider since it would functionally set wholesale prices.**
 - i. **The General Assembly has expressly limited the PUCO’s subject matter jurisdiction to “retail” electric service.**

The Ohio Supreme Court has recognized that the FPA provides FERC with exclusive jurisdiction related to the “sale of electric energy at *wholesale*,” defined as a “sale of electrical energy to any person *for resale*.”¹⁰⁵ Indeed, the courts have recognized that, in enacting the FPA, “Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction”¹⁰⁶

Consistent with this jurisdictional separation, the Ohio General Assembly limited the PUCO’s jurisdiction to “retail” electric services. The PUCO’s authority only extends to “an electric light company when engaged in the business of supplying electricity . . . *to consumers* within this state.”¹⁰⁷ This limitation of jurisdiction also was imposed on the PUCO in subsequently enacted R.C. Chapter 4928, which is replete with references restricting the PUCO’s authority to “retail electric service.” Specifically, as it pertains to this proceeding, R.C.4928.141 requires “an electric distribution utility” to provide “*consumers* . . . a standard service offer of all competitive *retail electric services*”¹⁰⁸ R.C. 4928.143 permits an “electric distribution utility” to comply with R.C. 4928.141 by filing an ESP for the PUCO’s approval.¹⁰⁹

¹⁰⁵ See *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, fn. 4 (1996) (italics added, citation omitted).

¹⁰⁶ *Fed. Power Comm. v. S. California Edison Co.*, 376 U.S. 205, 215-216 (1964).

¹⁰⁷ See R.C. 4905.03.

¹⁰⁸ See R.C. 4928.141(A).

¹⁰⁹ See R.C. 4928.143(A).

For purposes of R.C. Chapter 4928, the General Assembly defined an “electric distribution utility”¹¹⁰ as an “electric utility,”¹¹¹ which in turn is defined as an “electric light company” under R.C. 4905.03(C), discussed above.¹¹² AEP Ohio satisfies each of these definitions, and under each definition, the General Assembly consistently and expressly limited the PUCO’s jurisdiction to the provision of retail electric service. Thus, the PUCO’s jurisdiction clearly is limited to retail electric service.

ii. The PUCO has jurisdiction over retail electric service; the PPA Rider is not for retail electric service.

Under R.C. 4928.01(A)(27) retail electric service is defined as “any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption.” The PPA Rider does not fit within the definition of retail electric service. This is because the PPA Rider does not constitute a service that is involved in supplying or arranging for the supply of electricity to ultimate consumers in this state.

Instead, the PPA Rider is a financial transaction that is separate and distinct from the sale of electricity to consumers in this state. It involves a FERC jurisdictional contract¹¹³ between AEP Ohio and its affiliate AEPGR. Under the PPA, AEP Ohio will contract to purchase all the energy, capacity, and ancillary services of the PPA Units on a cost basis plus return on investment.¹¹⁴ AEP Ohio will then offer the energy, capacity, and ancillary services into the PJM markets – it will not supply the energy from the plants

¹¹⁰ See R.C. 4928.01(A)(6).

¹¹¹ See R.C. 4928.01(A)(11).

¹¹² See R.C. 4928.01(A)(8).

¹¹³ See, e.g., Hearing Transcript at Vol. I, p. 274.

¹¹⁴ See generally Amended Application.

to ultimate consumers in this state. After the sale of the energy, capacity, and ancillary services into the PJM markets, retail customers will be charged/credited for the difference between the PPA contract price and market price obtained through the sale into the PJM market. Retail customers are twice removed from the transaction, which involves 1) a wholesale sale between AEP Ohio and AEPGR, and 2) a wholesale sale by AEP Ohio into the PJM markets. With no electricity service being provided directly (or even indirectly) by AEP Ohio to retail customers, there is no valid claim that the PPA Rider proposal pertains to retail electric service.

iii. Approving the PPA Rider proposal would involve the PUCO in supplementing the PJM wholesale auction clearing price and, thus, exceed its subject matter jurisdiction by functionally setting wholesale prices to consumers.

The PUCO's approval of the PPA Rider would create a program where AEP Ohio participates in the PJM markets by bidding the products purchased under the PPAs into the PJM auctions. This program would accomplish the same objective as in the contracts for differences programs that were found preempted in *Solomon*¹¹⁵ and *Nazarian*¹¹⁶: supplementing the PJM wholesale auction clearing prices received by the PJM market participant with the revenues secured through out-of-market state subsidies. By supplementing the PJM wholesale auction clearing price, the PUCO would be setting wholesale prices, which is beyond its subject matter jurisdiction under state law. Therefore, the PUCO should deny the Amended Application/Modified Amended Application.

¹¹⁵ 753 F.3d at 473-74.

¹¹⁶ 766 F.3d at 248; 252.

b. The PUCO lacks jurisdiction to approve the PPA Rider because it would fundamentally change the competitive environment established by S.B. 3.

As described above,¹¹⁷ the Ohio General Assembly created a *competitive* market for generation. And it specifically contemplated that adjustments to the market structure may have to be made. And it found that the PUCO would have a role to play in that regard, in passing R.C. 4928.06(C). The statute provides for monitoring of the market by the PUCO, reports by the PUCO to the General Assembly, and for recommendations by the PUCO for *legislative* action. It does not provide for wholesale changes to the competitive generation market, such as that which AEP Ohio rather candidly advocates for here, by way of a PUCO Order.

That the General Assembly intended for any adjustments to the competitive generation market be made through legislation was confirmed by the Ohio Supreme Court in *In re Columbus Southern Power Co.* There, the Supreme Court noted that *legislative* action might be required to address perceived deficiencies in the competitive market. And the General Assembly, itself, reaffirmed its intent by passing S.B. 221 – it did not wait for a PUCO Order. Ironically, AEP Ohio Witness Fetter urges the PUCO to do here – adjust the competitive generation market by way of an Order – what, apparently, the Michigan PSC was unwilling to do.¹¹⁸

As recognized by the Ohio Supreme Court, the statutory regime and history of deregulation in Ohio confirm that the Ohio General Assembly intended for it, and it alone, to make adjustments to the competitive environment established by S.B. 3 as and

¹¹⁷ See Background at IIIA, *supra*.

¹¹⁸ See Direct Testimony of Steven M. Fetter (AEP Ohio Ex. 3) filed May 15, 2015 at 9 (“after access to choice was opened up to all customers . . . , the Legislature pulled that policy back . . .”).

when necessary. AEP Ohio concedes that the PPAs are not driven by the competitive market, as it would not enter into the contracts absent the PUCO's authorization of regulatory recovery through the PPA Rider.¹¹⁹ As a creature of statute with limited and defined powers, the PUCO has no jurisdiction to fundamentally change the competitive environment established by the General Assembly by way of an Order.¹²⁰ As OMAEG Witness Hill explained, AEP Ohio's PPA Rider "would fundamentally undermine the intent of the Ohio General Assembly when it restructured Ohio's electricity markets in 1999 with the passage of [S.B. 3]."¹²¹ And as former Michigan PSC Chairman and AEP Ohio Witness Fetter stated: "In my experience, once a market is set up, with its ups and downs, the intent of the legislators and regulators is to let the market operate, . . ."¹²² Thus, when he was on the Michigan PSC, AEP Ohio Witness Fetter carried out the law established by the Michigan legislature.¹²³

Ohioans have been awaiting the end of a 16-year journey to competition in the electric generation market. This road to markets has been long and winding, and very expensive for Ohioans. At a time when Ohioans should be reaping the benefits of markets, AEP Ohio's objective is to reap the benefits of consumer subsidies by resort to old regimes of government command and control. The PUCO should resist this temptation by utilities to try to outthink competitive markets, and deny AEP Ohio's Amended Application/Modified Amended Application.

¹¹⁹ See Hearing Transcript at Vol. III, p. 799:9-19; Vol. VII, p. 2023:15-22.

¹²⁰ See *id.* at Vol. III, p. 895:6-11.

¹²¹ Direct Testimony of Edward W. Hill (OMAEG Ex. 19) filed September 11, 2015 at 6.

¹²² See Hearing Transcript at Vol. III, p. 894:8-17.

¹²³ See *id.* at p. 895:6-11.

B. The PUCO should protect consumers by rejecting the onerous terms of the Joint Stipulation, based on evidence by the Consumers' Counsel and others.

One and only one Signatory Party filed testimony in support of the Joint Stipulation – AEP Ohio. Were the PUCO to apply the three-prong test, such testimony is insufficient for the PUCO to approve the Joint Stipulation.¹²⁴ Testimony by OCC and others justifies rejecting the Joint Stipulation.

1. The Joint Stipulation should be rejected in favor of protecting Ohio consumers because AEP Ohio and the Signatory Parties failed to meet their burden of proof.

AEP Ohio as the applicant bears the burden of proof.¹²⁵ The Signatory Parties joining AEP Ohio in the Joint Stipulation also bear that burden. That burden has not been met.

¹²⁴ OCC does not concede the credibility of any of AEP Ohio's "evidence" discussed in this section. Instead, OCC shows that the Joint Stipulation should be rejected based on analysis similar to what would be applied under Rules 12(B)(6) and 50(A) of the Ohio Rules of Civil Procedure and in light of the governing law squarely placing the burden of proof on AEP Ohio as the applicant. Nonetheless, OCC would be remiss if it did not point out that AEP Ohio Ex. 52, WAA-2 -- AEP Ohio's forecast for the PPA Rider presented during the evidentiary hearing on the Joint Stipulation -- is founded on a 2013 Fundamentals Forecast. *See* Hearing Transcript at Vol. XVIII, p. 4567:18-25. This notwithstanding that, unlike when AEP Ohio ran its model to forecast the PPA Rider in connection with the first phase of this proceeding, the 2015 Fundamentals Forecast *was* complete before AEP Ohio Witness Allen prepared AEP Ohio Ex. 52, WAA-2, and no fundamentals forecasts have been prepared since. *See id.* at Vol. XIX, p. 4665:21-4667:22.

¹²⁵ *See, e.g.,* R.C. 4928.143(C)(1); *In the Matter of the Application of The Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations*, 1985 Ohio PUC Lexis 7, 91 (PUCO Case No. 84-1435-TP-AIR); *In the Matter of the Application of the Ottoville Mutual Telephone Company for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16 Revised Code*, 1973 Ohio PUC Lexis 3, 4 (PUCO Case No. 73-356-Y) ("Although the applicant must shoulder the burden of proof in every application proceeding before the Commission, this burden takes on an added dimension in the context of an emergency rate case.").

a. The Joint Stipulation cannot be adopted unless it, as a package, is in the public interest; but AEP Ohio did not prove that it meets the public interest.

AEP Ohio Witness Allen asserts that the Joint Stipulation will increase a typical customer's rates approximately \$.62 per month per customer for the first year if the Joint Stipulation is adopted.¹²⁶ AEP Ohio's estimates for the PPA Rider purport to show that the PPA Rider is expected to result in a net credit each year.¹²⁷ Thus, it is the provisions in the Joint Stipulation *other than* the PPA Rider that would cost consumers, according to AEP Ohio's estimates, \$.62 per month per typical residential customer using 1,000 kwh in the first year under the Joint Stipulation (for AEP Ohio's residential customers as a whole, almost \$10,000,000 annualized).¹²⁸ Therefore, based on AEP Ohio's own estimates, residential consumers are *worse off* under the Joint Stipulation than they would be were only the PPA Rider approved. For this reason alone, the Joint Stipulation cannot pass the third-prong of the PUCO's test because it is not in the public interest.

¹²⁶ See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at p. 14:18-20; *see also* Hearing Transcript at Vol. XVIII, p. 4626:23-4627:6; 4627:16-4628:4. Significantly, AEP Ohio has not analyzed the rate impact, or the net customer impact, of the Joint Stipulation beyond year one. *See* Hearing Transcript at Vol. XVIII, pp. 4623:9-4625:7. Thus, the only record evidence of the Joint Stipulation's impact is that it will cost \$.62 per month per typical residential customer using 1,000 kwh in the first year.

¹²⁷ See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2; *see also* KDP-2 (OCC Ex. 1, admitted at Hearing Transcript Vol. II, p. 365) (PPA Rider proposed in first phase of this proceeding shows a net credit each year from 2016-2024).

¹²⁸ \$.62 x 12 x 1.3 million customers; *see also* Hearing Transcript at Vol. XVIII, p. 4627:16-4628:4.

- b. Under the first and third prongs of the settlement test, the Joint Stipulation cannot be adopted unless it is the product of serious bargaining among knowledgeable, diverse parties and as a package is in the public interest; but the many unknowns mean that AEP Ohio did not meet its burden of proof.**

There is so much unknown about the Joint Stipulation that it could not conceivably have been the product of serious bargaining among knowledgeable parties or, as a package, be in the public interest.¹²⁹ The unknowns, which leave consumer interests unprotected, are material and extensive:

- With the exception of a handful of the Joint Stipulation's provisions, its rate impacts on consumers are unknown.¹³⁰
- The cost impact on consumers of reducing AEP Ohio's reliance on coal/lignite generation from 74 percent in 2005 to 48 percent in 2026 is unknown.¹³¹
- How AEP Ohio plans to reduce its reliance on coal/lignite generation from 74 percent in 2005 to 48 percent in 2026 is unknown.¹³²
- The cost impact on consumers of increasing natural gas generation from 17 percent in 2005 to 25 percent by 2026 is unknown.¹³³
- How AEP Ohio plans to increase natural gas generation from 17 percent in 2005 to 25 percent by 2026 is unknown.¹³⁴

¹²⁹ The PUCO should also require a level of certitude from a stipulation as a matter of regulatory principle and policy. The Joint Stipulation is uncertain.

¹³⁰ See Interrogatories, Requests for Admission, and Request for Production of Documents (OCC Ex. 30, admitted at Hearing Transcript Vol. XXI, p. 5207), Int. No. 8.

¹³¹ See *id.* at Int. No. 16; see also Joint Stipulation and Recommendation (Joint Ex. 1, admitted at Hearing Transcript Vol. XX, p. 5011) at pp. 28-29, para. E (1).

¹³² See OCC Ex. 30, Int. No. 17; see also Joint Ex. 1 at pp. 28-29, para. E (1).

¹³³ See OCC Ex. 30, Int. No. 18; see also Joint Ex. 1 at p. 29, para. E (2).

¹³⁴ See OCC Ex. 30, Int. No. 19; see also Joint Ex. 1 at p. 29, para. E (2).

- The cost impact on consumers of increasing hydro/wind/solar/pumped storage from 3 percent in 2005 to 15 percent in 2026 is unknown.¹³⁵
- How AEP Ohio plans to increase hydro/wind/solar/pumped storage from 3 percent in 2005 to 15 percent in 2026 is unknown.¹³⁶
- The cost impact on consumers of increasing energy efficiency/demand response from less than 1 percent in 2005 to 6 percent in 2026 is unknown.¹³⁷
- How AEP Ohio plans to increase energy efficiency/demand response from less than 1 percent in 2005 to 6 percent in 2026 is unknown.¹³⁸
- The “battery resources” that AEP Ohio asserts that it will include in future filings, and thus the costs thereof, are unknown.¹³⁹
- The costs associated with providing retail electric service that may not be reflected in SSO bypassable rates is not known.¹⁴⁰
- The annual cost impact on consumers of the proposed two year Pilot Supplier Consolidated Billing Program have not been provided.¹⁴¹
- The cost of converting Conesville Units 5 and 6 to natural gas co-firing by December 31, 2017, and its impact on consumers, is unknown.¹⁴²
- What regulatory approvals are necessary to co-fire Conesville Units 5 and 6 are unknown.¹⁴³

¹³⁵ See OCC Ex. 30, Int. No. 20; *see also* Joint Ex. 1 at p. 29, para. E (3).

¹³⁶ See OCC Ex. 30, Int. No. 21; *see also* Joint Ex. 1 at p. 29, para. E (3).

¹³⁷ See OCC Ex. 30, Int. No. 22; *see also* Joint Ex. 1 at p. 29, para. E (4).

¹³⁸ See OCC Ex. 30, Int. No. 23; *see also* Joint Ex. 1 at p. 29, para. E (4).

¹³⁹ See OCC Ex. 30, Int. No. 25; *see also* Joint Ex. 1 at p. 30, para. H.

¹⁴⁰ See OCC Ex. 30, Int. No. 43; *see also* Joint Ex. 1 at pp. 12-13, para. 12.

¹⁴¹ See OCC Ex. 30, Int. No. 47; *see also* Joint Ex. 1 at pp. 16-19, para. 7.

¹⁴² See OCC Ex. 30, Int. No. 48; *see also* Joint Ex. 1 at pp. 19-20, para. D (9).

¹⁴³ *See id.*

- The costs of retiring, refueling, or repowering Conesville Units 5 and 6, and Cardinal Unit 1, and the costs' impact on consumers, are unknown.¹⁴⁴
- Barriers there may be to retiring, refueling, or repowering Conesville Units 5 and 6, and Cardinal Unit 1, are unknown.¹⁴⁵
- The costs for removing the barriers there may be to retiring, refueling, or repowering Conesville Units 5 and 6, and Cardinal Unit 1, and the costs' impact on consumers, are unknown.¹⁴⁶
- The cost of retiring, refueling, or repowering Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC Units, and its impact on consumers, is unknown.¹⁴⁷
- Barriers there may be to retiring, refueling, or repowering Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC Units are unknown.¹⁴⁸
- The costs for removing the barriers there may be to retiring, refueling, or repowering Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC Units, and the costs' impact on consumers, are unknown.¹⁴⁹
- The cost of the 2017-2019 EE/PDR plan to achieve an energy savings goal of 1.33 percent annually and a demand reduction goal of .75 percent annually, and the cost's impact on consumers, are not known.¹⁵⁰
- Whether AEP Ohio will seek to increase the charge for the riders or tariffs in its filing to extend the current ESP, and associated costs to consumers, is unknown.¹⁵¹

¹⁴⁴ See OCC Ex. 30, Int. No. 51; *see also* Joint Ex. 1 at p. 20, paras. D (9) and (10).

¹⁴⁵ See OCC Ex. 30, Int. No. 52; *see also* Joint Ex. 1 at pp. 21-23, para. D (11).

¹⁴⁶ See OCC Ex. 30, Int. No. 53; *see also* Joint Ex. 1 at pp. 21-23, para. D (11).

¹⁴⁷ See OCC Ex. 30, Int. No. 54; *see also* Joint Ex. 1 at pp. 23-26, para. D (12).

¹⁴⁸ See OCC Ex. 30, Int. No. 55; *see also* Joint Ex. 1 at pp. 23-26, para. D (12).

¹⁴⁹ See OCC Ex. 30, Int. No. 56; *see also* Joint Ex. 1 at pp. 23-26, para. D (12).

¹⁵⁰ See OCC Ex. 30, Int. No. 57; *see also* Joint Ex. 1 at p. 28, para. D (15).

¹⁵¹ See OCC Ex. 30, RFA No. 8; *see also* Joint Ex. 1 at pp. 10-13.

- Whether AEP Ohio will seek to extend the PPA Rider beyond May 31, 2024 is unknown.¹⁵²
- Whether AEP Ohio will seek cost recovery through a PPA Rider for retiring, refueling, or repowering Conesville Units 5 and 6, and Cardinal Unit 1, and such cost recovery's impact on consumers, is unknown.¹⁵³
- Whether AEP Ohio will seek cost recovery through a PPA Rider for removing the barriers there may be to retiring, refueling, or repowering Conesville Units 5 and 5, and Cardinal Unit 1, and such cost recovery's impact on consumers, is unknown.¹⁵⁴
- Whether AEP Ohio will seek cost recovery through a PPA Rider for retiring, refueling, or repowering Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC Units, and such cost recovery's impact on consumers, is unknown.¹⁵⁵
- Whether AEP Ohio will seek cost recovery through a PPA Rider for removing the barriers there may be to retiring, refueling, or repowering Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC Units, and such cost recovery's impact on consumers, is unknown.¹⁵⁶
- Whether AEP Ohio will seek cost recovery through the PPA Rider for the methods by which it intends to promote fuel diversification and carbon emission reductions indicated in the Carbon Reduction Plan, and such cost recovery's impact on consumers, is unknown.¹⁵⁷
- Whether AEP Ohio will seek cost recovery through the PPA Rider for the programs to promote fuel diversity and carbon emission reductions to address potential future

¹⁵² See OCC Ex. 30, RFA No. 10.

¹⁵³ See *id.* at RFA No. 12.

¹⁵⁴ See *id.* at RFA No. 13.

¹⁵⁵ See *id.* at RFA No. 14.

¹⁵⁶ See *id.* at RFA No. 15.

¹⁵⁷ See *id.* at RFA No. 16; see also Joint Ex. 1 at p. 28-29, para. E.

environmental regulations, and such cost recovery's impact on consumers, is unknown.¹⁵⁸

- The charge added to the non-shopping rate above the auction price in connection with the Competition Incentive Rider ("CIR"), and the charge's impact on consumers, is unknown.¹⁵⁹
- The parameters of the Pilot Supplier Consolidated Billing Program ("SCB") are unknown.¹⁶⁰
- The direction that AEP Ohio will give AEPGR to offer the PPA Units' output into PJM, and whether any document containing such direction will create any enforceable rights in AEP Ohio, is unknown.¹⁶¹
- The purported offsetting benefits for increasing the IRP credit are unknown.¹⁶²
- The criteria by which environmental and renewable energy projects will be selected for advancement are unknown.¹⁶³
- The cost/benefit of deploying 160 circuits of Volt-Var Optimization is unknown.¹⁶⁴
- The costs/benefits of the PPA Rider are unknown.¹⁶⁵

¹⁵⁸ See OCC Ex. 30, RFA No. 17; *see also* Joint Ex. 1 at p. 29, para. F.

¹⁵⁹ See Joint Ex. 1 at p. 12, para. 12a.

¹⁶⁰ See *id.* at p. 16, para. 7.

¹⁶¹ See Hearing Transcript at Vol. XVIII, p. 4659:15-4661:1; *see also id.* at 4485:16-21 (AEPGR will actually offer the PPA Units into PJM).

¹⁶² See *id.* at Vol. XIX, p. 4759:22-4760:8; *see also* Joint Ex. 1 at p. 10-11, para. 7.

¹⁶³ See Hearing Transcript at Vol. XIX, p. 4790:10-21; *see also* Joint Ex. 1 at p. 30, para. 11c.

¹⁶⁴ See *id.* at 4807:11-18; *see also* Joint Ex. 1 at p. 26, para. 13.

¹⁶⁵ See, e.g., KDP-2 (OCC Ex. 1, admitted at Hearing Transcript Vol. II, p. 365), Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015, Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015, Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015; Hearing Transcript at Vol. I, p. 272:15-19; *id.* at 172:15-19.

- c. **Under the first and third prongs of the settlement test, the Joint Stipulation cannot be adopted unless it is the product of serious bargaining among knowledgeable, diverse parties and, as a package, be the in public interest; but AEP Ohio failed its burden to prove it.**

The Joint Stipulation is so vague and ambiguous that it could not conceivably have been the product of serious bargaining among knowledgeable parties or, as a package, be in the public interest.¹⁶⁶ Adopting it will plunge the PUCO and consumers of all types into an endless wave of litigation.

Further, certain parties have greatly diminished the significance, if any, of their signatures on the Joint Stipulation, by using footnotes to opt out of material provisions. The Joint Stipulation provisions and associated footnotes that excuse stipulators from the provisions include:

- This Stipulation is supported by adequate data and information; as a package, the Stipulation benefits customers and the public interest; provides direct benefits to residential and low income customers; and represents a just and reasonable resolution of all issues in this proceeding; violates no regulatory principle or practice; and complies with and promotes the policies and requirements of Title 49 of the Ohio Revised Code.
 - *Footnote: The Sierra Club, Direct Energy, and Interstate Gas Supply, Inc. (IGS) agree not to oppose this provision.*¹⁶⁷
- The Signatory Parties agree that, for purposes of settlement, the Commission should approve the Amended Application of Ohio Power Company as filed May 15, 2015, subject to the modifications described in this Stipulation.

¹⁶⁶ The PUCO should also require a level of clarity in a stipulation as a matter of regulatory principle and policy. The Joint Stipulation provides no clarity.

¹⁶⁷ See Joint Exhibit 1 at p. 2 and fn. 1.

- *Footnote: The sierra Club agrees not to oppose this provision.*¹⁶⁸
- The Signatory Parties agree that it would [sic] prudent for AEP Ohio to sign a Revised Affiliate PPA, which has been updated as summarized in Attachment A.
 - *Footnote: Sierra Club, Direct Energy, and IGS are not participating in this provision but agree not to oppose it.*¹⁶⁹
- The Signatory Parties further agree that the net credits or costs of a Revised Affiliate PPA should be reflected in AEP Ohio's retail rates by including the Revised Affiliate PPA in the PPA Rider.
 - *Footnote: Sierra Club, Direct Energy, and IGS are not participating in this provision but agree not to oppose it.*¹⁷⁰
- AEP Ohio will file and advocate for a Competition Incentive Rider as an addition to the SSO non-shopping rate above the auction price.
 - *Footnote: Ohio Partners for Affordable Energy is not participating in this provision but agrees not to oppose it in this docket.*¹⁷¹
- Provisions regarding retiring, refueling, or repowering Cardinal Unit 2, Conesville Units 5 and 6, and Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4, and the OVEC Units (Sections III.D.10-12 of the Stipulation).
 - *Footnote: Buckeye Power, Inc. is not participating in Sections III.D.10-12 of the Stipulation.*¹⁷²
- The Signatory Parties agree that the Stipulation satisfies the three-part test traditionally used by the Commission to consider stipulations.
 - *Footnote: The Sierra Club, Direct Energy, and IGS agree not to oppose this provision.*¹⁷³

¹⁶⁸ See *id.* at p. 4 and fn. 3.

¹⁶⁹ See *id.* at fn. 4.

¹⁷⁰ See *id.* at fn. 5.

¹⁷¹ See *id.* at p. 12 and fn. 11.

¹⁷² See *id.* at p. 20 and fn. 12.

¹⁷³ See *id.* at p. 33 and fn. 14.

- The Signatory Parties agree that the Stipulation preserves and advances the positive results of the MRO v. ESP test.
 - *Footnote: Sierra Club is not participating in this provision but agrees not to oppose it.*¹⁷⁴
- The Signatory Parties will support the Stipulation if the Stipulation is contested.
 - *Footnote: Sierra Club, Direct Energy, and IGS are not obligated to support the Stipulation.*¹⁷⁵
- Each Signatory Party agrees to and will support the reasonableness of this Stipulation before the Commission, and to cause its counsel to do the same, and in any appeal it participates in from the Commission’s adoption and/or enforcement of this Stipulation.
 - *Footnote: Sierra Club and its counsel are not obligated to support the reasonableness of this Stipulation before the Commission. Sierra Club and its counsel agree not to oppose the Stipulation.*¹⁷⁶

These footnoted qualifications and exceptions undermine AEP Ohio’s representation of the Joint Stipulation as a “settlement” under the three-prong test. The settlement is not really as has been advertised, given the materiality of the qualifications and exceptions attached to certain signatures (most notably those of Sierra Club, OP&A, Direct Energy, and IGS).

Also, settlement terms that are not endorsed by Signatory Parties should be excluded from the “package” to which the PUCO applies its public interest analysis. (And the hodgepodge of unrelated terms also should disqualify the settlement from being treated as a package under the three-prong test.)

¹⁷⁴ See *id.* at p. 34 and fn. 15.

¹⁷⁵ See *id.* at p. 36 and fn. 16.

¹⁷⁶ See *id.* at p. 37 and fn. 17.

The footnotes stating mere non-opposition instead of support for the settlement also demonstrate the lack of diversity of interests under the first prong. Since certain Signatory Parties are not obligated to support the Joint Stipulation, they do not support it as a package.¹⁷⁷ The three-prong test is failed.

The issues raised by the footnotes are not theoretical. Important issues for the PUCO's consideration are whether the Joint Stipulation is the product of serious bargaining between knowledgeable parties representing diverse interests and whether it, as a package, is in the public interest. Sierra Club's counsel has asserted that Sierra Club's position on the Joint Stipulation is "reflected in the stipulation itself[.]" it is "apparent on the face of the stipulation what Sierra Club's position is."¹⁷⁸ Later, Sierra Club's counsel said that there is no reason for a Sierra Club employee to testify at the evidentiary hearing about what Sierra Club's position on the Joint Stipulation is, as Sierra Club's lawyers will be informing the PUCO of what Sierra Club's position is: "Sierra Club does not oppose the stipulation."¹⁷⁹ This is in stark contrast to the characterization of AEP Ohio Witness Allen who, taking an excess of liberty, said: "Sierra Club supports the stipulation as a package, that's correct."¹⁸⁰ In fact, Sierra Club has 12 different ways, represented by 12 different opt-out footnotes, of showing that what Mr. Allen said is mistaken.

The implications for these drastically different characterizations of Sierra Club's position on the Joint Stipulation are legion. For example: 1) Based on Sierra Club's

¹⁷⁷ Parties in this proceeding may interpret the footnotes differently. Therefore, at best, the footnotes introduce so much vagueness and ambiguity into material provisions of the Joint Stipulation that the PUCO cannot meaningfully evaluate it under the three-prong test.

¹⁷⁸ See Hearing Transcript at Vol. XVIII, p. 4441:17-23.

¹⁷⁹ See *id.* at p. 4454:24-4455:6.

¹⁸⁰ See *id.* at Vol. XIX, p. 4697:24-25.

counsel's description of Sierra Club's position on the Joint Stipulation, the PUCO should not include Sierra Club in its diversity analysis. 2) Contrary to Sierra Club's assertion, its position on the Joint Stipulation is *not* apparent on the face of the Joint Stipulation itself. The discrepancy reinforces the Joint Stipulation's vagueness and ambiguity. 3) The Sierra Club (and other parties') footnoted opt outs indicate a lack of serious bargaining among parties. These parties could not reach full accord through bargaining, serious or otherwise; they solved their impasses merely by using opt out footnotes.

Further, the Joint Stipulation's vagueness and ambiguity is confirmed by the undefined, impractical standards by which AEP Ohio's actions under the Joint Stipulation will be judged. It must manage the PPA Units "efficiently, cost-effectively, and with maximum market profitability[.]"¹⁸¹ Its actions when selling the output from the PPA Units into the PJM markets must be "not unreasonable."¹⁸² It must advocate before PJM "in good faith[.]"¹⁸³ AEP Ohio must "work with" the Ohio Hospital Association ("OHA") on an annual energy efficiency program.¹⁸⁴ It will maintain a "nexus of operation" in Ohio and "intends" to maintain its corporate headquarters in Columbus.¹⁸⁵

¹⁸¹ See Joint Ex. 1 at p. 5, para. 3.

¹⁸² See *id.* at p. 7, para. 5a.

¹⁸³ See *id.* at p. 9, para. B1.

¹⁸⁴ See *id.* at p. 13, para. D2; see also *id.* at p. 14, para. D2b ("work together" to develop and automate Energy Star benchmarking); *id.* at para. D2d ("prioritize" circuits with OHA members for Volt-Var Optimization deployments).

¹⁸⁵ See *id.* at p. 16, para. 6.

On some occasions, AEP Ohio must use “best efforts” under the Joint Stipulation.¹⁸⁶ On others, it must take “reasonable steps.”¹⁸⁷ On still others, it must only “promote” or “explore” programs,¹⁸⁸ or give “preference” to others.¹⁸⁹ The Joint Stipulation is *riddled* with vagueness and ambiguity. Such standards invite endless litigation – what is one’s “best efforts” or “not unreasonable” actions are not necessarily another’s. The standards by which AEP Ohio’s actions under the Joint Stipulation will be judged are so vague and ambiguous that they cannot be in the public interest or the product of serious bargaining among knowledgeable parties.

d. Under the second prong of the settlement test, the Joint Stipulation cannot be adopted unless there is no violation of regulatory principles; the settlement fails the test because there are terms that would violate regulatory principles.

The Joint Stipulation violates important regulatory principles and is not in the public interest. Any conceivable public interest served by the Joint Stipulation, as a

¹⁸⁶ See, e.g., *id.* at p. 19, para. 9 (“best efforts” to seek cost recovery for co-firing Conesville Units 5 and 6); *id.* at p. 25-26, para. i (“best efforts” to develop plan with joint owners to retire, repower, or refuel jointly owned PPA Units and to consolidate ownership); *id.* at p. 26, para. 13 (“best efforts” to pursue Volt-Var matters); *id.* at p. 30, para. IIb (“best efforts” to obtain cost recovery for environmental and renewable energy projects, with cost recovery being a condition precedent to developing the projects); *id.* at p. 32, para. 2 (“best efforts” to complete solar energy projects by 2021).

¹⁸⁷ See, e.g., *id.* at p. 22, para. c (AEP Ohio must take “reasonable steps” to implement any necessary transmission upgrades or non-transmission alternatives). What is “reasonable” is not defined in the Joint Stipulation. See Hearing Transcript at Vol. XIX, p. 4792:13-15.

¹⁸⁸ See Joint Ex. 1 at p. 29, paras. F (fuel diversification) and G (“explore avenues to empower consumers through grid modernization initiatives[.]”).

¹⁸⁹ See *id.* at p. 32, para. 2 (“preference” must be given to Appalachian Ohio in connection with solar projects).

package, cannot be founded on AEP Ohio “commitments” to make future filings.¹⁹⁰

Such filings may or may not be approved by the PUCO, and all commitments are contingent.¹⁹¹ As a matter of regulatory policy and principle the PUCO should require more than contingent commitments to underlie a stipulation. And contingent commitments are not in the public interest. Such commitments may never come to fruition. If not, any associated purported benefit will never be realized.

e. Under the third prong of the settlement test, the Joint Stipulation cannot be adopted unless it, as a package, benefits consumers and is in the public interest; the settlement fails the test because AEP Ohio did not prove it.

The Joint Stipulation’s purported benefits are overstated. The PPA Rider is not necessary for customers to realize any hedging benefit from PPAs. AEP Ohio has been a member of PJM since 2005 or 2006.¹⁹² Since then, PPAs entered into by AEP Ohio have the effect of reducing volatility – hedging.¹⁹³ At the end of the day, they are financial transactions.¹⁹⁴ Thus, according to AEP Ohio, PPAs to date have been essentially

¹⁹⁰ See, e.g., *id.* at pp. 10-13 (ESP III extension); *id.* at p. 19, para. 19 (future filing regarding co-firing Conesville Units 5 and 6); *id.* at p. 21, para. 11 (future filing to open a docket regarding retiring, refueling, or repowering Conesville Units 5 and 6); *id.* at 23, para. 12 (future filing to open a docket regarding retiring, refueling, or repowering the co-owned PPA Units); *id.* at 27, para. c (future filing to seek cost recovery for Volt-Var technology, a condition precedent to deploying the technology); *id.* at 28, para. 15 (future filing regarding 2017-2019 EE/PDR Plan); *id.* at 31, para. e (future filing regarding cost recovery of environmental and renewable energy projects, a condition precedent to proceeding with the projects).

¹⁹¹ See, e.g., *id.* at p. 15, para. f (OHA’s rights under the clause “contingent” on continued approval of AEP Ohio’s EE/PDR plan, approved funding, and continued recovery of net lost distribution revenues); *id.* at 15, para. d (OPAE’s partnership and rights under the clause “contingent” on continued approval of AEP Ohio’s EE/PDR plan, approved funding, and continued recovery of net lost distribution revenues); *id.* at 19, para. 9 (co-firing Conesville 5 and 6 “subject to approval for cost recovery”); *id.* at 27, para. c (Volt-Var deployment subject to cost recovery); *id.* at 28, para. 15 (commitments regarding 2017-2019 EE/PDR Plan “contingent” on funding and any other mechanism to ensure continued recovery of net lost distribution revenues); *id.* at 30, para. 11e and 2 (commitment regarding environmental and renewable energy projects “premised upon” and “subject to” cost recovery).

¹⁹² See Hearing Transcript at Vol. XVIII, p. 4650:10-14.

¹⁹³ See *id.* at p. 4650:15-4651:19.

¹⁹⁴ See *id.* at 4652:18-4653:6.

financial transactions that reduce volatility, stabilize prices, and thus hedge. The PPA Rider is simply unnecessary to achieving such benefits.

If Conesville Units 5 and 6 are co-fired, they will run at only a seventy five percent capacity factor.¹⁹⁵ While consumers are paying Conesville Units 5 and 6's costs, the Units' revenue will be much less since they will run less.

AEP Ohio proposes that the PPA Rider start with a \$4 million credit, but the PPA Rider's net impact on consumers could go up or down -- consumers bearing all the risk, of course.¹⁹⁶ Although the net effect of capacity performance auctions expected by AEP Ohio, including potential penalties, are purportedly included in AEP Ohio's PPA Rider forecast, the PPA Units may actually incur full capacity performance penalties -- consumers bearing all the risk, of course.¹⁹⁷

AEP Ohio commits to providing credits during the last four years of the PPA Rider. But the credits will serve only to limit, not eliminate, charges to consumers -- and there are no committed credits provided for in the PPA Rider's first four years.¹⁹⁸ AEP Ohio's PPA Rider forecast showing customer credits does not include the cost of converting Conesville Units 5 and 6 or developing the wind and solar projects,¹⁹⁹ and the carbon reduction plan it promises to file will not contain any additional binding commitments to reduce carbon.²⁰⁰ Although the Joint Stipulation purportedly permits PUCO review of AEP Ohio's offering strategies into PJM, the review would not be

¹⁹⁵ See *id.* at 4648:7-18.

¹⁹⁶ See *id.* at 4682:5-9.

¹⁹⁷ See *id.* at Vol. XIX, p. 4685:24-4686:17. This is significant since capacity performance penalties can exceed capacity revenues. See *id.* at XVIII, p. 4571:12-17.

¹⁹⁸ See Joint Ex. 1 at p. 5, para. 3; Hearing Transcript at Vol. XIX, p. 4728:22-4729:4.

¹⁹⁹ See Hearing Transcript at Vol. XIX, p. 4715:7-24.

²⁰⁰ See *id.* at 4716:7-14.

conducted until *four years after the fact*.²⁰¹ Also, the Joint Stipulation contains a severability provision that would come into play were the PPA Rider found unlawful. But consumers would not necessarily get a refund of dollars for the unlawful charge.²⁰²

2. Testimony on behalf of OCC justifies rejecting the Joint Stipulation.

Testimony on behalf of OCC demonstrates that the Joint Stipulation is too costly for consumers, its rate design is flawed, and it otherwise fails the three-prong settlement test. Thus it confirms, and independently justifies, rejecting the Joint Stipulation.

a. The Joint Stipulation is a bad deal for consumers, and should be rejected under all three prongs of the PUCO's test, based on OCC's and others' testimony.

The Signatory Parties' own case confirms that the Joint Stipulation does not pass the three-prong test. Based on AEP Ohio's own forecasts, consumers are worse off under it than they would be if only the PPA Rider were approved.

The Joint Stipulation is vague and ambiguous. It contains undefined, impractical standards by which AEP Ohio's actions under the Joint Stipulation will be judged. It is an invitation to further litigation. Serious bargaining, had it been present as required under the first prong of the settlement standard, should have produced a settlement with much more defined resolution of issues. This settlement is more of an agreement in principle in significant respects. The settlement should be rejected under the first prong of the settlement standard.

The settlement, as a package, is not in the public interest given the hodgepodge of unrelated handouts that are assembled in it. As a matter of regulatory policy, more

²⁰¹ See Hearing Transcript at Vol. XVIII, p. 4500:5-19.

²⁰² See *id.* at Vol. XIX, p. 4740:7-4743:19.

certainty and clarity should be required of stipulations than that provided by the Joint Stipulation. Any conceivable public interest served by the Joint Stipulation, as a package, can be founded on little more than AEP Ohio “commitments” to make future filings, all of which are contingent.²⁰³

OCC's case confirms, and independently justifies, rejecting the Joint Stipulation. It does not pass the three-prong test. It is a compilation of financial benefits and inducements for Signatory Parties to sign. And most of the inducements to sign will be paid with other people's money (Ohioans' money), not by AEP Ohio.

The rate design is flawed and will harm consumers. The result of all this is unreasonable rates, but R.C. 4928.02(A) requires reasonably priced service. Further, the “Catch-22” for AEP Ohio is that approving the Joint Stipulation would require rejecting its Modified Amended Application because the Joint Stipulation would cause ESP III to fail the MRO v. ESP test.

The Joint Stipulation is a bad deal for consumers, and should not be approved.²⁰⁴

²⁰³ The Joint Stipulation's problems should not necessarily surprise. AEP Ohio asserts that equal bargaining power is not even necessary to serious bargaining. *See* Hearing Transcript at Vol. XIX, p. 4683:20-24.

²⁰⁴ As noted earlier, the PUCO set out in ESP III factors it would consider, but not be bound by, when determining if the PPA Rider is in the public interest. Accordingly, evidence from the first phase of this proceeding, discussed below, is equally applicable to the PUCO's public interest analysis of the Joint Stipulation under the three-prong test. That discussion also confirms that the Joint Stipulation should be rejected. It is incorporated here by reference.

- b. Under the first and third prongs of the settlement test, the Joint Stipulation cannot be adopted unless it is the product of serious bargaining among knowledgeable, diverse parties and as a package is in the public interest; it fails the test.**

OCC Witness Dr. Noah Dormady concludes that the Joint Stipulation is not the product of serious bargaining among capable, knowledgeable parties; it violates regulatory principles and practices; and it does not benefit consumers or the public interest.²⁰⁵ “At a time when households are struggling to keep up with the ever-increasing cost of living, the astronomical costs of college tuition, the increasing cost of housing, and flat-to-declining real wages,” OCC Witness Dormady explained, “saddling AEP Ohio’s customers and businesses with a litany of additional riders, surcharges and taxes is most certainly not in the public interest.”²⁰⁶

- i. The settlement’s proposed conversion of coal-fired generation to natural gas lacks important details pertaining to costs to consumers.**

One of the alleged public benefits of the Joint Stipulation is converting coal-fired Conesville Units 5 and 6 to gas co-firing by the end of 2017. But there is no evidence in the record showing any analysis of the costs consumers will pay for the conversion of these units.²⁰⁷ The General Assembly determined that Ohioans will pay market prices for electric generation. AEP Ohio cannot determine by settlement that deregulated power plants will be converted to a different fuel source using other people’s (consumers) money. Also, there is no guarantee that the PUCO will approve converting these units.

²⁰⁵ Direct Testimony of Dr. Noah Dormady (OCC Ex. 36) filed December 28, 2015 at 2.

²⁰⁶ *Id.* at 22.

²⁰⁷ *Id.* at 6.

Earlier in this proceeding, AEP Ohio witnesses argued that the interruptible service contracts of gas supply were not consistent with the public interest. But now, with the Joint Stipulation, over 62 percent of the generation provided by these converted units will be provided by natural gas.²⁰⁸ Were AEP Ohio's prior testimony believed, the interruptible nature of these converted plants could be inconsistent with the public interest.

AEP Ohio Witness Allen discussed in his May 15, 2015 testimony that shutting down these coal plants would not be good for Ohio because of the economic value of mining employment. But with the Joint Stipulation, there are no AEP Ohio analyses showing how many Ohio coal workers will lose their jobs if Conesville Units 5 and 6 are converted to gas co-firing units.²⁰⁹

ii. Marketers IGS and Direct Energy have negotiated an artificial increase to what consumers pay for AEP Ohio's standard offer; that is bad.

The hodgepodge nature of the Joint Stipulation is reflected by the so-called Competition Incentive Rider. It's really an *anti-competition* incentive rider.

Here is a shameful settlement term, by certain marketers seizing a moment of opportunity, that would increase what AEP Ohio consumers pay for electricity (the standard offer). In any other setting this price increase for consumers would alone be the subject of considerable controversy. But it shows up unannounced at the end of this case, without any prior notice to the public, as just another term for AEP Ohio to obtain a

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 7.

signature on its settlement. That's bad for consumers. And that is not transparent to the public. And that is not fair process.

Worse, the Signatory Parties will choose what the price increase will be for consumers. Those that shop will not pay the Competition Incentive Rider and those that do not shop will pay the yet-to-be-determined price increase. Here again, AEP Ohio's vision is to layer regulatory charges for consumers to pay above market prices. That Ohio is a deregulated state where Ohioans' electric bills are to be determined by market prices is of no moment.

OCC Witness Dormady explained that adding this charge to AEP Ohio customers' bills – a charge above the auction market price – adds to the complexity of rate-setting.²¹⁰ This conflicts with important regulatory principles. OCC Witness Dormady also explained that the Competition Incentive Rider is inconsistent with the regulatory principle identified by AEP Ohio Witness Allen that “rates should be conducive to rate stability.” Fluctuating Competition Incentive Rider rates will create inefficiently high rates because customers will switch marketers, thereby adding more costs and fees. This is counter to the public interest.²¹¹ And further, no party has done any assessment of the impact that the Competition Incentive Rider charge will have on rate stability.²¹²

Though the Competition Incentive Rider is collected from all non-shopping SSO customers, the entire amount of the Competition Incentive Rider is refunded to all customers. To make the non-shopping customers bear a disproportionate burden of the

²¹⁰ *Id.* at 9.

²¹¹ *Id.* at 10.

²¹² *Id.*

Competition Incentive Rider is unduly discriminatory.²¹³ As a matter of sound regulatory policy, rates should be economically efficient. Adding the Competition Incentive Rider on standard offer consumers' bills eliminates economic efficiency.

When there is the additional cost added to the standard offer rate, it greatly diminishes the incentives for marketers to offer a competitive price to attract standard offer customers.²¹⁴ In fact, as explained by OCC Witness Dormady, marketers will have an incentive to raise their rates by some amount up to the Competition Incentive Rider rate.²¹⁵ There is no economic efficiency when marketer rates are artificially inflated.

The Competition Incentive Rider is essentially an energy tax that will increase energy costs to businesses and households and likely will have an adverse effect on the Ohio economy.²¹⁶ Additionally, the Competition Incentive Rider rate would be set by Signatory Parties that include private firms, wholesale market participants, and—absurdly – the very marketers that have to compete against the standard offer. To allow private entities to set this rate violates regulatory policies that call for the generation price to be established by the competitive market. And it is an unlawful delegation of state authority. And it violates R.C. 4928.02(A) because it results in discriminatory rates against AEP Ohio standard offer customers and it does not produce reasonably prices service.

²¹³ *Id.* at 11.

²¹⁴ *Id.*

²¹⁵ *Id.* at 12.

²¹⁶ *Id.* at 13.

iii. Cash or cash equivalents were provided to certain Signatory Parties to induce their signature on the Joint Stipulation – with other people (consumers) paying for much of it; the settlement thus fails the third prong of the test.

The Joint Stipulation purposefully provides incentives to a few parties while the majority of customers pay for these incentives through the various additional riders.²¹⁷ One of the costs passed on to all customers is payment for the discount received by automakers. The Joint Stipulation provides a \$10/MWh discount to automakers in the AEP Ohio service areas, capped at \$500,000 per year.²¹⁸ Another fee paid for by customers is the \$200,000 paid to OPAE for managing a community assistance program.

Yet another signing bonus is the \$400,000 annual payment to OHA and the additional amount of up to \$600,000 in EE/PDR funding per year from consumers to be distributed according to AEP Ohio and OHA's agreement.²¹⁹ An extra \$8 million will be paid to Industrial Energy Users-Ohio ("IEU") for not opposing the Joint Stipulation and dismissing several other cases.²²⁰

These payments to a few parties only benefit a small group, while the costs are spread across all customers – residential, commercial, and industrial.²²¹ The incentives that benefit only Signatory Parties violates the public interest. As OCC Witness

²¹⁷ *Id.* at 14.

²¹⁸ *Id.* at 13.

²¹⁹ *Id.* at 14.

²²⁰ *Id.*

²²¹ *Id.* at 15.

Dormady testified, this is “precisely the purpose of public service/utilities commissions to protect customers against these sorts of abuses.”²²²

iv. The settlement term for 900 mw of wind and solar renewable generation resources will undoubtedly come at a hefty price for consumers; that is unfortunate.

Perhaps topping the list of the unlimited possibilities of using other people’s money to settle a case, the Joint Stipulation calls for developing at least 900 MW of wind and solar renewable generation capacity – at customers’ expense. But the General Assembly determined long ago that the public will benefit from market pricing for their electric generation service. The only information known about building these plants is that AEP Ohio will file future applications with the PUCO to pass the costs on to customers through the PPA Rider.²²³

The public benefit claimed by constructing these renewable units is that they allegedly will create permanent manufacturing jobs in Appalachian Ohio.²²⁴ But OCC Witness Dormady points out that once solar installations are put in place, only operational and maintenance staff will be needed – not permanent manufacturing jobs.²²⁵ Further, there is no guarantee that the solar equipment will be purchased from Ohio manufacturers because there is international pressure, particularly from China, in developing the solar panel market.²²⁶

²²² *Id.*

²²³ *Id.* at 16.

²²⁴ *Id.* at 17.

²²⁵ *Id.*

²²⁶ *Id.*

This will not be AEP's first attempt to bring renewable energy to Ohioans through an ESP application, that others would pay for. In AEP's ESP II case, AEP proposed the \$20,000,000 Turning Point solar project.²²⁷ In a subsequent proceeding, the PUCO rejected a stipulation between AEP Ohio and Staff, stating: "[T]here is no basis upon which we can find that the Turning Point provision of the stipulation benefits AEP-Ohio's ratepayers."²²⁸ The PUCO should once again reject AEP Ohio's wind and solar proposal in this proceeding.

v. The Joint Stipulation fails the first prong of the settlement test because it is inherently uncertain.

OCC Witness Dormady includes a table in his testimony listing 17 substantive provisions of the Joint Stipulation that contain considerable amounts of uncertainty. OCC Witness Dormady explained that the provisions have the following degrees of uncertainty: (1) an action or outcome that is conditioned on future regulatory approval by the PUCO or other authority; (2) an action or outcome for which no analyses, preliminary or technical, has been performed; (3) an outcome or actions that may not be technically feasible and no analyses has been provided to the signatory parties (e.g., carbon emissions reduction plan, fuel diversification plan, battery deployment); and (4) an action or outcome where there has been no economic or cost-benefit analyses performed and provided to signatory parties (e.g., EE/PDR energy savings, renewable energy

²²⁷ See, e.g., *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO Opinion and Order at pp. 38-40 (December 14, 2011).

²²⁸ *In the Matter of the Long-Term Forecast Report of the Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR Opinion and Order at p. 26.

development, carbon emissions reduction plan).²²⁹ OCC Witness Dormady concludes that, in light of the uncertainty associated with the 17 provisions that he listed, and many more contained in the Joint Stipulation, there could be no bargaining that was knowledgeable or capable.²³⁰

vi. The Joint Stipulation fails the settlement test because it runs counter to the intention of deregulation.

OCC Witness Dormady confirms that the Joint Stipulation as a package was not the subject of serious bargaining between knowledgeable parties, violates important regulatory principles, and does not benefit the public interest. It violates the principle of separating electric distribution and generation inherent to deregulation.²³¹ The PPA Rider indemnifies AEP Ohio against any losses and places that risk entirely on households and businesses.²³² The PPA Rider ensures that all environmental costs, all fuel costs, all retrofit costs, wholesale market risk costs, and all other costs associated with the operation, maintenance, and retrofit of the PPA Units are borne by customers.²³³ OCC Witness Dormady affirms that these increases in costs run counter to the intention of deregulation since such costs and risks should be borne by the businesses operating in a competitive market.²³⁴

²²⁹ *Id.* at 18.

²³⁰ *Id.* at 19.

²³¹ *Id.* at 20.

²³² *Id.*

²³³ *Id.* In the words of PJM's Independent Market Monitor, "[t]he purpose of the PPA Rider is to transfer the costs and market risks associated with the PPA Rider Units from AEP's shareholders to AEP's ratepayers." First Supplemental Testimony of Joseph E. Bowring on behalf of the Independent Market Monitor for PJM (IMM Ex. 2) filed December 28, 2015 at 4:13-14.

²³⁴ Direct Testimony of Dr. Noah Dormady (OCC Ex. 36) filed December 28, 2015 at 21.

c. The Joint Stipulation should not be considered as a package under the PUCO's three-prong standard for considering settlements.

The hodgepodge nature of the settlement should disqualify it from being considered as a “package” under the PUCO’s three-prong settlement test. For treatment as a package, a settlement should have terms that, in the context of an application, have a sufficient nexus between each other and can be lawfully and reasonably considered in the case as filed. In a case allegedly about “hedging” electric generation, there is no nexus to the various terms and issues that have shown up for the first time at case-end in a settlement--other than that the terms induced others to sign.

d. The Joint Stipulation is too costly and, thus, it is not, as a package, in the public interest; OCC's and others' testimony demonstrates that it hurts consumers.

OCC Witness James F. Wilson estimates that, based on the Joint Stipulation and the current market conditions, the cost to consumers through the PPA Rider is a cumulative \$1.9 billion, or \$1.5 billion on a net present value basis.²³⁵ He confirms that this is a conservative estimate of the potential cost.²³⁶ Additionally, OCC Witness Wilson explained that there are losses and costs passed through to customers in every year of the arrangement, ranging from \$50 million in 2024 to \$271 million in 2018.²³⁷ The cost for a typical residential customer would be approximately \$99 per year or a total of over \$700.²³⁸ OCC Witness Wilson concluded that the shortened time period for the

²³⁵ Supplemental Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 5:4-5. This estimate assumes that the PPA Units will clear PJM’s Base Residual Auctions. If they do not, costs to consumers would be much higher.

²³⁶ *Id.* at 16:3-4.

²³⁷ *Id.* at 10:12-14.

²³⁸ *Id.* at 11:3-5.

PPA and the credit offered to customers could theoretically reduce the overall cost of the PPA Rider.²³⁹ But these cost reduction efforts are offset by the continued decline of forward prices.²⁴⁰ And OCC Witness Wilson's estimates assume that these PPA units clear the capacity auction each year. If that assumption proves to be invalid, then consumers will be saddled with the costs of the PPA Units without any (or much reduced) offsetting revenues – significantly increasing the potential cost to consumers. The testimony of PJM Market Monitor Bowring speaks to his intention that the PPA units not be allowed to bid into the markets at subsidized prices.²⁴¹

OCC Witness Wilson also testified that the credit commitment contained in the Joint Stipulation will not ensure that the PPA Units are managed efficiently, cost-effectively, and with maximum market profitability, as AEP Ohio Witness Allen asserts.²⁴² OCC Witness Wilson explained that his analysis determined that the cost to customers under the PPA Rider is greater than the maximum credit amount each year. Thus, the full credit is always applied and the credit will have no impact on AEP Ohio's lack of incentive to manage the PPA Units efficiently and effectively.²⁴³

Additionally, OCC Witness Wilson reiterated that the Joint Stipulation does not include an alternative plan to allocate risk, as was required by PUCO Order.²⁴⁴ Instead, all costs of the PPA Units, net of market revenues, would be passed through to customers

²³⁹ *Id.* at 5:8-10.

²⁴⁰ *Id.*

²⁴¹ *See* First Supplemental Testimony of Joseph E. Bowring on behalf of the Independent Market Monitor for PJM (IMM Ex. 2) filed December 28, 2015 at p. 6:16-33.

²⁴² *Id.* at 17:8-15.

²⁴³ *Id.* at 17:15-20.

²⁴⁴ *Id.* at 18:5-9.

through the PPA Rider, after the offered “credit”.²⁴⁵ Thus, after the total credit amount, all risk is imposed on customers.²⁴⁶

OCC Witness Wilson affirmed that forward prices are not disconnected from market fundamentals as AEP Ohio Witness Bletzacker stated.²⁴⁷ OCC Witness Wilson stated that forward prices reflect a consensus of market participants’ expectations of future prices, reflecting their expectations of supply, demand, and price.²⁴⁸

OCC Witness Wilson also testified that, contrary to the Direct Testimony of AEP Ohio Witness Bletzacker, both sides of a futures transaction are concerned about future price levels.²⁴⁹ He explained that both sides to such a transaction would likely evaluate future market conditions because the transaction could allow the party to protect itself from undesirable price movements.²⁵⁰

OCC Witness Wilson also asserted that AEP Ohio Witness Bletzacker is incorrect in his belief that the exclusion of future CO2 emission costs from future contract prices provides strong evidence that natural gas and electric power futures market participants have no ability to accurately forecast actual energy values.²⁵¹ First, AEP Ohio Witness Bletzacker’s claim is baseless because it is not possible for anyone to determine the extent to which futures prices do or do not reflect a particular anticipated policy change.²⁵² Additionally, AEP Ohio Witness Bletzacker provides no argument for why

²⁴⁵ *Id.* at 18:10-11.

²⁴⁶ *Id.* at 18:12.

²⁴⁷ *Id.* at 11:8-12.

²⁴⁸ *Id.* at 11:13-16.

²⁴⁹ *Id.* at 12:4-10.

²⁵⁰ *Id.* at 12:10-14.

²⁵¹ *Id.* at 13:1-9.

²⁵² *Id.* at 13:9-11.

futures market participants would ignore the potential impact of CO2 policy in their decisions to engage in futures transactions.²⁵³

OCC Witness Wilson also described that long-term natural gas futures are not tethered to current market spot prices due to storage as AEP Ohio Witness Bletzacker stated.²⁵⁴ He explained that storage is used to shift purchases between summer and winter periods, but is not used to protect against possible price increases in future years or connect prices in future years to current prices.²⁵⁵

OCC Witness Wilson stated that using forward prices does not prematurely dismiss credible upside threats to US natural gas prices as AEP Ohio Witness Bletzacker believes.²⁵⁶ In fact, as OCC Witness Wilson pointed out, many future market participants are buying specifically because they are concerned about such threats.²⁵⁷ These actions can be seen as a direct reflection of their views on the likelihood of such threats.²⁵⁸

Finally, OCC Witness Wilson explained that a “longer-term capacity product”, the idea of which is supported in the Joint Stipulation, is not suitable for PJM’s RPM construct.²⁵⁹ He noted that PJM’s RPM is fundamentally a short-term capacity product and that numerous issues would arise if a multi-year product was implemented.²⁶⁰ OCC

²⁵³ *Id.* at 13:12-20.

²⁵⁴ *Id.* at 14:14-17.

²⁵⁵ *Id.* at 14:17-22.

²⁵⁶ *Id.* at 15:1-5.

²⁵⁷ *Id.* at 15:5-7.

²⁵⁸ *Id.* at 15:5-7.

²⁵⁹ *Id.* at 18:14-20.

²⁶⁰ *Id.* at 18:20-19:9.

Witness Wilson pointed out that PJM stakeholders have rejected the idea of a multi-year capacity product at least four times over several years.²⁶¹

OCC Witness Wilson's concluded that the PPA Rider, "as modified by the [Joint] Stipulation, would be very costly to customers, and result in AEP Ohio and the owners of the PPA Units having no incentive to manage costs or maximize revenues."²⁶² As a result, his bottom-line: "Ohio consumers should not be burdened with the PPA Units."²⁶³

e. The Joint Stipulation fails the three-prong test, is a compilation of signature inducements to Signatory Parties, and fails the MRO v. ESP test – all to consumers' detriment.

OCC Witness Michael Haugh testified that the proposed Joint Stipulation is not the product of serious bargaining among parties with diverse interests; violates important regulatory principles; and does not, as a package, benefit the public interest.²⁶⁴ Also, the Joint Stipulation would make the ESP more costly for customers. Were the PUCO to approve it, the Modified Amended Application would have to be denied because it would cause ESP III to fail the MRO versus ESP in R. C. 4928.143(C).²⁶⁵

OCC Witness Haugh noted that the Joint Stipulation is fatally flawed because the Signatory Parties will receive cash equivalents and other benefits that are paid by consumers who oppose it.²⁶⁶ The PUCO has warned against the practice of paying signatory parties, stating that "parties to future stipulations should be forewarned that such provisions are strongly disfavored by this Commission and are highly likely to be

²⁶¹ *Id.* at 18:18-20.

²⁶² *Id.* at 19:15-17.

²⁶³ *Id.* at 19:20.

²⁶⁴ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 3.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 5.

stricken from any future stipulation submitted to the Commission for approval.”²⁶⁷ Yet, as pointed out by OCC Witness Haugh, AEP Ohio has presented the PUCO with a Joint Stipulation that does exactly that. Payments are directed to the Signatory Parties and these payments are paid for by non-signatory parties.²⁶⁸ “Many of the [Joint] Stipulation provisions use other people’s money (consumers’ money) to underwrite (subsidize) the deal making.”²⁶⁹

OCC Witness Haugh explained that the Joint Stipulation fails to meet the requirement that stipulations must be the product of serious bargaining representing diverse interests. In this case, there is no signatory party that represents only residential customers. For example, OPAE is an association of providers of weatherization services to low-income customers. As OPAE’s signature on the settlement amply demonstrates, OPAE does not represent 1.3 million AEP Ohio consumers in the role of an advocate for just and reasonable rates on behalf of those residential customers.²⁷⁰ Also, the negotiations behind the Joint Stipulation took place over a two-week period and consisted of giving financial incentives and other benefits to Signatory Parties (paid for by other people’s money) to push the Joint Stipulation through as quickly as possible.²⁷¹ In light of the abbreviated negotiations that deal with billions of dollars that consumers will pay,

²⁶⁷ *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 Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (Feb. 11, 2015).

²⁶⁸ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 5.

²⁶⁹ *Id.* at 4.

²⁷⁰ *Id.* at 7.

²⁷¹ *Id.*

and the financial inducements handed out to Signatory Parties, the Joint Stipulation cannot be classified as the product of serious bargaining.²⁷²

It should be well noted, for purposes of finding a lack of serious bargaining, that Buckeye Power, Inc., Sierra Club, Direct Energy, IGS, and OPAE all could not get to full agreement with the settlement. They solved the bargaining issue by agreeing to not agree, where they are not participating in terms, not opposing terms, or both.²⁷³

In fact, Sierra Club, though it is characterized as a “signatory party,” is not even obligated to support the Joint Stipulation's purported reasonableness.²⁷⁴ Sierra Club's real agreement is significantly to not agree, except principally for obtaining AEP Ohio's signature on 900 MW of a renewable power that will be built with other people's money (if it is built at all).

Marketers IGS and Direct Energy did not even sign the Joint Stipulation term that the settlement satisfies the three-prong test.²⁷⁵ But they “signed” to get AEP Ohio's signature for increasing what other people (Ohioans) will pay for AEP Ohio's electric generation, above the market price of electricity.

So there are some parties that do not support the Joint Stipulation overall but that nonetheless agreed to limited terms in order to receive cash or cash equivalents from AEP Ohio and thereby be counted among the so-called signatories. In the words of OMAEG Witness Edward W. Hill:

In the Joint Stipulation, AEP-Ohio has raised new issues, offered new arguments, and presented a carefully crafted coalition of

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 8, citing Joint Stipulation at footnote 17.

²⁷⁵ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 8.

supporters, labeled a ‘redistributive coalition,’ in an attempt to influence the public policy process in ways that are deleterious for the state of Ohio.²⁷⁶

Additional examples of benefits (handouts) for signatures or non-opposition are the Interruptible Power-Discretionary Rider (“IRP-D”), the automaker credit provision, the SCR, the energy efficiency programs earmarked for OHA, OPAE’s administration of the Community Assistance Program (“CAP”), the renewable energy projects, and the \$8 million payment to IEU.²⁷⁷ OCC Witness Haugh explained that these financial benefits are provided to individual interests and clearly provide no benefit to the overall public interest.²⁷⁸ Indeed, the public is paying for much of it.

The IRP-D provides large industrial customers a hefty discount, up to \$9/kW per month, if they agree to curtail their energy consumption at high usage times. The large customers that are able to take advantage of this part of the proposed Joint Stipulation already participate in the PJM Demand Response Programs and receive credits for the same curtailment.²⁷⁹ In other words, the IRP-D provision in the Joint Stipulation simply gives additional payments to participants for the same capacity resource that previously cleared PJM’s Base Residual Auction. There is no additional incremental value to consumers for these additional payments beyond that which PJM already made for commitments to curtail consumption during peak periods. The additional payments simply constitute extra money to join the Joint Stipulation. And it is the other AEP Ohio customers that pay for the entirety of these additional unnecessary payments.

²⁷⁶ Direct Testimony of Edward W. Hill (OMAEG Ex. 29) filed December 28, 2015 at 4.

²⁷⁷ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 13.

²⁷⁸ *Id.* at 13.

²⁷⁹ *Id.* at 14.

The automaker credit provides \$10/MWh for all consumption above the 2009 automaker customer's 2009 annual usage. This credit is paid for by customers through the Economic Development Cost Rider ("EDR").²⁸⁰ There is no explanation of how this benefits customers or how it is in the public interest. OCC Witness Haugh found no justification for using 2009 as a baseline. But he did point out that according to the International Organization of Motor Vehicle Manufacturers, in 2009, there was a 34.2 percent decrease in automobile production with 5,709,432 cars produced in the United States.²⁸¹ In contrast, there were 11,660,699 cars produced in 2014.²⁸² The year 2009 was chosen as a baseline due to its low production of autos. Therefore, the financial benefit is easier to obtain now that production and energy usage have increased above the 2009 baseline.²⁸³

OHA is eligible to receive \$1 million a year funded through the EE/PDR under the Joint Stipulation. In addition to the \$1 million, OHA's projects would be prioritized for Volt-Var optimization deployment, though the EE/PDR will be paid by all customers. The idea of Volt-Var is to optimize the entire electricity system. But in AEP Ohio's

²⁸⁰ *Id.*

²⁸¹ *Id.* at 15, citing <http://www.oica.net/category/production-statistics/2009-statistics>.

²⁸² *Id.* at 15, citing <http://www.oica.net/category/production-statistics/2014-statistics>.

²⁸³ *Id.* at 15. OCC Witness Haugh's conclusion regarding the hand out to automakers is confirmed by AEP Ohio Witness Allen's testimony. *See* Hearing Transcript at Vol. XIX, p. 4762 (no current automaker credit, arose as a result of Joint Stipulation). Further, AEP Ohio did not know what the aggregate automaker electricity bill within AEP Ohio's service territory is. *See* Hearing Transcript at Vol. XX, p. 4961:3-24. Thus, the PUCO cannot conclude based on the record evidence that the automaker credit will have any meaningful effect on automakers.

territory, priority installation of Volt-Var will be provided to a party that decided to sign the Joint Stipulation.²⁸⁴

OPAE is another party that decided to sign the Joint Stipulation to further finance its interests. Under the Joint Stipulation, OPAE will receive five percent of the Community Action Program's up to \$8 million annual budget to manage and administer the Community Action Program.²⁸⁵ There is no requirement that administering Community Action Program be competitively bid so that other organizations may have the chance to offer their services to low-income consumers at a lower, more economical cost. If a lower administrative cost could be achieved, there would be more benefits available to the Community Action Program for low income customers.²⁸⁶

A financial benefit will be provided to IEU. In return for IEU not opposing the PPA Rider and voluntarily withdrawing from a number of cases before the PUCO and the Ohio Supreme Court, AEP Ohio will pay \$8 million to IEU.²⁸⁷ So AEP Ohio could not

²⁸⁴ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 15. OCC Witness Haugh's conclusion regarding the hand out to OHA is confirmed by AEP Ohio Witness Allen's testimony. *See* Hearing Transcript at Vol. XVIII, p. 4541:18-23; 4547:7-13 (under the Joint Stipulation, approximately \$1 million "earmarked" for OHA); *id.* at 4551:1-4; 4552:15-18 (rate reduction under Joint Stipulation to Alternative Feed Service would save participating OHA members \$100,000).

²⁸⁵ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 16.

²⁸⁶ OCC Witness Haugh's conclusions regarding the handout to OPAE are confirmed by the testimony of AEP Ohio Witness Allen. *See* Hearing Testimony at Vol. XVIII, p. 4556:4-23 (\$200,000 "earmarked" for OPAE to assist with CAP program notwithstanding nothing prevents OPAE from seeking that funding irrespective of the Joint Stipulation); *id.* at p. 4562:12-15 (OPAE not currently administering CAP program); *id.* at p. 4558:2-8; 4558:24-4559:2 (up to \$8,000,000 "earmarked" for programs to be administered by OPAE, for which OPAE will receive a 5% management fee).

²⁸⁷ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 17; *see also* Hearing Transcript at Vol. XVIII, p. 4573:8-20.

even resolve its bargaining with IEU (perhaps to IEU's credit) to reach agreement on the PPA.²⁸⁸

OCC Witness Haugh highlighted the importance of the specific provisions that Direct Energy, IGS, and Sierra Club opted out of by footnote. When looking closely at them, it is apparent that those Signatory Parties do not support key provisions of the Joint Stipulation. Further reflecting that AEP Ohio has failed the first prong of the settlement standard, Direct Energy, IGS, and Sierra Club all are not participating in the key settlement term that "the Commission should approve the Amended Application of Ohio Power Company as filed on May 15, 2015."²⁸⁹ The three also opted out of the provision that "it would be prudent for AEP Ohio to sign a Revised Affiliate PPA."²⁹⁰

Another important criterion under the three-prong test analyzed by OCC Witness Haugh is whether the Joint Stipulation violates any important regulatory principle or practice. The Joint Stipulation proposes to add brand new charges to customers through the addition of the Competition Incentive Rider.²⁹¹ The Competition Incentive Rider's undetermined charge will be added to all non-shopping customers' bills and then

²⁸⁸ The Global Settlement Agreement, P3/EPSCA Ex. 11 (admitted at Hearing Transcript Vol. XX, p. 5012), between IEU and AEP Ohio further calls into question whether the Joint Stipulation was the product of serious bargaining among knowledgeable parties. The only witness to testify at the evidentiary hearing supporting the Joint Stipulation could say nothing more than that "some parties" were aware of the Global Settlement Agreement before they signed the Joint Stipulation. *See* Hearing Transcript at Vol. XIX, p. 4814:14-17.

²⁸⁹ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 9, citing Stipulation at 4.

²⁹⁰ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 9, citing the Stipulation at 4.

²⁹¹ AEP Ohio has asserted that the CIR will promote retail competition and that the PUCO has implemented programs to support retail competition. The best it could do to support the assertion was to cite to a case from fifteen years ago when retail competition was in its infancy. *See* Hearing Transcript at Vol. XX, p. 4958:11-4959:1. Yet it acknowledged that now seventy percent of the load is shopping and approximately fifty percent of the customer count. *See id.*

redistributed to all distribution customers.²⁹² The addition of the yet-to-be-determined CIR charge applied to non-shopping customers' bills is another cost that consumers will pay.

Another increased charge -- yet again, undetermined in amount -- is the proposed cost of the SCB. The SCB permits only select marketers to provide customers with one bill that includes marketer and AEP Ohio charges. Fifty percent of the costs associated with the proposal will be paid with other people's money -- by customers.²⁹³ Three marketers -- Direct Energy, FES, and IGS -- may get to participate in the SCB because they signed the Joint Stipulation. No other marketers are entitled, according to the Joint Stipulation, to participate in the SCB. OCC Witness Haugh explained that this pilot SCB program *should* be paid for by the cost causers -- the three marketers that are benefitting from it.²⁹⁴ The program has no relationship to the implementation of the PPA Rider and has no place in the Joint Stipulation.²⁹⁵ It, like various others of AEP Ohio's financial inducements for signatures, just showed up at the end of the case in a settlement.

Based on AEP Ohio's own numbers and testimony, OCC Witness Haugh pointed out that the Joint Stipulation harms consumers.²⁹⁶ Consumers and the public will be worse off if the PUCO approves it. AEP Witness Allen asserted that the PPA Rider will begin with a \$4 million credit in 2016.²⁹⁷ Were one to assume that customers' net credit

²⁹² Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 9.

²⁹³ See Joint Ex. 1 at 18, para. f; Hearing Transcript at Vol. XVIII, p. 4644:1-11.

²⁹⁴ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 11.

²⁹⁵ *Id.* Further, neither the CIR nor the SCB, each offering certain benefits to certain Signatory Parties, were part of AEP Ohio's Amended Application. See Hearing Transcript at Vol. XVIII, p. 4643:13-15 (CIR) and 4645:3-5 (SCB). They only arose as part of the Joint Stipulation.

²⁹⁶ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 19.

²⁹⁷ *Id.* at 17, citing Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at 3.

throughout the year is going to be \$4 million, that would be \$0.12 credit per month in 2016. But with the addition of the new terms and financial incentives in the proposed Joint Stipulation, the cost to a typical residential customer using 1,000 kWh per month will be a \$0.62 charge per month.²⁹⁸ As quantified by OCC Witness Haugh, this means that the incentives beyond the PPA Rider will cost residential customers \$0.74 per month.²⁹⁹ This does not include the cost of converting Conesville Units 5 and 6 to co-firing by the end of 2017 or the costs of building the renewable wind and solar units. Such costs, among other undetermined and unquantified costs and promises (if delivered as promised), will increase the Joint Stipulation's cost well beyond the \$0.62 per month.

For all these reasons, OCC Witness Haugh determined that the Joint Stipulation fails the three-prong test and should be rejected by the PUCO.

Additionally, he determined that the Joint Stipulation should be rejected because, were the PUCO to approve it, the Modified Amended Application would have to be denied. The Modified Amended Application would cause ESP III to fail the MRO v. ESP test. Ohio Revised Code Section 4928.143(C) requires that the PUCO only approve an ESP if it finds that the plan, including its pricing and all other terms and conditions, and any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that of a market rate offer under R.C. 4928.142. According to OCC Witness Wilson, the cost of the ESP from January 1, 2016 through May 31, 2018, were the PUCO to approve the Joint Stipulation and grant the Modified

²⁹⁸ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 18, citing Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at 14.

²⁹⁹ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 18.

Amended Application, would be \$580 million.³⁰⁰ In its incomplete MRO v. ESP analysis in ESP III, the PUCO found \$53 million in quantifiable benefits.³⁰¹

Consequently, the cost to consumers for AEP Ohio's ESP III, were the Joint Stipulation approved and the Modified Amended Application granted, would be a net cost of \$527 million for the term of ESP III.³⁰² Because approving the Joint Stipulation and granting the Modified Amended Application would cause ESP III to fail the MRO v. ESP test, the Joint Stipulation (and Modified Amended Application) should be rejected.

f. The Joint Stipulation's rate design violates important regulatory principles, harms consumers with unreasonable prices, and thus fails the settlement test as OCC's evidence shows.

Section III.D.4 of the Joint Stipulation provides that 50 percent of the EE/PDR Rider costs for transmission and sub-transmission voltage customers will be transferred to the EDR Rider.³⁰³ The Joint Stipulation also states that that 50 percent of the IRP credits from the EE/PDR Rider costs will be transferred to the EDR Rider.³⁰⁴ OCC Witness Fortney explained that transferring these costs to the EDR Rider causes harm to residential customers because the allocations of EE/PDR and EDR are no longer based upon cost causation, as they initially were.³⁰⁵ The Joint Stipulation abandons those principles in favor of the arbitrary transfer of 50 percent of the cost recovery of the

³⁰⁰ *Id.* at 19, citing Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 6.

³⁰¹ Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 20, citing Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at 4.

³⁰² This quantification does not take into account the Joint Stipulation's other additional costs.

³⁰³ Direct Testimony of Robert B. Fortney (OCC Ex. 31) filed December 28, 2015 at 3:13-16.

³⁰⁴ *Id.* at 3:16-18.

³⁰⁵ *Id.* at 3:18-21.

EE/PDR to the EDR.³⁰⁶ Therefore, the Joint Stipulation would assign cost responsibility to residential customers for costs that they did not cause. That result is not reasonable pricing under R.C. 4928.02(A).

Additionally, OCC Witness Fortney affirmed that the PPA Rider credits and charges should not be allocated based on the PJM five monthly peak demands.³⁰⁷ A straight allocation by demand of the PPA costs and revenues unfairly and arbitrarily assigns a disproportionate share of those costs to the Residential class.³⁰⁸ The proper allocation should be based on the combination of demand and energy, netting the difference between the costs and the sales of all three of the generation products.³⁰⁹ Such a determination should be part of the forecasted values and subject to the quarterly true-ups.³¹⁰

The Joint Stipulation is a bad deal for consumers, and should not be approved based upon the fact that the Joint Stipulation cannot pass the PUCO's three-prong test.

C. AEP Ohio's Amended Application/Modified Amended Application would harm consumers and should be rejected based on the record evidence from AEP Ohio's own case.

Of course, AEP Ohio as the applicant bears the burden of proof.³¹¹ The PUCO need look no further than the record evidence at the close of AEP Ohio's case in the

³⁰⁶ *Id.* at 3:21-4:3; *see also* Hearing Transcript at Vol. XVIII, p. 4566:3-12 (transferring riders into EDR not approved in last ESP proceeding).

³⁰⁷ Direct Testimony of Robert B. Fortney (OCC Ex. 31) filed December 28, 2015 at 5:17-19.

³⁰⁸ *Id.* at 5:19-21.

³⁰⁹ *Id.* at 6:2-4. Of note, the Joint Stipulation proposes to increase PPA Rider costs borne by residential customers by ten percent.

³¹⁰ *Id.* at 6:4-5.

³¹¹ *See* note 125, *supra*.

initial phase of this proceeding to conclude that it has failed to meet its burden.³¹²

Among the showings that the PUCO required AEP Ohio to make, “at a minimum,” were:

- 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.³¹³

The PUCO emphasized that it would balance, but not be bound by, the foregoing factors.³¹⁴ These factors cannot be met by AEP Ohio. Therefore, its Amended Application/Modified Amended should be denied.

1. AEP Ohio seeks corporate welfare from Ohioans, without proving financial distress.

Make no mistake, state and federal law does not allow what AEP Ohio proposes. But AEP Ohio’s premise for Ohioans to pay the subsidy is flawed beyond the legal issues.

³¹² OCC does not concede the credibility of any of AEP Ohio’s “evidence” discussed in this section. Instead, OCC shows that AEP Ohio’s Amended Application/Modified Amended Application should be rejected based on analysis similar to what would be applied under Rules 12(B)(6) and 50(A) of the Ohio Rules of Civil Procedure and in light of the governing law squarely placing the burden of proof on AEP Ohio as the applicant.

³¹³ See ESP III Opinion and Order at 25.

³¹⁴ See *id.* As Staff explained in the initial phase of this case, AEP Ohio could satisfy all of these factors and the PUCO may still say “no” to its Amended Application/Modified Amended Application. See Hearing Transcript at Vol. XVI, p. 3893:6-16.

AEP Ohio initially asserted in its Amended Application and pre-filed Direct Testimony that the PPA Units are on the economic bubble.³¹⁵ But the record evidence produced at hearing tells a different story, as AEP Ohio conceded.

a. AEP's assets are increasing substantially in value, and the PPA Units are positioned to compete.

AEP, which wholly owns AEP Ohio and AEPGR, represented to the public that it had \$58 billion in total assets as of September 30, 2014.³¹⁶ AEP represented to the public that it had \$ 60 billion in total assets as of December 31, 2014.³¹⁷ And AEP represented to the public that it had \$61 billion in total assets as of June 30 total assets in, 2015.³¹⁸ So from 2014 through 2015, AEP's assets increased in value by \$3 billion.³¹⁹

AEP has consistently represented to the public that its generation fleet, including the PPA Units, is cost-competitive and well-positioned to compete in the competitive generation market. In "American Electric Power 2nd Quarter 2014 Earnings Presentation" dated July 25, 2014, AEP represented that AEPGR's generation fleet, including the PPA Units, is a "Cost-competitive fleet [that] captured significant spot opportunities[.]"³²⁰ In "American Electric Power May 2015 Investor Meeting[.]" AEP represented that AEPGR's generation fleet, including the PPA Units, is "well-positioned

³¹⁵ See, e.g., Amended Application at 6, para. 9; Direct Testimony of Toby L. Thomas (AEP Ohio Ex. 5) filed May 15, 2015 at p. 11:7; Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 16:14.

³¹⁶ See Hearing Transcript at Vol. I, p. 191:2-192:2; AEP 49th EEI Financial Conference Presentation, 11-13-14 (OCC Ex. 4, admitted at Hearing Transcript Vol. II, p. 365) at p. 3.

³¹⁷ See Hearing Transcript at Vol. I, p. 192:18-193:1; AEP May 2015 Investor Meeting (OCC Ex. 5, admitted at Hearing Transcript Vol. II, p. 365) at p. 3.

³¹⁸ See Hearing Transcript at Vol. I, p. 194:7-21; AEP September 2015 Investor Meetings (OCC Ex. 7, admitted at Hearing Transcript Vol. II, p. 365).

³¹⁹ See Hearing Transcript at Vol. I, p. 195:1-4.

³²⁰ AEP 2nd Quarter 2014 Earnings Release Presentation (OCC Ex. 3, admitted at Hearing Transcript Vol. II, p. 365) at 31; see also Hearing Transcript at Vol. I, p. 190:1-25.

from a cost and operational perspective to participate in the competitive market[.]”³²¹

AEP reaffirmed that its generation fleet, including the PPA Units, is “well-positioned from a cost and operation perspective to participate in the competitive market” in June 2015³²² and September 2015³²³ – the very month in which the hearing in this matter began.

AEP’s representations to the public are buttressed by recently reported earnings from its generation and marketing segment, which includes AEPGR.³²⁴ In the second quarter of 2015, AEP’s generation and marketing segment reported earnings of \$82 million.³²⁵ For the first six months of 2015, it reported earnings of \$269 million.³²⁶ Importantly, the earnings in the first six months of 2015 increased year over year compared to the first six months of 2014.³²⁷ Clearly, a consumer bailout of these units is not warranted.

b. AEP Ohio’s finances are such that it does not need a customer-funded bailout provided by the PPA Rider.

AEP Ohio’s financial wherewithal is such that it could enter the PPA and weather any storm associated with short-term low energy and capacity prices without the PPA

³²¹ AEP May 2015 Investor Meeting (OCC Ex. 5, admitted at Hearing Transcript Vol. II, p. 365) at 23; *see also* Hearing Transcript at Vol. I, p. 192:4-193:7.

³²² AEP June 2015 Investor Meetings (OCC Ex. 6, admitted at Hearing Transcript Vol. II, p. 365) at 28; *see also* Hearing Transcript at Vol. I, p. 193:16-194:6.

³²³ AEP September 2015 Investor Meetings (OCC Ex. 7, admitted at Hearing Transcript Vol. II, p. 365) at 28; *see also* Hearing Transcript at Vol. I, p. 194:7-25. AEP’s public representations that AEPGR’s generation fleet, including the PPA Units, is cost-effective and competitive as reflected in OCC Exs. 3, 5-7 were all made *after* statements made by AEP’s CEO during the April 23, 2015 earnings call referenced in the May 15, 2015 cover letter from AEP Ohio’s President accompanying the filing of the Amended Application.

³²⁴ *See* Hearing Transcript at Vol. VI, p. 1716:20-1717:4.

³²⁵ *Id.* at p. 1718:20-23.

³²⁶ *Id.* at p. 1718:24-1719:7.

³²⁷ *Id.* at p. 1719:23-1720:2.

Rider. AEP Ohio's President acknowledged that investors can make short-term investments based on long-term price signals.³²⁸ He also acknowledged that AEP Ohio Witness Pearce in his PPA Rider forecast projected a \$48 million cost for October-December 2015 and a \$574 million profit for 2016 to 2024.³²⁹ Thus, AEP Ohio's President acknowledged that the \$48 million cost would be a short-term investment in order to get the long-term payoff of \$574 million.³³⁰ AEP Ohio's financial capability is such that there is no need to take AEP Ohio Witness Pearce's forecast to a commercial bank to see if it would fund the short-term costs forecasted by AEP Ohio Witness Pearce – AEP Ohio has “the credit capabilities to cover short-term investments[,]” including a \$48 million investment.³³¹ Therefore, consumers should not be put in the unreasonable position of being at risk for the profitability of the PPA Units as required under the AEP Ohio proposal.

c. A subsidy from consumers is not necessary to profitably operate the PPA Units.

Over the forecast periods, AEPGR could operate the PPA Units just as they assert they will do under the proposals in the Amended Application/Modified Amended Application, but without the PPA Rider, and make a profit of \$574.³³² According to AEP

³²⁸ See *id.* at p. Vol. I, p. 168:20:23.

³²⁹ See *id.* at p. 169:6-15; KDP-2 (OCC Ex. 1, admitted at Hearing Transcript Vol. II, p. 365). Likewise, AEP Ohio projects that the PPA Rider as modified by the Joint Stipulation will result in a \$721 million profit. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Average of High Load and Low Load Forecast.

³³⁰ See Hearing Transcript at Vol. I, p. 169:16-19. Presumably AEPGR, AEP's wholly-owned subsidiary and AEP Ohio's affiliate, could make the same investment. Under the PPA Rider as modified by the Joint Stipulation, AEP Ohio would not even have to make a short-term “investment” – each and every year of the PPA Rider is forecast by AEP Ohio to net a profit. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Average of High Load and Low Load Forecast.

³³¹ See Hearing Transcript at Vol. I, p. 169:20-170:12.

³³² Or \$721 million, if the Joint Stipulation is approved.

Ohio's President, there will be a net financial benefit to customers based on AEP Ohio's own forecasts.³³³ Looking at AEP Ohio's forecast and, specifically, the Average of High Load and Low Load Forecast,³³⁴ AEP Ohio forecasts revenue of \$11.8 billion.³³⁵ It forecasts costs under the proposed PPAs of \$11.2 billion.³³⁶ AEP Ohio went out of its way to clarify that the \$11.2 billion costs are those associated with generating the \$11.8 billion revenue.³³⁷ "[T]he agreement costs are a function of the revenues."³³⁸ The costs projected by AEP Ohio would not be offset by the additional revenues, instead:

When you run a power plant, okay, we will go back to how the real world works. When we run a power plant, you only incur costs for things like fuel and large portions of the O&M if the units are dispatching and creating revenues. So the revenues are what create the dispatch, okay, that dispatch revenues, that's what creates the costs. The costs flow with the revenues. *You can't have – I can't assume these costs without putting them in the perspective of the revenues that are creating those costs.*³³⁹

³³³ See Hearing Transcript at Vol. I, p. 167:13-18; see also Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Average of High Load and Low Load Forecast (projecting a net profit and, thus, benefit to consumers, of \$721 million under the modified PPA Rider proposal).

³³⁴ See KDP-2 (OCC Ex. 1, admitted at Hearing Transcript Vol. II, p. 365). A "good forecast" and the one AEP Witnesses Pearce and Vegas suggest should inform the PUCO's consideration of the Amended Application. See, e.g., Hearing Transcript at Vol. VII, p. 1868:2-7; Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at 5, Table 1; *id.* at 13:1-7; 5-15-15 Letter to Commission from Mr. Vegas (OCC Ex. 2, admitted at Hearing Transcript Vol. II, p. 365).

³³⁵ See Hearing Transcript at Vol. VII, p. 1868:8-11; see also KDP-2 (OCC Ex. 1, admitted at Hearing Transcript Vol. II, p. 365). The forecasted revenues under the modified PPA Rider proposal are \$10.8 billion. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Average of High Load and Low Load Forecast.

³³⁶ See Hearing Transcript at Vol. VII, p. 1868:13-16; see also KDP-2 (OCC Ex. 1, admitted at Hearing Transcript Vol. II, p. 365). The forecasted costs under the modified PPA Rider proposal are \$10 billion. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Average of High Load and Low Load Forecast.

³³⁷ See Hearing Transcript at Vol. VII, p. 1868:13-16.

³³⁸ See *id.* at p. 1868:25.

³³⁹ *Id.* at p. 1869:12-1870:4 (italics added). To the degree AEP Ohio has "great confidence" in its forecasts, there is no reason that AEPGR should not run the PPA Units as it is asserted they would be run under the Amended Application/Modified Amended Application, but without the PPA Rider. See *id.* at Vol. I, p. 237:1-2.

Thus, AEP Ohio's own forecasts confirm that AEPGR could operate the PPA Units in the same way proposed under the Amended Application/Modified Amended Application, but without the PPA Rider, and still make a profit of \$574 million because "the revenues are what create[] the costs."³⁴⁰

As discussed above, the PPA Units are not in financial need. AEP Ohio's President admitted this, and the PUCO need look no further than his sworn testimony provided at the hearing:

If I could maybe refer you to one of the discovery or one of the exhibitions [verbatim] that was presented and referenced the performance of the *AEP Generation Resources business* and, I've been handed so many of these reports I'm not sure which one it's in, but what it essentially illustrates is *that that segment of the business is performing profitably and performing very well, and in the last couple of years if you look at the performance of that unregulated generation segment, it's created a lot of profit and a lot of earnings*, of which under a PPA would have been returned to customers. *So it's not about these units and these plants not having potential to perform profitably . . .*³⁴¹

AEP Ohio has failed to meet its burden of proof on the first (and most important)³⁴² factor from the PUCO's ESP III Opinion and Order. The record evidence

³⁴⁰ *Id.* at Vol. VII, p. 1890:13-16. Or, under the modified PPA Rider proposal, \$721 million. *See* Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Average of High Load and Low Load Forecast.

³⁴¹ Hearing Transcript at Vol. I, p. 235:15-236:13 (italics added). It does not require a stretch of any sort to conclude that the "exhibitions" to which AEP Ohio's President was referring are AEP 2nd Quarter 2014 Earnings Release Presentation, AEP May 2015 Investor Meetings, AEP June 2015 Investor Meetings, and AEP September 2015 Investor Meetings (OCC Exs. 3, 5-7, respectively).

³⁴² Since the PPA Units are not in financial need and, in fact, are very profitable now and, as forecast, into the future (according to AEP and AEP Ohio's witnesses), there is no need to address the other three factors. Since AEPGR can profitably operate the PPA Units in the same manner proposed under the Amended Application/Modified Amended Application, but without the PPA Rider, there is no material concern about future reliability, including supply diversity. Since AEPGR can profitably operate the PPA Units in the same manner proposed under the Amended Application/Modified Amended Application, but without the PPA Rider, compliance with pertinent and pending environmental regulations is not a concern. Since AEPGR can profitably operate the PPA Units in the same manner proposed under the Amended Application/Modified Amended Application, but without the PPA Rider, closing the PPA Units and any purported impact doing so would have on electric prices and the resulting effect on economic development in Ohio is not a concern.

not only fails to show that the PPA Units are in financial need, it shows the exact opposite. To use AEP's words, the PPA Units are "well-positioned from a cost and operational perspective to participate in the competitive market[.]"³⁴³ Therefore, consumers should not be asked to bailout AEP and be put in the position of being at risk for the profitability of the PPA Units as required under the AEP Ohio proposal.

2. PJM, not the PUCO, is responsible for electric generation reliability.

a. PJM is ensuring resource adequacy for the protection of Ohio and other electric consumers, despite what appears to be AEP Ohio messaging otherwise.

At the outset, the PUCO should recognize that AEP Ohio, itself, acknowledges that PJM is responsible for ensuring adequate resources to meet customer demand requirements.³⁴⁴ Not only does AEP Ohio recognize that PJM is responsible for ensuring adequate resources to meet customer demand requirements, it recognizes that PJM is *capable* of ensuring system reliability.³⁴⁵ In the capacity market, PJM provides enough capacity plus a targeted reserve margin of 15.7 percent.³⁴⁶ It is typical that the 15.7 percent target reserve margin is exceeded.³⁴⁷ Based on the 2018-19 Base Residual Auction, the reserve margin was actually 19.8 percent.³⁴⁸ Although AEP Ohio tries to

³⁴³ See notes 316-323, *supra*. AEP's representations to the public regarding the PPA Units' competitive merits were not made contingent on passage of the PPA Rider. See AEP 2nd Quarter 2014 Earnings Release Presentation, AEP May 2015 Investor Meetings, AEP June 2015 Investor Meetings, and AEP September 2015 Investor Meetings (OCC Exs. 3, 5-7, respectively); see also Hearing Transcript at Vol. III, p. 890:4-17 (AEP Ohio Witness Fetter acknowledges that the PPA Units are going to be profitable based on AEP Ohio Witness Pearce's forecasts).

³⁴⁴ See Hearing Transcript at Vol. I, p. 214:3-8; 137:19-23.

³⁴⁵ See *id.* at Vol. VI, p. 1618:23-25.

³⁴⁶ See *id.* at Vol. II, p. 451:12-20.

³⁴⁷ See *id.* at p. 453:8-11; 454:1-6.

³⁴⁸ See *id.* at p. 451:21-452:22; 454:18-22.

raise questions about whether the healthy reserve margins will continue in light of plant retirements,³⁴⁹ it concedes that most of the retirements occurred by the end of 2015 and nearly all of the retirements have already had any impact that they may have on capacity prices and, thus, capacity availability.³⁵⁰

b. Part of AEP's messaging seems to be that the PPA Units are needed by Ohioans and might close without a PPA. But the plants will not necessarily be closed.

Make no mistake that PJM, not the PUCO, is responsible for generation reliability. But concerns about reliability and supply diversity have been raised at the PUCO in the context of the PPA Units closing. Nonetheless, AEP Ohio's President will not say that the PPA Units will be retired if the Amended Application/Modified Amended Application is rejected.³⁵¹ Any concern that the PPA Units might retire were the PPA Rider denied is largely mitigated by the fact that AEP could not retire the Stuart units, Zimmer, or Conesville 4 unilaterally.³⁵² A *unanimous* vote of the co-owners of the units would be required.³⁵³ There are no plans as of now to close the PPA Units that AEPGR owns 100 percent.³⁵⁴ Nevertheless, any decision regarding plant retirements in a deregulated environment should be dictated by market forces, not government intervention. And PJM is the arbiter of generation reliability.

³⁴⁹ See Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at 21:21-23.

³⁵⁰ See Hearing Transcript at Vol. II, p. 512:3-14.

³⁵¹ See *id.* at Vol. I, 95:24-96:3; 96:18-22; see also *id.* at Vol. 6, p. 1580:10-24 (AEP Ohio Witness Bradish); *id.* at Vol. III, p. 830:5-8.

³⁵² See *id.* at Vol. IV, p. 1202:24-1203:4.

³⁵³ See *id.*; see also *id.* at 1215:1-11; *id.* at Vol. VII, p. 1912:21-25; *id.* at Vol. I, p. 128:5-8; *id.* at Vol. II, p. 272:14-19; *id.* at 492:2-5.

³⁵⁴ See, e.g., *id.* at Vol. I, p. 259:24-260:1 (Cardinal Unit); p. 260:24-261:1 (Conesville Units 5 and 6).

c. AEP Ohio insinuates that it needs Ohio government to act to increase supply diversity. But that's not true and supply diversity is increasing on its own in any event.

AEP Ohio wants to reinsert the state government, for its own favorable ratemaking, into AEP's generation diversity. That is not allowed under state law. In any event, AEP itself is already diversifying its supply portfolio. And it's doing so without involving state government in PPAs that favor utilities and their affiliates.³⁵⁵

The Amended Application's/Modified Amended Application's proposal does not add a new or different fuel mix to Ohio or the region.³⁵⁶ AEP Ohio's Amended Application/Modified Amended Application would not facilitate diversifying the supply portfolio. AEPGR's generation fleet is already 79.3 percent coal-fired.³⁵⁷ So far from contributing to diversifying Ohio's supply portfolio, continued operation of the PPA Units would simply maintain coal's dominance.³⁵⁸ In any event, AEP Ohio did no quantitative analysis to determine what percentage of Ohio generation has to be coal-fired to maintain a "diversified" portfolio to guard against rate volatility or reliability concerns.³⁵⁹

Further, the market is working to diversify Ohio's supply portfolio and increase available generation. Carrol County Energy, the Middletown Energy Center, and

³⁵⁵ See *id.* p. 209:20-24; AEP September 2015 Investor Meetings (OCC Ex. 7, admitted at Hearing Transcript Vol. II, p. 365).

³⁵⁶ See *id.* at Vol. I, p. 122:5-10.

³⁵⁷ See *id.* at Vol IV, p. 1206:10-13.

³⁵⁸ See *id.* at Vol. I, p. 121:24-122:1.

³⁵⁹ See *id.* at p. 110:10-24. It did, however, acknowledge that there was a "substantial number" of coal-fired megawatts that were offline during the so-called Polar Vortex. See *id.* at p. 128:17-21. And it acknowledged that the percentage of the total unforced outages during the so-called Polar Vortex was greater for coal than natural gas. See *id.* at 129:22-130:1.

the Oregon Clean Energy Center are all under construction and have interconnection agreements with PJM.³⁶⁰ New generation has been added to PJM, generally, too.³⁶¹

For reasons of law and fact, AEP Ohio's proposed bailout should not be indulged for reasons of supply diversity.

d. AEP Ohio's analysis of the cost impact for consumers on the transmission system is not credible.

AEP Ohio did not consider new generation currently under construction in Ohio that has interconnection agreements with PJM.³⁶² But for purposes of its "analysis" of the impact on the transmission system were the PPA Units to retire, it did include 11,800 additional, non-PPA Unit megawatts of retirement.³⁶³ The 11,800 non-PPA Unit megawatts will retire regardless of whether the PPA Units retire.³⁶⁴ And AEP Ohio does not know what level of upgrades to the transmission system, if any, would be needed if only the PPA Units were retired.³⁶⁵ Including the 11,800 megawatts from non-PPA Units substantially increases the modeled impact on transmission, including the financial impact ultimately charged to consumers.³⁶⁶

³⁶⁰ See *id.* at Vol. VIII, p. 2096:6-14 (Carrol County Energy); p. 2099:12-20 and 2100:21-25 (Middletown Energy Center); p. 2103:7-18 (Oregon Clean Energy Center). Proposed new generation arose even during the pendency of the hearing in this matter. See *id.* at 2145:8-19.

³⁶¹ See *id.* at p. 2122:18-21. Conveniently, AEP Ohio did not consider this new generation for purposes of this proceeding. See *id.* at p. 2139:5-12. Nor, conveniently, did AEP Ohio consider the effects of increased natural gas production in Ohio on bringing new generation to Ohio. See *id.* at 2136:6-11 and 2137:22-2138:1.

³⁶² See, e.g., *id.* at Vol. VI, p. 1582:10-1583:1 (did not consider Carrol County Energy); p. 1583:21-1584:4 (did not consider Oregon Clean Energy Center).

³⁶³ See *id.* at p. 1553:3-8; 1563:2-5. AEP Ohio Witness Fetter neither reviewed AEP Ohio Witness Bradish's transmission "analysis" nor is he offering an opinion about its reasonableness. See *id.* at Vol. III, p. 831:16-24.

³⁶⁴ See *id.* at Vol. VI, p. 1555:19-25.

³⁶⁵ See, e.g., *id.* at 1554:9-16; 1556:15-21; 1557:1-15; 1558:4-14; 1559:14-19.

³⁶⁶ See *id.* at p. 1547:6-12.

Further calling into question the credibility of AEP Ohio's model, the non-PPA Units that AEP Ohio included in its model may not even be the ones that actually do retire.³⁶⁷ Yet another assumption in AEP Ohio's model that seriously undermines its credibility is that *all* of the PPA Units and *all* of the 11,800 megawatts from the non-PPA Units retire *on the same day*.³⁶⁸ A more reasonable approach – that the PPA Units retire at different times – was not performed by AEP Ohio.³⁶⁹

PJM is both responsible for, and capable of, ensuring the reliability of the transmission system. There are no plans to retire the PPA Units that AEPGR owns 100 percent, and AEP Ohio could not retire the plants it co-owns. AEP is, itself, diversifying its generation portfolio. The PPA Rider does nothing more than maintain coal's current dominance of AEP's generation fleet. The market, in any event, is working both to induce the construction of new generation and to diversity the supply portfolio. AEP Ohio's effort to forecast the impact on the transmission system in light of retirements is not credible because it includes a substantial amount (on the order of 3 to 1) of non-PPA Unit retirements. AEP Ohio cannot specify the impact, if any, of retiring the PPA Units on the transmission system. Further, it does not include new generation. For these reasons, AEP Ohio has failed to meet its burden of proof on the second factor from the PUCO's ESP III Opinion and Order.

³⁶⁷ See *id.* at p. 1569:17-21; 1578:22-25. One of AEP's own generating facilities was included in the model as a non-PPA Unit retirement but has since gotten approval, and begun the process of, converting fuel supply in such a manner that makes it less likely to retire. See *id.* at 1570:4-25.

³⁶⁸ See *id.* at p. 1553:18-22; *id.* at Vol. I, p. 184:21-185:10; *id.* at Vol. VII, p. 1912:5-7.

³⁶⁹ See *id.* at Vol. I, p. 185:11-14; *id.* at Vol. VII, p. 1912:8-11.

3. AEP Ohio has not shown, and cannot show, that the PPA Units are compliant with current environmental regulations or a plan for complying with pending environmental regulations. That is concerning because Ohio consumers could be tapped for subsidizing costly power plant environmental upgrades.

The record evidence confirms that uncertainty is the only certainty when it comes to environmental regulations and compliance costs. Accordingly, AEP Ohio has not shown, and cannot show, that the PPA Units are compliant with current environmental regulations and a plan for complying with pending environmental regulations as required by the PUCO in its ESP III Opinion and Order.

AEP Ohio does not develop environmental compliance projects at the co-owned PPA Units.³⁷⁰ Nor does AEP Ohio know what the environmental compliance cost estimates for the PPA Units operated by non-AEP entities are based on.³⁷¹ Although AEP Ohio modeled the financial impact of the PPA Rider through 2024, germane environmental regulations will require compliance thereafter.³⁷² Even through 2024, there is uncertainty regarding the costs of complying with current and pending environmental regulations and the best AEP Ohio can muster is a “good estimate.”³⁷³

Notwithstanding the “good estimate,” AEP Ohio concedes that compliance cost estimates could change – “[t]here’s a lot of things that could change the numbers that [AEP Ohio] used as estimates.”³⁷⁴ Indeed, AEP Ohio does not even know the going price

³⁷⁰ See *id.* at Vol. IV, p. 970:24-971:3 (Stuart and Zimmer).

³⁷¹ See *id.* at p. 977:12-16.

³⁷² See *id.* at p. 978:13-22.

³⁷³ See *id.* at p. 980:16-981:3.

³⁷⁴ See *id.* at p. 993:23-994:9.

for how it proposes to comply with environmental regulations.³⁷⁵ Nor can AEP Ohio describe in detail how it will comply with the Clean Power Plan, or even what will be required.³⁷⁶ It needs first to know the terms of a yet-to-be determined state implementation plan or a federal implementation plan.³⁷⁷

Because such terms are uncertain, it is also uncertain what capital and operation and maintenance expenses will be charged to consumers for complying with the Clean Power Plan.³⁷⁸ It is certain, however, that the Clean Power Plan's end goal is to reduce carbon emissions and that the carbon emission rate from coal combustion is higher than other fossil fuels.³⁷⁹ Thus it is also certain that the Clean Power Plan will likely impact coal-fired generation significantly – much more so than other generation.

The trend is that environmental regulations are becoming more stringent on coal-fired generation.³⁸⁰ New regulations are a reasonable possibility.³⁸¹ As a result, additional capital and operating or maintenance costs are a possibility.³⁸² But even though the Amended Application proposes PPAs and a PPA Rider for the life of the PPA Units,³⁸³ there is no way to foresee what the environmental regulatory regime, or the level of costs to be charged to consumers for complying therewith, will look like during that

³⁷⁵ See, e.g., *id.* at 1028:11-19 (price for purchasing allowances for complying with CASPR); *id.* at 1028:23-1029:3 (does not know if it is more cost-effective to buy allowances or make additional investments).

³⁷⁶ See *id.* at p. 1071:4-11.

³⁷⁷ See *id.* at p. 1072:7-12.

³⁷⁸ See *id.* at p. 1072:22-1073:6.

³⁷⁹ See *id.* at p. 1084:13-24.

³⁸⁰ See *id.* at p. 1073:21-25.

³⁸¹ See *id.* at p. 962:4-12; 979:3-11.

³⁸² See *id.* at p. 1074:19-23.

³⁸³ See *id.* at p. 1075:13-17. Or if the Joint Stipulation is approved and the Amended Application modified, for at least eight and a half years.

term.³⁸⁴ So AEP Ohio has not provided any analysis of environmental compliance obligations for the life of the PPA Units.³⁸⁵ And it has not provided operation and maintenance costs associated with environmental requirements beyond the year 2024, though it is unreasonable to assume that there will be zero dollars spent on operation and maintenance for environmental projects after that year.³⁸⁶ This is no doubt because environmental compliance costs after 2024 are, according to AEP Ohio, “uncertain[.]”³⁸⁷

At this time, the breadth and scope of current and pending environmental regulations are unknown. Accordingly, compliance costs consumers would be obligated to pay are unknown. As a result, AEP Ohio’s environmental compliance plans, and the costs associated therewith, are unknown. In light of the uncertainty surrounding environmental regulations, current and pending, and the compliance costs associated therewith, it stretches credulity to even consider “life of the plant” contracts, or even eight year contracts that may be renewed, for coal-fired generation. AEP Ohio has failed to meet its burden of proof on the third factor from the PUCO’s ESP III Opinion and Order.

4. AEP Ohio has advanced claims about the economic impact of closing the power plants (not that there is any conclusion that the power plants would close), without offering credible evidence regarding economic impact.

AEP Ohio is tasked with the burden of proof to show the impact that closing the PPA Units would have *on electric prices* and the resulting effect on economic development in the state. But AEP Ohio has chosen to focus primarily on the economic

³⁸⁴ See *id.* at p. 1076:6-10; *id.* at 1079:19-22.

³⁸⁵ See *id.* at p. 959:8-12.

³⁸⁶ See *id.* at p. 1182:12-1183:2.

³⁸⁷ See *id.* at p. 1185:11-15.

impact of closing the PPA Units.³⁸⁸ To do so, AEP Ohio Witness Allen attached to his testimony an alleged economic analysis performed by someone else utilizing economic base theory.³⁸⁹ According to the documents attached to AEP Ohio Witness Allen's

Direct Testimony:

Economic base theory was used to develop impact multipliers in this study. This theory divides the local economy into two sectors. The basic sector drives growth in the local economy and is dependent upon external factors and exports goods and services from the region. The non-basic sector is driven by local business activity and primarily serves customers in the region. Location quotients are one method to determine basic and non-basic sectors. The location quotient measures the relative intensity of a sector in a region or a state versus the nation. . . . The direct impact of the converted plant is measured as the employment our output of the facility. The total impact is the direct impact multiplied by the economic base multiplier.³⁹⁰

The purported economic impacts of closing the PPA Units were measured in certain defined regions³⁹¹ and the state.³⁹²

a. AEP Ohio Witness Allen is not qualified to render an opinion on AEP's economic analysis.

AEP Ohio Witness Allen neither wrote the documents containing the purported economic analysis nor ran the model resulting in the information therein.³⁹³ He has not studied specific economic impact methodologies.³⁹⁴ He has never taught a course on

³⁸⁸ To the degree that AEP Ohio's "analysis" of the impact on the transmission system were the PPA Units to close was meant to address economic impact in addition to reliability, the "analysis" should be rejected for the same reasons demonstrated earlier. *See* sec. 2d, *supra*.

³⁸⁹ *See* Direct Testimony of William A. Allen (AEP Ohio Ex. 10) filed May 15, 2015 at p. 11:4-18; WAA-3 and WAA-4.

³⁹⁰ *See id.* at WAA-3, p. 2-3; WAA-4, p. 7.

³⁹¹ *See id.* at WAA-3, p. 4 (defining OVEC Region); WAA-4, p. 10 (defining Cardinal Region, Conesville Region, and Stuart-Zimmer Region).

³⁹² *See, e.g., id.* at WAA-3, p. 3; WAA-4, p. 7-8.

³⁹³ *See* Hearing Transcript at Vol. VII, p. 1779:24-1780:4.

³⁹⁴ *See id.* at p. 1777:17-19.

economic development or economic development models.³⁹⁵ He has not published any books, treatises, or dissertations on economic development theory, economic development studies, or their underlying methodology and procedures.³⁹⁶ AEP Ohio Witness Allen admits that he is not an expert in the economic base model.³⁹⁷ He does not even claim to be an economist.³⁹⁸ Therefore, AEP Ohio Witness Allen is unqualified as an expert to render an opinion on the economic analysis required by the PUCO.

b. AEP Ohio Witness Allen should have the requisite expertise and involvement to opine on economic analysis, but he doesn't.

AEP Ohio Witness Allen admits that he is not an expert in the economic base model and not an economist. It therefore is not surprising that he had next to no involvement in the purported economic analysis attached to his testimony and even less knowledge of it. On the former, he did not direct what model to use for the analysis.³⁹⁹ Although other models could have been used to test the economic base model's accuracy, AEP Ohio Witness Allen did not direct that models other than the economic base model be used.⁴⁰⁰ He did not direct that 100 percent of an industry be considered as basic, nor that 100 percent of an industry be considered non-basic.⁴⁰¹ He did not direct what counties to include in the OVEC Region,⁴⁰² the Cardinal Region,⁴⁰³ the Conesville

³⁹⁵ See *id.* at p. 1779:3-6.

³⁹⁶ See *id.* at p. 1820:4-12.

³⁹⁷ See *id.* at p. 1787:8-11.

³⁹⁸ See *id.* at p. 1936:13-25.

³⁹⁹ See *id.* at p. 1933:16-19; 1781:7-10.

⁴⁰⁰ See *id.* at p. 1933:20-23.

⁴⁰¹ See *id.* at p. 1933:24-1934:6.

⁴⁰² See *id.* at p. 1934:12-16.

⁴⁰³ See *id.* at p. 1934:17-20.

Region,⁴⁰⁴ or the Stuart-Zimmer Region.⁴⁰⁵ He gave no direction regarding which PPA Units shut down, when, or on any other matter related to the forecasted shutdown of the PPA Units.⁴⁰⁶

On the latter, being AEP Ohio Witness Allen's lack of knowledge of the purported economic analysis attached to his testimony, he does not know what industries were used in the analysis. He does not know how specific/non-specific the industries were classified, or how much of an industry considered in the analysis was assigned to the basic sector.⁴⁰⁷ He does not know what industries were included in either the basic or non-basic sector.⁴⁰⁸ Nor does he know that economic base theory focuses on the demand side of the economy and ignores the supply side.⁴⁰⁹ AEP Ohio Witness Allen does not know if the basic sector is equivalent to the export sector or if the non-basic sector is equal to the service sector.⁴¹⁰ He knows neither which location quotients were utilized in the model employed by someone else to create the documents attached to his Direct Testimony nor any other specific elements included in the model.⁴¹¹ This further amplifies the fact that AEP Ohio Witness Allen lacks the requisite expertise to render an opinion on the economic analysis attached to his testimony. No weight should be given to his testimony.

⁴⁰⁴ See *id.* at p. 1934:21-24.

⁴⁰⁵ See *id.* at p. 1934:25-1935:3.

⁴⁰⁶ See *id.* at p. 1935:12-15.

⁴⁰⁷ See *id.* at p. 1788:5-25.

⁴⁰⁸ See *id.* at p. 1787:13-21.

⁴⁰⁹ See *id.* at p. 1806:13-19.

⁴¹⁰ See *id.* at p. 1792:23-1793:4.

⁴¹¹ See *id.* at p. 1789:5-12.

c. AEP Ohio Witness Allen did not focus on electricity prices. The Ohio General Assembly focused on electricity prices.

The Ohio General Assembly’s policy for Ohio requires “reasonably priced” electric service, per R.C. 4928.02(A). Rather than look at the impact on electric prices and the resultant impact on Ohio’s economy, as directed by the PUCO in its ESP III Opinion and Order, the documents created by someone else attached to AEP Ohio Witness Allen’s testimony looked at the impacts of the plants not existing – not the effect of the PPA Rider on electricity prices.⁴¹² This fundamental flaw is highlighted by the acknowledgement of AEP Ohio’s President that an increase in electric prices would have a negative impact on energy-intensive customers’ productivity.⁴¹³ Additionally, the “analysis” is based on the completely unrealistic assumption that *all* of the PPA Units close *all at the same time*.⁴¹⁴ It ignored reality, too, by not accounting for new generation⁴¹⁵ and assuming that the PPA Units’ employees could find no other jobs in the region.⁴¹⁶

AEP Ohio has offered no credible evidence on economic impact. It has not, based on its own admission, offered any evidence on what the ESP III Opinion and Order required. AEP Ohio has therefore failed to meet its burden of proof on the fourth factor from the PUCO’s ESP III Opinion and Order.

⁴¹² See *id.* at p. 1806:23-1807:4; 1816:24-1817:4; 2018:1-7.

⁴¹³ See *id.* at p. Vol. I, p. 156:20-157:7.

⁴¹⁴ See *id.* at Vol. VII, p. 1806:23-1807:4; 1816:24-1817:4; 2018:1-7.

⁴¹⁵ See *id.* at p. 1807:18-22.

⁴¹⁶ See *id.* at p.1812:6-10.

5. AEP Ohio’s proposal should, but did not, provide for rigorous PUCO oversight, full information sharing, and allocating financial risk as required by the PUCO -- thus opening the door to consumer harm.

In the ESP III Opinion and Order, the PUCO instructed AEP Ohio to include certain provisions in a future filing seeking approval for a PPA Rider. The PUCO also directed AEP Ohio to provide in the future filing:

- Provision for rigorous PUCO oversight of the rider, including a proposed process for a periodic substantive review and audit;
- A commitment to full information sharing with the PUCO and its Staff;
- An alternative plan to allocate the rider’s financial risk between it and its ratepayers; and
- A severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.⁴¹⁷

a. AEP Ohio does not provide for rigorous oversight, thus increasing risk to consumers.

AEP Ohio’s proposal for PUCO oversight leaves out the rigor in rigorous.⁴¹⁸ It does not permit public participation and transparency, as it only permits a bilateral process between AEP Ohio and the PUCO.⁴¹⁹ It would not involve a hearing.⁴²⁰ Though AEP Ohio says that its “intent” would be to bring to the PUCO for an up-front preconstruction prudency review of any “significant investment,”⁴²¹ it fails to provide any

⁴¹⁷ See ESP III Opinion and Order at 25-26.

⁴¹⁸ The Joint Stipulation does not change the PUCO’s review from that contemplated under the Amended Application. See Hearing Transcript at Vol. XIX, p. 4728:22-4729:4.

⁴¹⁹ See *id.* at Vol. I, p. 75:2-7.

⁴²⁰ See *id.* at p. 74:1-8.

⁴²¹ See *id.* at p. 161:3-17.

threshold for what is a “significant investment.”⁴²² Not to worry, says AEP Ohio, if it does not fulfill its intent to seek an up-front preconstruction prudency review. The PUCO could look at the investment after the fact, when the dollars have already been spent or are in the process of being spent.⁴²³ Under AEP Ohio’s proposal, consumers have limited protection against unjust and unreasonable charges due to the lack of a rigorous review process. Once the investment is made or the dollars are spent, it is an uphill battle to demonstrate imprudence without the due process protection of a hearing.

b. There should be transparency and information disclosure in the processes of the AEP Ohio proposal, but AEP Ohio does not commit to adequate transparency and information-sharing, thus increasing risk to consumers.

AEP Ohio’s relative commitment to full information sharing is ambiguous, at best. On the one hand, AEP Ohio asserts that the PUCO will have access to information that AEP Ohio has available to it.⁴²⁴ But the term sheet provides that AEPGR will keep, or cause to be kept, all necessary books of record, books of account, and memoranda of all transactions involving the PPA Units,⁴²⁵ which documents will remain in AEPGR’s possession.⁴²⁶

On the other hand, AEP Ohio asserts that it will provide the PUCO with summaries and details about the information contained in the books and records for OVEC and AEPGR.⁴²⁷ Such summaries and details “may or may not” include the actual

⁴²² See *id.* at p. 184:1-6.

⁴²³ See *id.* at p. 184:13-20.

⁴²⁴ See, e.g., *id.* at Vol. VII, p. 1830:24-1831:3.

⁴²⁵ See *id.* at Vol. I, p. 65:25-66:3.

⁴²⁶ See *id.* at p. 67:7-9.

⁴²⁷ See *id.* at p. 72:24:73:5.

books themselves – whatever is necessary, in AEP Ohio’s view, for the PUCO to do an audit and review.⁴²⁸ On yet another hand, AEPGR fleet information on any “cost component” will be provided to Staff upon “reasonable request” (as determined by the PUCO), but only if made in connection with a *specific* cost component of the PPA Units.⁴²⁹ It is difficult to conceive that the PUCO can undertake a comprehensive and detailed examination of PPA expenditures if its review is limited to a specific cost examination.

These limitations and restrictions on information to be shared with the PUCO are disconcerting in their own right. Additionally, other interested parties, such as state consumer representative OCC, seem to be allowed no rights to information whatsoever. That is wrong for Ohioans.

c. AEP Ohio does not properly allocate financial risk, thus increasing risk to consumers.

AEP Ohio asserts that it has properly allocated the financial risks associated with the PPA Rider because it runs the risk that the PUCO may disallow cost recovery and, as a result, its credit rating could be impacted.⁴³⁰ Further, any PPA Rider balance could be disallowed in a future ESP proceeding or the PPA Rider may not be renewed in such future proceeding.⁴³¹ Yet, as Staff recognized in the initial stage of this proceeding, such risk that AEP Ohio is purportedly retaining is no risk at all because the costs of a disallowance, or not renewing the PPA Rider, are simply too high.

⁴²⁸ See *id.* at p. 73:6-11.

⁴²⁹ See Joint Ex. 1 at p. 7, para. 5b.

⁴³⁰ See Hearing Transcript at Vol. I, p. 94:2-7; 179:11-15.

⁴³¹ See Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 29:6-7.

If the PUCO were to make a disallowance, AEP Ohio would still be required to pay AEPGR the PPA contract price.⁴³² AEP Ohio would have the option of terminating the PPAs.⁴³³ If it did so, AEP Ohio would be responsible under the PPAs for paying AEPGR the undepreciated net book value of the PPA Units (or, if the Joint Stipulation is approved, liquidated damages).⁴³⁴ So if the PUCO were contemplating a disallowance, it would have to do so with an eye toward the fact that if it made one, AEP Ohio might terminate the PPAs and then be on the hook for paying the undepreciated net book value for the PPA Units and expected retirement-related costs (or liquidated damages).⁴³⁵ Once AEP Ohio became obligated to pay the undepreciated net book value for the PPA Units and expected retirement-related costs (or liquidated damages), it would come to the PUCO to obtain authority for a mechanism for collecting such costs from customers.⁴³⁶

If the PUCO were to terminate the PPA Rider in a future ESP proceeding, AEP Ohio would still be required to pay AEPGR the PPA contract price.⁴³⁷ AEP Ohio would

⁴³² See, e.g., Hearing Transcript at Vol. I, p. 77:2-8. Further, AEP Ohio is not waiving any rights to challenge a disallowance. See *id.* at Vol. XVIII, pp. 4493:21-4494:1.

⁴³³ See Hearing Transcript at Vol. I, p. 177:14-20; Power Purchase and Sale Agreement By and Between GenCo and OPC (Sierra Club Ex. 2, admitted at Hearing Transcript Vol. II, p. 360) at Art. II, sec. 2.3; Art. V, sec. 5.7(B); Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSC Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at Art. II, sec. 2.3; Art. V, sec. 5.7(B) (if Joint Stipulation were approved, AEP Ohio could terminate the PPA if cost recovery were discontinued).

⁴³⁴ See Hearing Transcript at Vol. I, p. 177:21-178:6. If the Joint Stipulation were approved, AEP Ohio would have to pay AEPGR “liquidated damages” of an annual payment equal to the most recent 12 months of actual fixed costs for the shorter of i) three years, or ii) the remainder of the Delivery Period, minus the amount of AEPGR’s forecasted net revenues for Capacity (based on cleared BRA prices) during such shorter period. See Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSC Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at Art. II, sec. 2.3; Art. V, sec. 5.7(B) (if Joint Stipulation were approved, AEP Ohio could terminate the PPA if cost recovery were discontinued); Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at Attachment A para. 3.

⁴³⁵ See *id.*

⁴³⁶ See Hearing Transcript at Vol. I, p. 178:7-179:2.

⁴³⁷ See *id.* at p. 174:8-19.

have the option of terminating the PPAs.⁴³⁸ If it did so, AEP Ohio would be responsible under the PPAs for paying AEPGR the undepreciated net book value of the PPA Units (or, if the Joint Stipulation is approved, liquidated damages).⁴³⁹

Accordingly, were the PUCO to evaluate the PPA Rider in an ESP in light of the MRO v. ESP test, it would have to do so with a wary eye. If it denied the ESP due to the PPA Rider, AEP Ohio would be on the hook for paying AEPGR the undepreciated net book value of the PPA Units and expected retirement-related costs (or liquidated damages).⁴⁴⁰ Once AEP Ohio became obligated to pay the undepreciated net book value for the PPA Units and expected retirement-related costs (or liquidated damages), it would come to the PUCO to obtain authority for a mechanism for collecting such costs from customers.⁴⁴¹

Given the very substantial costs associated with PUCO invocation of the tools that AEP Ohio asserts allocates risks to AEP Ohio – disallowance and terminating the PPA Rider – Staff itself recognized in the first phase of this proceeding that such tools are not

⁴³⁸ See *id.* at p. 175:12-18; Power Purchase and Sale Agreement By and Between GenCo and OPC (Sierra Club Ex. 2, admitted at Hearing Transcript Vol. II, p. 360) at Art. II, sec. 2.3; Art. V, sec. 5.7(B); Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSCo Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at Art. II, sec. 2.3; Art. V, sec. 5.7(B).

⁴³⁹ See Hearing Transcript at Vol. I, p. 176:21-177:2; Vol. II, 490:2-13; Power Purchase and Sale Agreement By and Between GenCo and OPC (Sierra Club Ex. 2, admitted at Hearing Transcript Vol. II, p. 360) at Art. II, sec. 2.3; Art. V, sec. 5.7(B). If the Joint Stipulation were approved, AEP Ohio would have to pay AEPGR “liquidated damages” of an annual payment equal to the most recent 12 months of actual fixed costs for the shorter of i) three years, or ii) the remainder of the Delivery Period, minus the amount of AEPGR’s forecasted net revenues for Capacity (based on cleared BRA prices) during such shorter period. See Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSCo Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at Art. II, sec. 2.3; Art. V, sec. 5.7(B); Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at Attachment A para. 3.

⁴⁴⁰ See *id.*; see also Hearing Transcript at Vol. I, p. 177:3-13.

⁴⁴¹ See *id.* at 178:7-179:2; see also *id.* at Vol. III, p. 892:4-893:5 (AEP Ohio Witness Fetter). Meanwhile, AEPGR could continue operating the PPA Units even after having been paid the undepreciated net book value and expected retirement-related costs. See *id.* at Vol. II, p. 424:8-12.

realistic ways to allocate risk to AEP Ohio at all.⁴⁴² Due to the impact that implementing such tools would have on AEP Ohio and, by extension, its customers, at best the PUCO would have to go to FERC and bear the burden of proof.⁴⁴³ Buying a federal lawsuit in Washington, D.C. before FERC – not a proper risk-sharing mechanism, in Staff’s view.⁴⁴⁴

d. All financial risk would be on consumers, exactly where it should not be. In markets (and in good regulation), investors take risks, not consumers.

AEP Ohio readily acknowledges that the Amended Application’s proposals shift the risk and benefits (if any) associated with AEP Ohio Witness Pearce’s (and as updated at AEP Ohio Witness Allen’s direction)⁴⁴⁵ inherently uncertain forecasts to customers.⁴⁴⁶ It readily acknowledges that captive customers would bear the financial risks of forced outages at the PPA Units.⁴⁴⁷ It readily acknowledges that customers would bear the risk of paying capital and fixed operation and maintenance costs if the PPA Units cannot operate.⁴⁴⁸ If the PPA Units are dispatched less than projected (or at all), customers will bear the risk of paying the associated costs.⁴⁴⁹ Customers would bear the risks of

⁴⁴² See *id.* at Vol. XVI, p. 3949:21-3950:15.

⁴⁴³ See *id.* at p. 3949:5-20.

⁴⁴⁴ See Direct Testimony of Dr. Hisham Choueiki (Staff Ex. 1) filed October 9, 2015 at p. 15:3-12.

⁴⁴⁵ See Hearing Transcript at Vol. XVIII, p. 4566:22-4567:5.

⁴⁴⁶ See *id.* at Vol. I, p. 172:15-173:2; *id.* at Vol. III, p. 921:10-17; *id.* at Vol III, p. 849:8-17.

⁴⁴⁷ See *id.* at Vol. II, p. 463:10-464:22.

⁴⁴⁸ See *id.* at Vol. I, p. 111:1-6.

⁴⁴⁹ See *id.* at p. 111:7-11.

incurring costs for prolonged outages.⁴⁵⁰ Customers would also bear the risks that the PPA Units incur capacity performance penalties or have increases in heat rate.⁴⁵¹

AEP Ohio readily acknowledges that customers would bear the financial risks related to the filing, defense, and settlement of claims, suits, and causes of action⁴⁵² -- including governmental penalties.⁴⁵³ So for example, if AEPGR were to enter a consent decree with the Environmental Protection Agency requiring a capital project, customers would bear the costs *plus a return on equity*.⁴⁵⁴ It readily acknowledges that customers would bear all the risk associated with an increase in the weighted average cost of capital.⁴⁵⁵ Indeed, it readily admits that one of the primary financial risks it is allegedly retaining under its proposal – decreased credit rating due to disallowances – could also flow through to customers.⁴⁵⁶ Said succinctly, AEP Ohio’s customers would bear the risk “for all the costs associated with operating the [PPA] Units.”⁴⁵⁷

AEP Ohio has not met its burden of proof regarding rigorous oversight, information sharing, or properly allocating financial risk.

⁴⁵⁰ See *id.* at p. 111:12-15.

⁴⁵¹ See *id.* at p. 111:16-25.

⁴⁵² See *id.* at Vol. II, p. 328:13-19.

⁴⁵³ See *id.* at p. 328:20-25.

⁴⁵⁴ See *id.* at p. 333:20-334:5.

⁴⁵⁵ See *id.* at p. 377:7-15.

⁴⁵⁶ See *id.* at Vol. I, p. 94:2-15.

⁴⁵⁷ See *id.* at p. 111:24-25.

D. Rejecting the Amended Application/Modified Amended Application is confirmed by, and independently justified by, OCC's evidence.

1. By subsidizing the PPA Units' operating and capital costs, the PPA Rider shifts all risks of their continued operation to AEP Ohio's captive customers, contrary to Ohio law and distorting the PJM markets.

The evidence in this proceeding shows that the proposed PPA Rider will result in the unlawful subsidization⁴⁵⁸ of AEPGR's merchant PPA Units by AEP Ohio's captive customers.⁴⁵⁹ Under the proposal, captive customers would be forced to pay for AEPGR's investment in the PPA Units, including a guaranteed return on that investment, in the staggering amount of \$2 billion (\$1.6 on a net present value basis)⁴⁶⁰ over the initial ten-year period (or eight and a half year period, if the Joint Stipulation is approved) of the PPAs.⁴⁶¹ Unfortunately, the harm to captive customers is not limited to the amount of this unlawful and unnecessary subsidy, but is exacerbated by the harm done to customers by the PPA Rider's effect on the competitive market created by the General Assembly and PJM's energy and capacity markets. This further harm, described below, provides additional justification to deny AEP Ohio's Amended Application/Modified Amended Application.

⁴⁵⁸ See R.C. 4928.02(H); Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 19.

⁴⁵⁹ See Hearing Transcript at Vol. XIII, p. 3424:21-3425:2; *see also* R.C. 4905.33 (prohibiting discrimination).

⁴⁶⁰ If the Joint Stipulation is approved, the figures would be \$1.9 billion and \$1.5 billion, respectively. *See* Supplemental Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at 7. The PPA Rider's cost under the Joint Stipulation confirms that the Joint Stipulation offers nothing in the way of a "fix" to the PPA Rider's enormous cost.

⁴⁶¹ Direct Testimony of James E. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13; Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 7 (if Joint Stipulation approved).

a. AEP Ohio's PPA Rider proposal is antithetical to the competitive market created by the General Assembly.

S.B. 3 became the law in Ohio in 1999⁴⁶² and the specific provisions pertaining to stranded investment, R.C. 4928.38 and 4928.39, remain applicable today.⁴⁶³ The legislative goals of S.B. 3 were to deregulate the generation market and end the use of cost-based rates for generation services in the state of Ohio.⁴⁶⁴ Cost-based regulation was to be replaced by market competition as a means to determine the wholesale and retail generation prices for all electricity customers.⁴⁶⁵ Consequently, after the enactment of S.B. 3, market forces are to determine which power plants should be operated and which power plants should be retired if they are inefficient and uneconomic.⁴⁶⁶ The fundamental idea behind S.B. 3 is that retail customers should not now be asked to protect Ohio electric utilities from competitive generation market risks or losses. Customers should also not be asked to pay a penny more than the market price for generation.

i. Under R.C. 4928.38, AEP Ohio may no longer receive transition revenues and “shall be fully on its own in the competitive market.”

A market development period was provided under S.B. 3 to provide electric utilities in Ohio time to prepare for a competitive market environment. Under R.C.

⁴⁶² As Passed by the Ohio 123rd General Assembly, 1999.

⁴⁶³ See Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 11:1-3.

⁴⁶⁴ Legislative Service Commission, Final Analysis, Am. Sub. S.B. 3, 123rd General Assembly, 1999; see Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at 11:5-7.

⁴⁶⁵ See Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 11:7-9.

⁴⁶⁶ See *id.* at p. 11:9-11.

4928.38, an electric utility had the opportunity to receive transition revenues⁴⁶⁷ from the starting date of competitive retail electric service through the end of the market development period. That time period expired on December 31, 2005.⁴⁶⁸ R.C. 4928.38 provides that once a utility's market development period ends, "the utility shall be fully on its own in the competitive market" and that the commission "shall not authorize the receipt of transition revenues or any equivalent revenues" after the termination of the market development period.⁴⁶⁹ AEP Ohio has already reaped the benefit of the market development period paid for by consumers, and it is over.

The market period has elapsed. From December 31, 2005 onwards, prices are supposed to be determined based on market forces.⁴⁷⁰ That is, AEP Ohio (and its affiliate) cannot charge captive customers of regulated services for revenues to support deregulated power plants.⁴⁷¹ AEPGR is now "wholly responsible" for whether they are in a competitive position in the generation market.⁴⁷² Customers should not be asked to guarantee the profitability of AEP Ohio's affiliate-owned generation units.⁴⁷³ Here, that is precisely what AEP Ohio is proposing because the PPA Rider, if approved, would

⁴⁶⁷ R.C. 4928.39 defines transition costs as costs unrecoverable in a competitive environment.

⁴⁶⁸ It should be noted that the "Generation Transition Charge" (GTC) ended at the end of 2005, but, for "regulatory transition charges" (RTC), the end dates were extended, per the PUCO-approved stipulation. Specifically, the stipulation indicates that the RTC recovery periods will not extend beyond December 31, 2006 for Ohio Edison, June 30, 2007 for Toledo Edison, and December 31, 2008 for CEI except in some limited circumstances. See *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM, Opinion and Order (July 19, 2000).

⁴⁶⁹ See R.C. 4928.38 (requiring that after the market development period is over, the utility is to no longer receive transition revenues and "shall be fully on its own in the competitive market.").

⁴⁷⁰ See Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at 16:3-15.

⁴⁷¹ See *id.* at p. 10:6-8.

⁴⁷² See *id.* at p. 12:16-17.

⁴⁷³ See *id.* at p. 12:17-19.

essentially amount to a bail-out funded by consumers for PPA Units.⁴⁷⁴ This would be bad public policy, it is a violation of Ohio public policy in R.C. 4828.02(H) among other policies, and it is contrary to the legislative mandate that the industry is to be on its own in the competitive market.⁴⁷⁵

ii. Neither AEP nor AEPGR should be permitted to use government regulation to collect additional revenues from captive consumers.

The PPA Rider can be viewed as either (1) a continuation of transition or “stranded” cost recovery for those power plants, which as explained above should no longer be permitted or (2) a loosely-designed cost-based regulation that incorporates a revenue guarantee for those generation plants.⁴⁷⁶ Either is problematic because the “cost” (or PPA contract price) of the specific generation assets is determined through bilateral contracts between affiliated companies, and the “cost” (or contract price) are not set by FERC or the PUCO.⁴⁷⁷ But the proposed PPA is considerably inferior to the traditional cost-based regulation because it is actually a revenue guarantee masked as partial cost-based regulation.⁴⁷⁸ The proposal lacks the important checks and balances that usually

⁴⁷⁴ See *id.* at p. 8:11-13.

⁴⁷⁵ See *id.* at p. 13:8-11, 15:5-6, 21:17-20; see also R.C. sec. 4928.38 (requiring that after the market development period is over, the utility is to no longer receive transition revenues and “shall be fully on its own in the competitive market.”). AEP Ohio’s market development period ended on December 31, 2005. See *In the Matter of the Application of Columbus Southern Power of Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC. Opinion and Order of January 26, 2005 at 5, 14.

⁴⁷⁶ See Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 13:13-17.

⁴⁷⁷ See *id.* at p. 13:17-20.

⁴⁷⁸ See *id.* at p. 14:11-13.

accompany traditional or cost-based regulation, such as a rigorous or meaningful prudence review of costs incurred, and information sharing.⁴⁷⁹

Under the proposed PPA, in a broader sense, AEP would be collecting additional revenues (that are above market price) from captive customers of its EDUs.⁴⁸⁰ And then the revenues would be transferred to the unregulated subsidiary AEPGR (the entity that actually owns generation assets that are no longer price-regulated by the State of Ohio).⁴⁸¹ By doing so, AEP will receive a guaranteed return on some of its generation capital investments.⁴⁸² These revenues would provide AEP, or its unregulated subsidiary AEPGR, additional dollars that it allegedly otherwise cannot collect by selling generation services in the wholesale or retail market.⁴⁸³

This scheme is contrary to the legislative intent of S.B. 3 to create a competitive generation market in the state.⁴⁸⁴ If AEP Ohio's Amended Application/Modified Amended Application were granted by the PUCO, some of AEPGR's generation plants would receive this additional revenue in the form of a guaranteed return.⁴⁸⁵ But other non-affiliated electric suppliers would not receive any similar guaranteed return for their competing in the market.⁴⁸⁶ In this regard, approving the PPA and its associated Rider will place generators other than AEPGR at a competitive disadvantage in the market.⁴⁸⁷

⁴⁷⁹ See *id.* at p. 14:13-15.

⁴⁸⁰ See *id.* at p. 14:17-19.

⁴⁸¹ See *id.* at p. 14:19-22.

⁴⁸² See *id.* at p. 14:22-23.

⁴⁸³ See *id.* at p. 14:23-15:1-3.

⁴⁸⁴ See *id.* at p. 15:5-6.

⁴⁸⁵ See *id.* at p. 15:6-8.

⁴⁸⁶ See *id.* at p. 15:8-10; see also R.C. 4905.35 (prohibiting discrimination).

⁴⁸⁷ See Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 15:10-12.

And the PPA Rider will impair the operation of a competitive market that is intended to provide generation pricing for Ohio electric customers.⁴⁸⁸

b. The PPA Rider cross-subsidizes generation contrary to state policy and consumer interests.

Authorization of the PPA Rider would also not ensure the avoidance of anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail service and other policies under Ohio law.⁴⁸⁹ R.C.4928.02(H) states that the state's policy is 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.⁴⁹⁰

This is often referred to as cross-subsidization, which includes, for example, having non-competitive services, such as distribution, subsidize competitive services, such as generation.⁴⁹¹

Here, the PPA Rider is a non-bypassable generation charge assessed through AEP Ohio and collected from all captive distribution customers, and, therefore, it is an example of cross-subsidization of generation service by distribution customers.⁴⁹² Accordingly, approving the PPA Rider would violate this state policy.⁴⁹³ The non-

⁴⁸⁸ See *id.* at p. 15:12-14.

⁴⁸⁹ See *id.* at p. 19.

⁴⁹⁰ See R.C. 4928.02(H); Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 19:6-11.

⁴⁹¹ See Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 19:13-15.

⁴⁹² See *id.* at p. 19:15-18.

⁴⁹³ See *id.* at p. 19:20.

bypassable charge collected through the PPA Rider only benefits one supplier, and provides additional revenue to that supplier that other suppliers in the market do not receive.⁴⁹⁴

2. AEP Ohio's proposal is too costly for consumers and is unnecessary.

AEP Ohio projects that the PPA Rider under its Low Load Case will produce a net loss to customers of \$0.9 billion over the first 10 years or \$0.8 billion, net present value at a five percent discount rate.⁴⁹⁵ That is, under AEP Ohio's Low Load Case, the costs associated with the generation from the PPA Units would exceed the market value by \$0.9 billion over the ten-year period (or nearly \$.7 billion over the eight and a half year period were the Joint Stipulation approved), and this net cost would be collected from AEP Ohio's customers through the PPA Rider over the period.⁴⁹⁶ AEP Ohio alleges that the PPA Rider will produce a credit for customers.⁴⁹⁷

a. AEP Ohio's projections are wrong, and consumers will unlawfully and unreasonably be made to pay for AEP Ohio's overstated estimates of the benefits of its proposal.

The projections described in the direct testimony of OCC Witness Wilson show that the cost to consumers could be much higher than AEP Ohio would have the PUCO believe.⁴⁹⁸ According to him, the cost to customers through the PPA Rider over the ten-

⁴⁹⁴ See *id.* at p. 19:20-23.

⁴⁹⁵ See Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at KDP-2. The germane net loss to customers were the Joint Stipulation approved would be nearly \$.7 billion over the eight and a half years or \$.6 billion net present value at a five percent discount rate. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2, Low Load Forecast.

⁴⁹⁶ See *id.*

⁴⁹⁷ See generally Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015; Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2.

⁴⁹⁸ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13; Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at 7.

year period would be a cumulative \$2.0 billion, or \$1.6 billion on a net present value basis.⁴⁹⁹ There are losses and costs passed through to customers in every year of OCC Witness Wilson's analysis, ranging from \$176 million to \$252 million per year.⁵⁰⁰ Over the forecasted 10 years, compared to an average total market revenue of \$71.6/MWh, the PPA Units' average cost is \$97.7/MWh.⁵⁰¹

Further, OCC Witness Wilson's analysis assumes that the PPA Units will clear PJM's Base Residual Auctions, which is not guaranteed. If they do not clear, offsetting revenues may be substantially decreased and costs to consumers would correspondingly increase.

The PUCO should not rely on AEP Ohio's projection that the PPA Rider will eventually produce a credit for customers. First, there is no evidence, barring AEP Ohio's long term cost projection, to support its position and, as shown throughout this case, an abundance of evidence contradicting it. As OCC Witness Wilson explained, long-term cost projections are extremely unreliable and should not be the basis of such an important PUCO determination.⁵⁰² Any analysis of a resource's future costs and market revenues relies upon multiple, uncertain assumptions and forecasts including energy, ancillary services and capacity market prices, fuel prices, environmental and other

⁴⁹⁹ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13:3-5 and Table 2. Were the Joint Stipulation approved, the costs would be \$1.9 billion and \$1.5 billion, respectively. See Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at 7 and Table 1.

⁵⁰⁰ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13:3-5; Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at 7 and Table 1 (ranging from \$269 million to \$50 million, were the Joint Stipulation approved).

⁵⁰¹ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13:7-9; Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at 7:12-14 (\$74.3/MWh and \$107.3/MWh, respectively, were the Joint Stipulation approved).

⁵⁰² See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 10:5-23-11:1-9.

regulations, the resource's operation, and generation.⁵⁰³ In fact, AEP Ohio Witness Vegas conceded that AEP Witness Pearce's forecast is inherently uncertain.⁵⁰⁴

Accordingly, as AEP Ohio admits, the results of any PPA Rider cost projection or analysis is highly uncertain.⁵⁰⁵ Of course, the farther the forecasts reach into the future, the greater the uncertainty.⁵⁰⁶

If AEP Ohio truly believed in its positive long-term projections, it would not seek to transfer the risk of the PPA Units to customers because it is a for-profit company and has an obligation to its shareholders to maximize its returns.⁵⁰⁷ This fact alone is strong evidence that AEPGR and AEP Ohio do not have faith in the program. If AEPGR is not willing to trust its projections then the PUCO should not do so either.

b. The PPA Rider's purported value as a hedge is greatly overstated by AEP Ohio, and the Rider would add to volatility to consumers' detriment.

AEP Ohio's claims regarding the value of the proposed arrangement as a hedge are based on greatly overstated estimates of the potential volatility of electricity prices in PJM.⁵⁰⁸ While prices can be volatile at times due to extreme weather, such periods last days or weeks, and the impacts on annual average prices are greatly moderated.⁵⁰⁹ Prices

⁵⁰³ See *id.* at p. 10:7-10.

⁵⁰⁴ See Hearing Transcript at Vol. I, p. 272:15-19; *id.* at 172:15-19. Nothing changed with AEP Ohio Ex. 52, WAA-2, prepared at AEP Ohio Witness Allen's direction for purposes of the Joint Stipulation, except the ROE, removing 2015 from the forecast, ending the forecast at May 31, 2024, and including PJM CP auctions. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2; see also Hearing Transcript at Vol. XVIII, p. 4567:18-4568:10.

⁵⁰⁵ See Hearing Transcript at Vol. I, p. 170:25-174:4.

⁵⁰⁶ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 10:12-13.

⁵⁰⁷ See *id.* at p. 66:1-9.

⁵⁰⁸ See *id.* at p. 14:5-7.

⁵⁰⁹ See *id.* at p. 14:7-9.

in PJM have not been volatile and, to the extent they have been, any volatility can be explained by the extreme weather events that PJM faced during January 2014.⁵¹⁰

Further, customers receiving their electric supply under the SSO will be served under one- to three-year full requirements contracts established through periodic auctions and, therefore, would not be exposed to substantial market price volatility.⁵¹¹ The PPA Rider would add a potentially volatile element to such customers' bills.⁵¹² Customers choosing competitive retail electric service would select among the available offerings according to their preferences, and could choose offerings that hedge prices and provide greater stability to the extent that is desired.⁵¹³ For such customers, the PPA Rider, which will be updated annually (or quarterly, if the Joint Stipulation is approved), could potentially move contrary to, or in the same direction as, the market-based prices these customers pay at any time.⁵¹⁴ The potential for the proposed PPA Rider to act as a hedge of volatile market prices or contribute to price stability is doubtful due to the time lag and the likely additional PPA charges to consumers.⁵¹⁵

Over the longer-term, whether the proposed arrangement would increase or decrease customers' bills will depend upon whether the PPA Units' costs are greater than

⁵¹⁰ See *id.* at p. 35-36.

⁵¹¹ See *id.* at p. 14:11-14; see also notes 82-87, *supra*; Hearing Transcript at Vol. XVIII, p. 4519:16-22 (PPA Rider would be adjusted quarterly to reflect deviations between forecasted and actual).

⁵¹² See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 14:14-15; see also notes 82-87, *supra*; Hearing Transcript at Vol. XVIII, p. 4519:16-22 (PPA Rider would be adjusted quarterly to reflect deviations between forecasted and actual).

⁵¹³ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015) at p. 14:15-18.

⁵¹⁴ See *id.* at p. 14:18-20.

⁵¹⁵ See *id.* at p. 14:20-22.

or less than the associated market revenues.⁵¹⁶ As noted above, OCC expects that the costs are very likely to exceed the revenues.⁵¹⁷

Also, as explained in the ESP III Opinion and Order, the current staggering and laddering of electricity auctions and availability of fixed price contracts already provides the financial hedge that AEP Ohio is hoping to achieve with its PPA proposal.⁵¹⁸ AEP Ohio did not refute this fact and has not carried its burden of showing that an additional mechanism, in the form of the PPA, is necessary, much less just and reasonable, to further hedge energy prices as a ploy to protect consumers.

c. AEP Ohio Witness Bletzacker's rebuttal falls short.

AEP Ohio Witness Bletzacker asserts that several intervenor witnesses “through the use of natural gas futures contract . . . are dismissing credible upside threats to US natural gas prices including the prospect of liquefied natural gas exports and compressed liquefied natural gas for use as a transportation fuel.”⁵¹⁹ AEP Ohio Witness Bletzacker's assertions are meritless.

First, he admitted that movement in gas prices in his 2015 forecast was driven by factors independent of liquefied natural gas (“LNG”) exports.⁵²⁰ Thus, AEP Ohio Witness Bletzacker admitted that his own gas price forecast was not dependent on, and in fact varied independently of, LNG exports.⁵²¹ There is no direct correlation between the two issues. Second, AEP Ohio Witness Bletzacker acknowledged at the evidentiary

⁵¹⁶ See *id.* at p. 15:1-3.

⁵¹⁷ See *id.* at p. 15:3-4.

⁵¹⁸ ESP III Opinion and Order at 24.

⁵¹⁹ See Rebuttal Testimony of Karl R. Bletzacker (AEP Ohio Ex. 50) filed October 27, 2015 at p. 7:10-8:3.

⁵²⁰ See Hearing Transcript at Vol. XVII, p. 4091:17-21.

⁵²¹ See *id.*

hearing that he is “not aware of any specific regulation”⁵²² that has the potential for upside cost threat on United States natural gas prices. Without any supporting evidence, his claims must be dismissed.

Third, when AEP Ohio first sought a PPA Rider, it relied on futures prices in its forecasts.⁵²³ Presumably, it provided the PUCO with a forecast based on data – futures prices – that it believed were reasonably reliable. That AEP Ohio is now criticizing the use of futures prices is, to say the least, ironic, and substantially calls into question the reliability and credibility of AEP Ohio Witness Bletzacker’s rebuttal testimony.

3. The PPA Rider subsidy would undermine the PJM energy market by permitting AEP Ohio to develop offer strategies that will harm its captive customers.

An underlying premise of restructured energy markets, such as that operated by PJM, is that customers will benefit from generation assets that supply electricity the most efficiently over the short-run. This benefit is accomplished through a bidding process under which generators must compete against one another to provide electricity to customers.

Those generating assets that are able to provide electricity reliably and at least cost are the assets that ultimately are dispatched.⁵²⁴ But under the proposed PPAs and PPA Rider, neither AEPGR nor AEP Ohio would be subject to this competitive selection process to recover the PPA Units’ costs. This is because the capital and operating costs, plus a guaranteed return on investment, for the PPA Units would be subsidized by captive

⁵²² See *id* at p. 4098:18-20.

⁵²³ See ESP III Opinion and Order at 16.

⁵²⁴ Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at 9.

customers.⁵²⁵ This unlawful subsidization would permit AEP Ohio to follow any strategy in offering the PPA Units into PJM to the detriment of its customers, as illustrated by the following two examples.

First, AEP Ohio could offer the PPA Units into PJM below the PPA Units' costs. Although AEP Ohio would not recover the PPA Units' full costs through the market, AEP Ohio and AEPGR would receive the cost deficit from customers through the PPA Rider subsidy. Under this offer strategy, the artificially low-priced energy from the PPA Units would be dispatched instead of the energy offered by lower-cost generators. Thus, not only would AEP Ohio's captive customers be forced to pay the PPA Rider subsidy, they also would be forced to pay higher PJM market prices for energy due the exclusion of the lower-cost generators' supply from the market.⁵²⁶

Second, and conversely, AEP Ohio could choose a strategy not to offer the PPA Units into PJM's Base Residual Auctions if a unit's cost is above the clearing price. Under this strategy, the PPA Units would not be dispatched and would receive no revenues from the market. Nevertheless, AEP Ohio's captive customers would be required to support the PPA Units through the PPA Rider subsidy. Further, by offering the PPA Units in this way, PJM would be forced to operate higher-cost generators, increasing AEP Ohio's customers' electricity cost even further.⁵²⁷

The record in this proceeding does not disclose the offer strategies that AEP Ohio will use for the PPA Units, and AEP Ohio provides no guarantee, or means to verify, that its offer strategies will not have anti-competitive effects on the PJM wholesale electric

⁵²⁵ See *id.* at p. 11:12-20.

⁵²⁶ See *id.* at p. 12:4-12.

⁵²⁷ See *id.* at p. 12:14-23.

markets to the detriment of Ohio consumers. This fact, coupled with others discussed below, support the PUCO's rejection of the Amended Application/Modified Amended Application.

4. The PPA Rider subsidy would harm consumers by undermining the PJM capacity market, where AEP could operate plants with immunity (funded by consumers) from downsides in market forces.

PJM supplements the revenues generators receive from the energy markets through the capacity market based on the Reliability Pricing Model ("RPM").⁵²⁸ The capacity market is meant to ensure the long-run efficiency of the electric power system.⁵²⁹ It does so by requiring generators to compete against each other in the RPM capacity auctions on the basis of cost.⁵³⁰ Generators that can provide capacity and reliability to the system at lower cost will clear the auction and receive capacity payments.⁵³¹ This process is intended to encourage the retention and entrance of efficient, reliable, and low-cost generation in PJM. This can be accomplished through investment in new low-cost generation technologies (which represent increased profit opportunities), or by the pressure the process exerts on generation owners to reduce capital cost and operating costs for existing plants, and thus increase profitability.⁵³² The subsidized PPA Rider threatens to undermine PJM's capacity market in the following two ways.

⁵²⁸ See *id.* at p. 10:21-23.

⁵²⁹ See *id.* at p. 10:4-7.

⁵³⁰ See *id.* at p. 11:3-6.

⁵³¹ See *id.* at p. 11:6-8.

⁵³² See generally *id.* at p. 10-11.

First, the PPA Rider operates to transfer all costs and operating risks from AEPGR to AEP Ohio's captive customers, assuring AEPGR full cost recovery plus a return on investment.⁵³³ Thus, the PPA Rider subsidy allows AEPGR to continue operating the PPA Units, even if they are less efficient than those with which they compete in the RPM auctions.⁵³⁴ This arrangement that disfavors lower-cost and more efficient generation would increase the cost of electricity for consumers in the long run.⁵³⁵

Indeed, if AEPGR's return on investment is high enough, the PPAs and PPA Rider subsidy may create a strong financial incentive for AEPGR and AEP Ohio to overinvest in the PPA Units.⁵³⁶ Overinvestment is a substantial risk in approving the PPA Rider in this proceeding, considering the limited review that AEP Ohio is willing to provide the PUCO under its proposal.⁵³⁷ Of course, such overinvestment would increase even more the subsidy that captive customers would be forced to pay AEP Ohio under its proposal.

Second, as explained above, the PPA Rider subsidy could affect AEP Ohio's offer strategy, resulting in the PPA Units being offered into PJM either under cost or at their costs, which may be higher than the clearing price.⁵³⁸ If offered at their costs and above the Base Residual Auctions' clearing price, the PPA Units would increase capacity costs. If offered below costs, the PPA Units could suppress capacity costs distorting the

⁵³³ See *id.* at p. 14:21-15:10.

⁵³⁴ See *id.* at p. 15:5-16.

⁵³⁵ See *id.* at p. 15:12-16.

⁵³⁶ See *id.* at p. 15:1-10.

⁵³⁷ See, e.g., Direct Testimony of Dr. Hisham Choueiki (Staff Ex. 1) filed October 9, 2015 at p. 14:4-11.

⁵³⁸ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 15:18-22.

market.⁵³⁹ If AEP Ohio's offer strategy suppresses capacity costs, this could result in lower-cost generation from entering the market.⁵⁴⁰ This would cause customer prices to increase further in the long run, because long-term investments are not being driven by market fundamentals.⁵⁴¹

5. Non-PPA Units' participation in PJM provides additional incentives for AEP Ohio to develop offer strategies that will harm captive customers.

AEP Ohio has a number of affiliates that own generation assets.⁵⁴² These affiliated generating assets participate in the PJM-operated markets and are not included in the proposed PPAs. The participation of these affiliated assets in the markets further complicates how AEP Ohio and AEPGR may offer the PPA Units into the PJM-operated markets.⁵⁴³ As explained above,⁵⁴⁴ the strategies used for offering the PPA Units into the PJM-operated markets can suppress or increase wholesale prices.

In a worst-case scenario for customers, AEP Ohio would have an incentive to not clear the Base Residual Auctions based on specific unit's costs if they exceed the clearing price. Although the PPA Units would not generate any revenues in the market, AEPGR would nevertheless earn a guaranteed profit through the PPAs. AEP Ohio's profits would not be affected because 100 percent of the PPAs' costs would be passed through the PPA Rider to AEP Ohio's customers. The resulting increase in wholesale PJM-market prices would improve the revenues earned by the deregulated affiliate-owned generators

⁵³⁹ See *id.* at p. 16:4-18.

⁵⁴⁰ See *id.* at p. 16:12-15.

⁵⁴¹ See generally *id.* at p. 16.

⁵⁴² See *id.* at p. 17:5-6.

⁵⁴³ See *id.* at p. 17:6-11.

⁵⁴⁴ See sec. 3, *supra*.

participating in the PJM-operated markets. In this worst-case scenario, customer costs rise due to higher wholesale market prices and customers also must pay to subsidize generation assets that are not used to their full potential to serve customer demands (due to their not clearing Base Residual Auctions).⁵⁴⁵

6. The PPA Rider subsidy harms consumers by disincenting AEP Ohio from controlling the PPA Units' costs.

As explained above, the PJM-operated markets provide generation owners with strong incentives to reduce costs. This is because generation owners must recover costs through revenues earned in the market and increase shareholder value. Any cost reduction achieved by a generation owner translates into a profit increase. These incentives are completely eliminated by the proposed PPA Rider subsidy.⁵⁴⁶

For example, a flue-gas desulfurization ("FGD") system may be added to a coal-fired plant in an effort to reduce pollutants. But this would only be done if the FGD system were the most efficient means of achieving these emissions reductions. If so, the costs of the FGD system would be borne by the market and the coal-fired plant would recover its costs. If a more efficient source of emissions reduction exists (*e.g.*, displacing the coal-fired plant with a natural gas-fired plant), that asset would enter the market and drive the coal-fired plant out.⁵⁴⁷

AEP Ohio's proposed PPA Rider eliminates any incentives for it or AEPGR to only make economically prudent investments, because recovery of its costs and a return

⁵⁴⁵ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 17:6-18:9. AEP Ohio has not set up a "firewall" between those that will offer the PPA Units and those that will offer the non-PPA Units into PJM. See Hearing Transcript at Vol. XVIII, p. 4492:18-21.

⁵⁴⁶ See Hearing Transcript at Vol. XIII, p. 3450:9-24.

⁵⁴⁷ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 20:6-14.

on investment are ensured by the PPA Rider.⁵⁴⁸ Considering that the PPA guarantees full recovery of all PPA Unit costs and a return on investment, the PPA provides AEPGR no incentive to ever retire any of the PPA Units.⁵⁴⁹

7. The Amended Application/Modified Amended Application should be denied because AEP Ohio has not met its burden of proof on the factors in the ESP III Opinion and Order.

a. AEP Ohio has not demonstrated a financial need for the PPA Units.

The PPA Units’ “financial need” is not an appropriate (nor a lawful) factor for the PUCO to consider in evaluating the Amended Application/Modified Amended Application.⁵⁵⁰ In any event, the PUCO has not defined what is meant by the term “financial need.”⁵⁵¹ AEP Ohio has taken this lack of direction to advance the nebulous notion that the PPA Units are purportedly in financial need because they are on the “financial bubble” in the short-run.⁵⁵² But AEP Ohio has failed to demonstrate that the PPA Units would be retired absent approval of the PPA Rider and, thus, has failed to demonstrate financial need.

The PJM markets are designed to foster long-run system efficiency by allowing free entry and exit of generating assets. Generating assets that are not able, and do not expect to be able, to recover their costs from market revenues are inefficient or uneconomic and should exit the market. Even if the PPA Units were in imminent danger of being retired, no evidence suggests that such retirement is attributable to anything

⁵⁴⁸ See *id.* at p. 20:16-18.

⁵⁴⁹ See generally *id.* at p. 19:14-20:22.

⁵⁵⁰ See, e.g., Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 21:1-20.

⁵⁵¹ See *id.* at p. 21:24-25; see also ESP III Opinion and Order at 25.

⁵⁵² See, e.g., Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 16:14-15; Direct Testimony of Toby L. Thomas (AEP Ohio Ex. 5) filed May 15, 2015 at p. 11:7-9.

other than PJM's design to replace inefficient or uneconomic generating assets with lower cost units. Accordingly, AEP Ohio has failed to demonstrate that the PPA units have "financial need."⁵⁵³

i. There are more market-based alternatives to the PPA Rider.

There are alternatives to the PPA Rider that are more market-based than the government re-regulation that AEP Ohio proposes. OCC is not now endorsing the approaches. But OCC is noting that the PUCO has alternatives to AEP Ohio's rent-seeking proposal, if there truly is interest in a hedge and in protecting consumers' electric bills from extreme costs.

Such alternatives would have the advantage over the proposed PPAs and PPA Rider because they do not entail a customer-funded subsidy of costs and a guaranteed return on investment to AEPGR. They do not have the potential to create inefficient market distortions or reduce the incentives for rational retirement and investment decisions by AEP Ohio and AEPGR. Two possible alternatives are (1) for AEPGR to directly contract with customers that would like to benefit from the purported rate-stability benefits of the proposed PPAs and PPA Rider or (2) for AEPGR to continue operation of the PPA Units through privately secured financing.⁵⁵⁴

(a) Bi-lateral contracts.

AEP Ohio Witness Allen states that, as opposed to liquidating all of the energy, ancillary services, and capacity of the PPA Units into PJM, AEP Ohio could sell them

⁵⁵³ See generally Direct Testimony of Kenneth Rose (OCC Ex. 11) filed September 11, 2015 at p. 21:1-22:6; Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 25:11-26:15.

⁵⁵⁴ See generally Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 45:9-20.

directly to specific customers that could benefit from a more stable price.⁵⁵⁵ AEP Ohio Witness Allen suggests that this could be done as part of AEP Ohio's proposal, and the revenues from such contracting could be netted against PPA costs in computing PPA Rider charges.⁵⁵⁶

As an alternative to the PPAs and PPA Rider proposal, bi-lateral contracts could be entered into directly between AEPGR and specific customers that could benefit from a more stable (albeit most likely higher) price.⁵⁵⁷ AEP Ohio Witness Vegas states that the purported price hedge protection from the impacts of market volatility, and retail price certainty offered by the PPAs and PPA Rider, are desired by Ohio business. This is demonstrated by Ohio Energy Group's ("OEG") endorsement of AEP Ohio's PPA proposal.⁵⁵⁸ Considering this endorsement, it is reasonable to conclude that AEPGR could directly contract with OEG members and other commercial and industrial customers to provide them the full price-stability and hedging benefits of the PPAs and PPA Rider, as opposed to imposing it on all of AEP Ohio's captive customers.⁵⁵⁹

Indeed, any price-stabilizing effect that the PPAs and PPA Rider may have would be imposed on shopping customers, who have explicitly opted not to have price stability through their decision to contract for supply through CRES providers.⁵⁶⁰ That is to say, if the PPAs and PPA Rider have any price-stabilizing benefit, this benefit would run

⁵⁵⁵ *See id.* at p. 46:4-7.

⁵⁵⁶ *See id.* at p. 46:7-9.

⁵⁵⁷ *See id.* at p. 46:11-13.

⁵⁵⁸ *See id.* at p. 46:13-17.

⁵⁵⁹ *See id.* at p. 46:19-47:2.

⁵⁶⁰ *See id.* at p. 47:2-5.

counter to the preferences of shopping customers.⁵⁶¹ Thus, bi-lateral contracts between AEPGR and customers wanting price stability would alleviate this perverse effect of the PPAs and PPA Rider.⁵⁶²

(b) Private financing.

AEP Ohio projects that the PPA Rider will result in a \$574 million total credit to customers over the term of the PPAs.⁵⁶³ If AEPGR believes AEP Ohio's analysis that the PPA Units could earn a net profit of \$574 million over the initial ten years of the PPAs, AEPGR could continue operation of the PPA Units through privately secured financing.⁵⁶⁴ This would be considerably preferable to the PPA Rider subsidy because privately secured financing does not introduce the market inefficiency and uneconomic retirement and investment issues raised by the PPAs and PPA Rider.⁵⁶⁵ And privately secured financing properly places the risk of uneconomic or inefficient decisions on AEPGR, shareholders, lenders, and investors, as opposed to transferring all of those risks to AEP Ohio's captive customers.⁵⁶⁶

⁵⁶¹ See *id.* at p. 47:5-7.

⁵⁶² See *id.* at p. 47:7-9.

⁵⁶³ See *id.* at p. 47:16-18. If the Joint Stipulation is approved, the purported net profit is \$721 million. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2.

⁵⁶⁴ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 48:1-3.

⁵⁶⁵ See *id.* at p. 48:3-8.

⁵⁶⁶ See *id.* at p. 48:9-12.

ii. AEP Ohio's proposed return on equity (profit) is unjust, unreasonable, unprecedented, and harmful to consumers.

(a) Traditional concepts of return on equity (profit) for regulated utilities are inapplicable here.

The 11.24 percent return on equity (profit) proposed in the Amended Application (and the 10.38 percent guaranteed profit proposed in the Joint Stipulation) is unjust and unreasonable for a variety of reasons. First, AEPGR is an unregulated power producer and its profit is, and should continue to be, decided in the marketplace.⁵⁶⁷ The generation market for wholesale and retail electricity in Ohio is currently unregulated.⁵⁶⁸ That is, Ohio now has a competitive market for electricity generation.⁵⁶⁹ Consequently, as AEP Ohio Witness Hawkins admits, unregulated generation owners in Ohio do not currently receive a guaranteed return on their investment in any of their generation assets.⁵⁷⁰ That return is instead decided through the marketplace.⁵⁷¹ AEPGR is no different.⁵⁷² It is not entitled to any specific level of a guaranteed return on equity on its generation plants.⁵⁷³

Second, if the proposed profit of 11.24 percent (or the 10.38 percent profit proposed in the Joint Stipulation) is adopted by the PUCO, AEPGR would be treated more favorably than other unregulated power producers in Ohio who have not received

⁵⁶⁷ See Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 4:2-7.

⁵⁶⁸ See Legislative Service Commission, Final Analysis, Am. Sub. S.B. 3, 123rd General Assembly, 1999; Hearing Transcript at Vol. VI, p. 1660:19-21.

⁵⁶⁹ See Hearing Transcript at Vol. VI, p. 1660:22-24.

⁵⁷⁰ See *id.* at p. 1661:1-25-1662:1 (generators that do not have power purchase agreements do not receive a guaranteed rate of return).

⁵⁷¹ See *id.* at p. 1661:22-1662:1.

⁵⁷² See *id.* at p. 1661:1-25-1662:1.

⁵⁷³ *Id.*

any guaranteed profit on their investments in generation plants.⁵⁷⁴ The adoption of a PPA Rider and a guaranteed profit for AEPGR will create a mandatory customer funded subsidy to a certain market participant and thus distort the outcomes (in this instance, the price and quantity of electricity) of a competitive market.⁵⁷⁵ The end result is an uneven playing field where the price of electricity for customers will be higher and new investments in conventional or alternative generation technology by other power producers to serve Ohio will be discouraged to the detriment of consumers.⁵⁷⁶

Third, the adoption of a guaranteed profit of 11.24 percent (or the 10.38 percent profit proposed in the Joint Stipulation) would also give AEPGR unprecedented favorable treatment as compared to that typically afforded to a regulated electric utility in Ohio.⁵⁷⁷ Under the proposed PPA Rider, AEPGR is receiving a profit of 11.24 percent (or the 10.38 percent profit proposed in the Joint Stipulation), which is higher than recently approved ROEs for Ohio's other regulated electric utilities.⁵⁷⁸ More significantly, this higher profit is guaranteed for the life of the PPA Units (or for eight and a half years, if the Joint Stipulation is approved).⁵⁷⁹

All electricity generated by the PPA Units will be sold to AEP Ohio and paid for by the customers of AEP Ohio.⁵⁸⁰ To AEPGR, there is no risk of insufficient demand in

⁵⁷⁴ See Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at 4:11-15.

⁵⁷⁵ See *id.* at p. 4:15-19.

⁵⁷⁶ See *id.* at p. 4:19-23-5:1.

⁵⁷⁷ See *id.* at p. 5:2-5.

⁵⁷⁸ See *id.* at p. 5:5-8.

⁵⁷⁹ See *id.* at p. 5:8-10.

⁵⁸⁰ See *id.* at p. 5:10-12; see also Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 11:20-23 and 13:1-3.

the service territory of AEP Ohio.⁵⁸¹ In contrast, there has never been a guarantee on the profit that a regulated Ohio electric utility can earn.⁵⁸² The profit authorized by the PUCO in a rate case provides an opportunity, not a guarantee, for the regulated electric utility to earn the approved profit.⁵⁸³ The profit actually earned by a regulated electric utility is influenced by many factors such as the load growth (or decline) in the service territory and the cost control efforts of the regulated utility.⁵⁸⁴ The rates or rate mechanisms approved by the PUCO in a rate case do not guarantee the regulated utility will earn the authorized profit.⁵⁸⁵

**(b) The proposed return on equity
(profit) is overstated,
unreasonable, and will therefore
harm consumers.**

Further, even if the concept of setting a profit for a regulated utility and the typical methods for estimating the profit were to be applied to AEPGR, the 11.24 percent (and 10.38 percent) profit proposed by AEP Ohio is overstated and unreasonable.⁵⁸⁶ The 11.24 percent (and 10.38 percent) profit as proposed by AEP Ohio is derived based on faulty assumptions and data.⁵⁸⁷ Regarding the former, the Moody's Baa Corporate Bond Index of 4.74 percent used by AEP Ohio is not a reasonable measurement of risk-free return in the current capital market.⁵⁸⁸

⁵⁸¹ See Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 5:12-14.

⁵⁸² See *id.* at p. 5:16-17.

⁵⁸³ See *id.* at p. 5:17-20.

⁵⁸⁴ See *id.* at p. 5:20-23.

⁵⁸⁵ See *id.* at p. 5:23-6:1-3.

⁵⁸⁶ See *id.* at p. 6:4-7.

⁵⁸⁷ See *id.* at p. 6:7-9.

⁵⁸⁸ See *id.* at p. 15:15-16.

Specifically, corporate bonds, even with the highest credit rating, generally are not considered as risk-free investments.⁵⁸⁹ A measurement of the current yields of U.S. Treasury Bonds with various years of maturity is considered by financial analysts as a better measurement of the return of risk-free investments.⁵⁹⁰ In fact, AEP Ohio Witness Hawkins testified: “U.S. treasuries would be a good proxy for risk-free rates. It’s what’s typically used.”⁵⁹¹ But AEP Ohio did not use U.S. Treasury yields for establishing the return on equity in this proceeding.⁵⁹² AEP Ohio Witness Hawkins also testified that the 10-year U.S. Treasury bond rate is approximately 2 percent and the 30-year rate is approximately 3.3 percent.⁵⁹³ Therefore, as AEP Ohio conceded, the current yields on U.S. Treasury Bonds are much lower than the Moody’s Index and if AEP Ohio had used these rates, instead of the Moody’s Bond Index, it would have resulted in a lower proposed profit.⁵⁹⁴

The Moody’s Baa Corporate Bond Index is also not a good measurement of the risk-adjusted return (non-risk-free return) associated with U.S. power producers of similar credit rating.⁵⁹⁵ As AEP Ohio Witness Hawkins confirmed, the Moody’s Corporate Bond Index includes the yields of the bonds issued by many companies in different industries, not just the bonds issued by power producers.⁵⁹⁶ This faulty assumption produces faulty results. An index of risk-adjusted return, which is a non-risk-

⁵⁸⁹ See *id.* at p. 15:17-18.

⁵⁹⁰ See *id.* at p. 15:18-20.

⁵⁹¹ See Hearing Transcript at Vol. VI, p. 1663:10-17.

⁵⁹² See *id.* at p. 1663:18-23.

⁵⁹³ See *id.* at p. 1664:4-12.

⁵⁹⁴ See *id.* at p. 1664-1666:1-10.

⁵⁹⁵ See Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p.15:22-16:1.

⁵⁹⁶ See Hearing Transcript at Vol. VI, p. 1666:11-17; Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 16:1-3.

free return such as the Moody's Index, can be used in the Risk Premium Model.⁵⁹⁷ But in doing so, the estimated equity risk premium, such as the 6.5 percent used by AEP Ohio, should be adjusted downward to reflect the difference in annualized returns between the equity and bond investments in that particular industry rather than the equity and bond investments in the broader stock and bond markets.⁵⁹⁸

(c) Any profit should be set as low as possible, and no higher than AEPGR's average cost of debt.

As just discussed, no profit should be included in the formula rate contract between AEPGR and AEP Ohio. For among other reasons, AEPGR is very strong financially and AEP Ohio has not demonstrated any financial need for the power plants. Specifically, in 2014, AEPGR had an actual profit of 14 percent.⁵⁹⁹ AEPGR's 2014 profit would be 20 percent if AEPGR had a more typical capital structure of 50 percent debt and 50 percent equity.⁶⁰⁰

But if a PPA Rider were adopted by the PUCO and a specific profit is needed for contracting or ratemaking, the initial "ROE" to be used in calculating the rate paid by AEP Ohio to AEPGR, and consequently paid by AEP Ohio's customers through the PPA Rider, should be set as low as possible.⁶⁰¹ This will protect customers from paying unreasonable rates.⁶⁰² The profit applicable to the PPA Units should be set no higher

⁵⁹⁷ See Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 16:5-6.

⁵⁹⁸ See *id.* at p. 15:6-10.

⁵⁹⁹ See Hearing Transcript at Vol. IX, p. 2264:5-15.

⁶⁰⁰ See *id.* at p. 2266:22-25.

⁶⁰¹ See Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 16:21-17:1-2.

⁶⁰² See *id.* at p. 17:1-2.

than AEPGR's average cost of debt, for both long-term and short-term debts, during the three-month period preceding the filing of a PPA Rider.⁶⁰³

AEP Ohio has failed to meet its burden of proof regarding the first (and most important) factor (financial need) from the PUCO's ESP III Opinion and Order.

b. AEP Ohio has not demonstrated the necessity of the PPA Units in light of reliability concerns, including supply diversity.

i. Contrary to AEP Ohio's assertions, PJM is successfully maintaining resource adequacy.

AEP Ohio Witnesses Vegas⁶⁰⁴ and Pearce⁶⁰⁵ express concerns about resource adequacy in PJM and in Ohio, toward convincing the PUCO to subsidize their power plants with Ohioans' hard-earned money. AEP Ohio argues that a large amount of retiring generation will destabilize the reliability and resource adequacy in the PJM region.⁶⁰⁶ But they are in the wrong forum at the PUCO. PJM maintains resource adequacy, with the oversight of the Federal Energy Regulatory Commission. The days of the PUCO's responsibility for the adequacy of generation resources are long past and part of a bygone era.

PJM maintains power plant resource adequacy primarily through its RPM capacity construct.⁶⁰⁷ As OCC Witness Wilson explains, while there have been some generation retirements, they have been absorbed with very little impact on resource

⁶⁰³ See *id.* at p. 6-7; Hearing Transcript at Vol. IX, p. 2263:10-22.

⁶⁰⁴ See Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 19-25.

⁶⁰⁵ See Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at p. 21-31.

⁶⁰⁶ See, e.g., *id.*

⁶⁰⁷ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 18:14-15.

adequacy or RPM results.⁶⁰⁸ AEP Ohio's concerns are further mitigated because there has been substantial new generation entry that, combined with other new resources including demand response and imports, has consistently resulted in reserve margins well above target levels.⁶⁰⁹ PJM already holds commitments to provide capacity well in excess of targets through May 31, 2019.⁶¹⁰

Additionally, a diverse mix of resources has been acquired through RPM to replace the retired generation and meet the rather modest load growth that has or is expected to occur.⁶¹¹ In addition to over 22,000 MW of new combined cycle units, there have been substantial amounts of new combustion turbines, new steam units and upgrades to existing steam units, wind, demand response, energy efficiency, and other imports from resources located in adjacent regions.⁶¹²

Further, capacity prices have not been volatile as AEP Ohio asserts.⁶¹³ In fact, PJM capacity prices have been reasonably stable in the \$100 to \$175/MW-day range over the twelve RPM delivery years to date, with the exception of four delivery years when prices were lower: 2007/08, the very first year; 2012/13 and 2013/14, primarily due to substantial increases in demand response resources in the auctions for those years;⁶¹⁴ and 2016/17, primarily due to a large increase in imports into the RTO region, along with

⁶⁰⁸ *See id.* at p. 20:12-13.

⁶⁰⁹ *See id.* at p. 21:15-17.

⁶¹⁰ *See id.* at p. 21.

⁶¹¹ *See id.* at p. 23:9-11.

⁶¹² *See id.* at p. 23:9-14, citing PJM, 2018/19 RPM Base Residual Auction Results, pp. 21-26.

⁶¹³ *See* Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at 11, 21.

⁶¹⁴ PJM, 2012/13 RPM Base Residual Auction Results, p. 1 and Figure 2 p. 10, and PJM, 2013/14 RPM Base Residual Auction Results, p. 1.

new entry within PJM, in the auction for that year.⁶¹⁵ Therefore, AEP Ohio's concerns are groundless and unfounded.

ii. AEP Ohio inappropriately focuses on plant retirements in discussing reliability.

AEP Ohio inappropriately focuses on plant retirements to allege that the PPA Units are necessary to meet reliability concerns. AEP Ohio seems to promote its re-regulatory, anti-markets, subsidy plan by spreading concern about reliability. But again, AEP Ohio is in the wrong forum at the PUCO. It's a matter for PJM and federal regulators, in the modern-era electric system.

AEP Ohio should have undertaken an objective assessment to measure the reliability benefits of the PPA Units on either the PJM system or on supply to Ohio customers. Reliability benefits of generating units are typically measured by conducting a loss of load expectation ("LOLE") or similar reliability study of a power system.⁶¹⁶ LOLE is a probabilistic assessment of the likelihood that the system will experience a generating capacity shortfall over some future planning horizon.⁶¹⁷ The benefit that a particular generator or a portfolio of generators (in the case of the PPA Units) provides is measured by determining the effect of adding (or removing) that generator to (or from) the system would have on the system LOLE.⁶¹⁸ AEP Ohio's failure to conduct such an assessment is fatal to its claim that the PPA Units are necessary for system reliability.⁶¹⁹

⁶¹⁵ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 19:16-20:17:1-3, citing PJM, *2016/17 RPM Base Residual Auction Results*, p. 31.

⁶¹⁶ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 27:1-2.

⁶¹⁷ See *id.* at p. 27:3-4.

⁶¹⁸ See *id.* at p. 27:5-8.

⁶¹⁹ See generally *id.* at p. 26:20-27:17.

(a) The PPA Units do not contribute to supply diversity.

Further, AEP Ohio fails to prove that the PPA Units contribute to supply diversity. The PPA Units make the generation mix in Ohio more homogeneous because they are coal-fired units in a state which has a coal-dominated generation mix.⁶²⁰ To illustrate this, the state of Ohio had about 32.4 GW generating capacity installed in 2013, of which about 18.8 GW and 9.5 GW was coal- and natural gas-fired, respectively.⁶²¹ This means that 58 percent and 29 percent of the generation mix was coal-and natural gas-fired, respectively.⁶²² If the 2.7 GW of coal-fired capacity that AEPGR owns among the PPA Units were retired and replaced with natural gas-fired generation, the generation mix would change to 50 percent and 38 percent coal and natural gas-fired generation, respectively, which would be a *more diverse* generation mix.⁶²³

AEP Ohio has failed to meet its burden of proof regarding the second factor from the PUCO's ESP III Opinion and Order.

c. AEP Ohio has not shown, and cannot show, environmental compliance.

OCC Witness Jackson analyzed AEP Ohio's proposal in light of the PUCO's directive that AEP Ohio show how the PPA Units are compliant with existing environmental regulations and its plan for complying with pending environmental regulations. She recommends that the PUCO deny AEP Ohio's proposal and not allow the environmental risks to be passed on to AEP Ohio's customers.⁶²⁴ OCC Witness

⁶²⁰ See *id.* at p. 27:20-22.

⁶²¹ See *id.* at p. 27:22-28:2.

⁶²² See *id.* at p. 28:3-4.

⁶²³ See *id.* at p. 28:4-8.

⁶²⁴ See Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at p. 5:3-5.

Jackson explains that customers are likely to pay much more than what AEP Ohio has estimated for environmental compliance over the years 2015 through 2024.⁶²⁵ AEP Ohio has only run compliance cost estimates through 2024 even though its proposal lasts until 2051.⁶²⁶

OCC Witness Jackson pointed out that coal-fired generation, such as the PPA Units, produces significant amounts of air, water, and waste pollution.⁶²⁷ Environmental regulations pose risks that will likely lead to higher costs for PPA Units in the future.⁶²⁸ She emphasized that although most of the PPA Units are currently fairly well-controlled from a criteria air pollutant standpoint, the PPA Units will be impacted by increasingly stringent environmental controls over the life of the PPAs and PPA Rider.⁶²⁹ OCC Witness Jackson specifically cited the following regulations that will create more stringent environmental standards for coal powered generators to comply with: Mercury and Air Toxics Standard (MATS), Effluent Limitations Guidelines and Standards (ELG), Disposal of coal Combustion Residuals (CCR), section 316(b) Cooling Water Intake Structures at Existing Facilities ruled (316b), National Ambient Air Quality Standards (NAAQS) for ozone and sulfur dioxide, and the Cross State Air Pollution Rule (CSAPR).⁶³⁰

⁶²⁵ See *id.* at p. 5:1–2.

⁶²⁶ See *id.* at p. 29:4–10; see also *id.* at p. 16:9–18.

⁶²⁷ See *id.* at p. 8:12–13.

⁶²⁸ See *id.* at p. 8:12–14.

⁶²⁹ See *id.* at p. 8:14–19.

⁶³⁰ See *id.* at p. 9:3–8.

i. AEP Ohio's consideration of 316(b), Coal Combustion Residuals, and Effluent Limitations Guidelines is inadequate, incomplete, and insufficient.

AEP Ohio provided cost estimates relating to compliance with the 316(b) rule, the CCR rule, and the ELG rule.⁶³¹ AEP Ohio assumes that no new cooling towers will be required on any of the 15 units involved in the Amended Application/Modified Amended Application that currently have once-through cooling.⁶³² Having to install cooling towers is a reasonable possibility, and OCC Witness Jackson estimates that the total cost for cooling towers on all fifteen units could be nearly \$900 million.⁶³³ AEP Ohio does not account for the potentiality of incurring such costs, but it should have.⁶³⁴

The CCR rule covers requirements relating to converting wet ash into dry ash handling. Although AEP Ohio included costs for converting to dry ash handling in its 10-year forecast, it is still analyzing other potentially necessary modifications to the PPA Units' surface impoundments.⁶³⁵ If additional modifications are necessary, spending on complying with the CCR rule would increase – AEP Ohio has not accounted for that potentiality.⁶³⁶ AEP Ohio also included costs for certain projects to comply with the pending ELG rule.⁶³⁷ If the final rule is more stringent than what AEP Ohio is anticipating, there will be more costs that customers must pay.⁶³⁸

⁶³¹ See *id.* at p. 12:1-11.

⁶³² See Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at p. 13:14-18.

⁶³³ See *id.* at p. 14:1-4.

⁶³⁴ See *id.* at p. 14:6-17.

⁶³⁵ See *id.* at p. 15:5-8.

⁶³⁶ See *id.* at p. 15:8-11.

⁶³⁷ See *id.* at p. 15:11-13.

⁶³⁸ See *id.* at p. 15:13-16.

OCC Witness Jackson stresses that it is likely that the CCR and ELG rules will become more stringent and compliance more costly.⁶³⁹ An example of the more stringent regulations that are likely to become a reality during AEP Ohio's proposal is that coal waste could be reclassified as a hazardous material, as was initially put forward under the proposed CCR rule.⁶⁴⁰ Associated compliance costs are not included in AEP Ohio's cost estimates but any such costs will be paid by customers.⁶⁴¹

ii. AEP Ohio's consideration of National Ambient Air Quality Standards and Cross State Air Pollution Rule is inadequate, incomplete, and insufficient.

NAAQS are an additional environmental hurdle that the PPA Units will have to clear in the near future. These regulations establish air quality limitation that must be met nationwide. OCC Witness Jackson pointed out that "several counties in Ohio and Indiana [where the PPA Units are located or in the vicinity] are not meeting the current 2008 ozone standard of 75ppb, and it appears likely that additional areas in these states will be designated as non-attainment for the new, more stringent standard when it is finalized."⁶⁴² Clermont County, where Zimmer is located, is at 79 ppb and exceeding the 75 ppb standard.⁶⁴³ The counties that border the Stuart plant all exceed the 2008 8-hour ozone

⁶³⁹ See *id.* at p. 15:18-21.

⁶⁴⁰ See *id.* at p. 16:3-16.

⁶⁴¹ See *id.*

⁶⁴² See *id.* at p. 23:12-15, citing US EPA, 2014. Counties Violating the Primary Ground-level Ozone Standard: <http://www.epa.gov/ozonepollution/pdfs/20141126-20112013datatable.pdf>.

⁶⁴³ See Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at p. 23:15-17.

standard.⁶⁴⁴ The county that borders the Clifty Creek plant exceeds the 75 ppb standard also, based upon 2011-2013 monitoring data.⁶⁴⁵

Because coal-fired generating units contribute disproportionately to emissions of NO_x, and are effectively controlled with post-combustion controls, it is not unlikely that environmental enforcement authorities will require rigorous NO_x controls or operational limits on the PPA Units.⁶⁴⁶ This means that Clifty Creek and Conesville units 5 and 6 would need a retrofit of post-combustion controls called selective catalytic reductions (“SCRs”).⁶⁴⁷ OVEC itself recognizes that “the purchase of additional NO_x allowances or the installation of additions NO_x controls may be necessary for Clifty Creek Unit 6 either under the CSAPR rule or any future NO_x regulations.”⁶⁴⁸

OCC Witness Jackson estimates that the capital costs to retrofit the Conesville units will be approximately \$127 million per unit and the Clifty Creek Unit 6 approximately \$69 million.⁶⁴⁹ According to AEP Ohio’s ownership interest, AEP Ohio would pay 19.3 percent for capital expenditures on Clifty Creek and customers would be responsible for the total costs of upgrades on the two Conesville units.⁶⁵⁰ OCC Witness Jackson focused on the costs of installing SCRs because this represents one of the more significant investments that may be required according to foreseeable environmental

⁶⁴⁴ See *id.* at p. 23:15-19.

⁶⁴⁵ See *id.* at p. 24:8-12.

⁶⁴⁶ See *id.* at p. 24:18-25:4.

⁶⁴⁷ See *id.* at p. 25:9-10.

⁶⁴⁸ See *id.* at p. 27:11-13, citing 2014 OVEC Annual Report at 29; <http://www.ovec.com/FinancialStatements/AnnualReport-2014-Signed.pdf>.

⁶⁴⁹ See Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at p. 25:11-15, referring to EPA IPM v.5.13 Appendix 5-3 (Sargent & Lundy), *Revisions to Cost and Performance for APC Technologies: SCR Cost Development Methodology*, http://www.epa.gov/powersectormodeling/doc/v513/attachments5_3.pdf.

⁶⁵⁰ See Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at p. 25:17-26:2.

regulation and therefore represents a significant risk to AEP Ohio's customers.⁶⁵¹ Such costs are not accounted for by AEP Ohio.

iii. AEP Ohio's consideration of the Clean Power Plan is inadequate, incomplete, and insufficient, further opening the door to additional charges to consumers.

The recently released Clean Power Plan will likely require that AEPGR spend more money on its fossil fuel-fired electric generators.⁶⁵² The final Clean Power Plan established technology-specific emission performance standards.⁶⁵³ It is left up to the states to choose their methods of compliance.⁶⁵⁴ The start of the Clean Power Plan compliance period will begin in 2022, which is well within AEP Ohio's PPA Rider proposal.⁶⁵⁵ The costs of getting the PPA Units into compliance and maintaining compliance with the Clean Power Plan will fall directly on customers, yet the PUCO has no estimates to calculate the potential cost to customers.

iv. AEP Ohio has assumed little short-term risk, and disregarded the long-term risk to the detriment of consumers.

AEP Ohio has assumed little risk for environmental expenditures in the near term, such as accounting for compliance with 316(b), but ignored additional risks from pending and likely future regulations such as NAAQS and CSAPR.⁶⁵⁶ As touched on earlier, a major flaw in AEP Ohio's "evidence" regarding environmental regulations is its forecast of environmental compliance costs ends in 2024 and AEP Ohio will not rule out seeking

⁶⁵¹ See *id.* at p. 28:14-15.

⁶⁵² See *id.* at p. 35:5-7.

⁶⁵³ See *id.* at p. 30:14-15.

⁶⁵⁴ See *id.* at p. 31:7.

⁶⁵⁵ See *id.* at p. 32:21.

⁶⁵⁶ See *id.* at p. 27:19-28:3.

to extend the PPA Rider. This flaw is underscored by the terms of the PPA Rider AEP Ohio proposes: Stuart and Cardinal will retire by 2033; Conesville will retire by 2038; and Zimmer will retire in 2051.⁶⁵⁷ AEP Ohio should have estimated costs through 2051, but did not. Because AEP Ohio will not rule out seeking to extend the PPA Rider, this leaves customers liable for unknown costs over a 27-year period (2025 through 2051).⁶⁵⁸

AEP Ohio failed to include any estimate for environmental compliance costs after 2024, even though customers may be on the hook for the costs beyond then.⁶⁵⁹ The costs that AEP Ohio has included in this proceeding are upfront capital costs only and do not incorporate estimates for the operations and maintenance costs that will also be passed through as charges to customers.⁶⁶⁰ AEP Ohio should have looked at *all* potential future environmental regulations and associated compliance costs and included those in this proceeding. Because AEP Ohio has not answered the PUCO's environmental questions regarding pending and future regulations, it has failed to meet its burden of proof.

d. OCC Witness Dormady confirms that AEP Ohio's "evidence" on economic impact is unreliable.

i. AEP Ohio's reliance on the economic base model is misplaced.

As discussed earlier, AEP Ohio Witness Allen attached documents to his testimony that purported to address the economic impact that the closure of the selected generation plants would have on Ohio's economy. Such testimony, as discussed earlier,

⁶⁵⁷ See *id.* at p. 16:12-14.

⁶⁵⁸ See *id.* at p. 16:14-18.

⁶⁵⁹ See *id.* at p. 29:6.

⁶⁶⁰ See *id.* at p. 29:16-17.

is far from sufficient for AEP Ohio to meet its burden of proof. That result is confirmed by, and independently justified by, testimony from OCC Witness Dormady.

AEP Ohio used the economic base model to develop its alleged economic impact. The model was developed in the 1920s and since the 1970s has rarely been used.⁶⁶¹ In fact, leading economists openly critique using the model at all, saying “[e]conomic base models suffer from old age: they have been built by so many analysts with varying levels of quality and they have been criticized so often that little remains except the concept.”⁶⁶² Put differently, “[e]conomic base models have had a long and checkered history, going back to the 1940s and even earlier. They have never been quite academically respectable”⁶⁶³

OCC Witness Dormady explained that the economic base model is not highly regarded and that no credible analysts or economist utilize the approach.⁶⁶⁴ OCC Witness Dormady pointed out that the model is based on historic, non-forecasted data regarding a single point in time and is not dynamic.⁶⁶⁵ The model does not allow for adjustments to the inputs, such as labor and capital, which change over time. According to OCC Witness Dormady, any credible long term economic model must allow for modifications to be made to inputs, but AEP Ohio’s economic base model is static and has no ability to incorporate any changes.⁶⁶⁶

⁶⁶¹ See Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015 at p. 5:23-6:3.

⁶⁶² *Id.* at p. 6:7-13, citing Schaffer, “Regional Impact Models” in *The Web Book of Regional Science*, West Virginia, Revised 2010, Chapter 2.

⁶⁶³ See Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015 at 6:11-13, citing Richardson, “Input-Output and Economic Base Multipliers: Looking Backward and Forward,” *Journal of Regional Science*, 1985, pg. 608.

⁶⁶⁴ See Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015 at p. 5:22-23.

⁶⁶⁵ See *id.* at p. 4:15-17.

⁶⁶⁶ See *id.* at p. 4:15-5:7.

OCC Witness Dormady criticized AEP Ohio's use of the economic base model because in the model industries are assigned to one of two highly aggregated sectors, basic and non-basic, which leads to misspecified results.⁶⁶⁷ First, the location quotient method employed by AEP Ohio results in misassignment of industries into the basic or non-basic sectors.⁶⁶⁸ Industries that are employed at a greater proportion locally than nationally are assigned entirely to the basic sector even when such industries are not entirely basic.⁶⁶⁹ This is a major problem because it is the sectoral ratio that generates the economic multiplier that produces the total economic impact assessment.⁶⁷⁰

Second, the model as used by AEP Ohio relegates all industries entirely, 100 percent, to either basic or non-basic.⁶⁷¹ In reality, many of these industries are partially basic and partially non-basic.⁶⁷² Third, the error inherent in determining which industries are considered basic versus non-basic is very dependent on the level of industrial classification disaggregation utilized.⁶⁷³ The greater the degree of aggregation used for determining the assignment of basic and non-basic, the greater the potential for error in the modeling approach.⁶⁷⁴ OCC Witness Dormady's review of the AEP Ohio testimony and accompanying documents revealed no description of the aggregation scheme utilized

⁶⁶⁷ *See id.* at p. 8:2-5.

⁶⁶⁸ *See id.* at p. 8:17-19.

⁶⁶⁹ *See id.* at p. 9:1-4.

⁶⁷⁰ *See id.* at p. 9:4-7.

⁶⁷¹ *See id.* at p.9:8-11.

⁶⁷² *See id.*

⁶⁷³ *See id.* at p. 9:18-21.

⁶⁷⁴ *See id.* at p. 10:5-9.

to determine the assignment of industries into basic and non-basic sectors for the analysis.⁶⁷⁵

Another problem with the model utilized by AEP Ohio is that it violates the cross-hauling assumption that can lead to overstated impacts.⁶⁷⁶ The economic base model employed by AEP Ohio assumes no cross-hauling, which means that the model assumes that all consumption in the basic sector is locally produced.⁶⁷⁷

In other words, the model assumes that 100 percent of the labor and capital inputs to the PPA Units and to the associated mining operations are provided from within the region entirely.⁶⁷⁸ If any employees live in neighboring West Virginia, their incomes support non-basic industries outside the region and the use of the economic base model misstates the economic impacts.⁶⁷⁹ If a PPA Unit buys materials from anywhere outside the region, the magnitude of the indirect labor and income effects will be overestimated.⁶⁸⁰ The economic base model does not account for any details like this and therefore produces inaccurate economic impacts. AEP Ohio's model also inappropriately assumes that all employee wages are spent in the local areas.⁶⁸¹

Economic base models fail to account for features of economic growth beyond exports from the basic sector and this grossly simplifies the macroeconomic effects of the analysis.⁶⁸² They assume that labor and capital productivities are the same as they are for

⁶⁷⁵ See *id.* at p. 10:9-13.

⁶⁷⁶ See *id.* at p. 10:14-15.

⁶⁷⁷ See *id.* at p. 10:19-22.

⁶⁷⁸ See *id.* at p. 11:1-4.

⁶⁷⁹ See *id.* at p. 11:4-9.

⁶⁸⁰ See *id.* at p. 11:9-13.

⁶⁸¹ See *id.* at p. 11:16-18.

⁶⁸² See *id.* at p. 12:14-13:3.

the nation.⁶⁸³ Where this assumption does not hold, the model will produce inaccurate macroeconomic impacts.⁶⁸⁴ Further, economic base models ignore general equilibrium effects, meaning that the model does not account for the economy balancing itself due to price changes in supply and demand.⁶⁸⁵ Each industry requires a different production mix of inputs – labor and energy, for example.⁶⁸⁶ Changes that occur in one sector are often mitigated by corresponding changes in other sectors/inputs through upstream and downstream supply changes.⁶⁸⁷ Because the economic base model does not account for such changes, it produces inaccurate results.⁶⁸⁸

Economic base models assume that consumption ratios of non-basic sector goods and services are the same in the region as they are nationally.⁶⁸⁹ OCC Witness Dormady explained that this assumption is often inaccurate when workers in rural areas do not purchase goods and services at the same level that consumers do on a national level.⁶⁹⁰ If workers in the basic sector do not buy local goods in the same proportion as employees on a national level, the reliance on local non-basic sector inputs is overstated and will result in overstated macroeconomic impacts.⁶⁹¹ Economic based models also produce erroneous results since they assume that all non-basic employment is generated by demand from consumption by the basic sector, ignoring the possibility that some

⁶⁸³ *See id.* at p. 13:4-6.

⁶⁸⁴ *See id.* at p. 13:6-8.

⁶⁸⁵ *See id.* at p. 13:10-12.

⁶⁸⁶ *See id.* at p. 13:12-14.

⁶⁸⁷ *See id.* at p. 13:12-17.

⁶⁸⁸ *See id.* at p. 13:17-18.

⁶⁸⁹ *See id.* at p. 13:19:21.

⁶⁹⁰ *See id.* at p. 13:21-14:3.

⁶⁹¹ *See id.* at p. 14:5-10.

consumption can be driven by government expenditures.⁶⁹² This can include state or federal workers not supported directly by the basic sector and capital projects funded by the federal government.⁶⁹³ OCC Witness Dormady explains that “[t]his assumption will tend to overstate the reliance of the local economy on the basic sector and overstate the magnitude of macroeconomic impacts.”⁶⁹⁴

Another faulty assumption made by AEP Ohio is that all coal workers supplying coal to the PPA Units will be unemployed if the PUCO does not approve the PPA Rider.⁶⁹⁵ These workers could continue producing coal for other plants in Ohio or elsewhere.⁶⁹⁶ If any of the coal workers continued to produce coal for other plants, they would not be accounted for in the economic impact model that AEP Ohio used.⁶⁹⁷ AEP Ohio presents only the worst case (and thus highly unlikely) scenario for coal worker unemployment and the indirect economic consequences.⁶⁹⁸

OCC Witness Dormady opines succinctly that the economic base model, with all of its problems, is not likely to accurately portray the economic impacts of closing the PPA Units.⁶⁹⁹

⁶⁹² *See id.* at p. 14:10-16.

⁶⁹³ *See id.* at p. 14:16-20.

⁶⁹⁴ *See id.* at p. 14:20-22.

⁶⁹⁵ *See id.* at p. 15:5-15.

⁶⁹⁶ *See id.*

⁶⁹⁷ *See id.* at p. 15:6-11.

⁶⁹⁸ *See id.* at p. 15:14-15.

⁶⁹⁹ *See id.* at p. 15:17-21.

ii. The economic base model does not address, and cannot address, the effect of a change in electricity prices and associated harm to consumers.

In its ESP III Opinion and Order, the PUCO directed AEP Ohio to address the impact that a closure of the PPA Units would have on electric prices and the resulting effect on economic development within the state. But the economic base model cited to by AEP Ohio Witness Allen addresses only the impact of closing the PPA Units. The economic based model was not used, and cannot be used, to estimate the macroeconomic/economic development impacts of electric price changes.⁷⁰⁰

iii. The economic base model does not address, and cannot address, the effect of future carbon costs and associated harm to consumers.

OCC Witness Dormady discussed the likelihood that beginning in the forecasted year 2022, consumer charges may increase due to the implementation of the Clean Power Plan.⁷⁰¹ He referred to the testimony of AEP Ohio Witness Pearce, who acknowledged that “[t]he results are reasonably conservative in that they include a ‘double whammy’ of both the carbon expense and the resulting reduced dispatch due to the higher cost basis.”⁷⁰² AEP Witness Pearce’s testimony quantifies more than three quarters of a billion dollars of carbon costs associated with the PPA Rider for the last three forecasted years that will be passed on to customers.⁷⁰³

⁷⁰⁰ See *id.* at p. 16:12-14.

⁷⁰¹ See *id.* at p. 16:19-23.

⁷⁰² See *id.* at p. 17:3-5. AEP Ohio’s forecast provided in connection with the Joint Stipulation also encompasses 2022. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2.

⁷⁰³ See Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015 at p. 17:6-8.

AEP Witness Pearce assumes a \$15 per ton cost for carbon for the coal plants in the future, but OCC Witness Dormady affirmed that actual costs could be much higher or lower.⁷⁰⁴ For this reason, OCC Witness Dormady recommends that a sensitivity analysis should have been used to allow the PUCO to evaluate the degree to which a valid range of carbon costs (that customers would pay through the PPA Rider) would affect the range of customer costs or credits.⁷⁰⁵

An analysis should be run that models the costs resulting from \$5/ton of carbon, as well as a cost of \$25/ton of carbon.⁷⁰⁶ According to OCC Witness Dormady, a \$25/ton carbon cost would pass \$1.28 billion of carbon cost to customers in the years 2022 through 2024.⁷⁰⁷ A carbon cost of \$15/ton would create customer costs of \$768 million.⁷⁰⁸ The enormity of such figures notwithstanding, nowhere does AEP Ohio provide a macroeconomic impact analysis of the effect that these carbon costs would have on Ohio.⁷⁰⁹

OCC Witness Dormady also finds fault with AEP Ohio's estimates using nominal dollars rather than in real dollars.⁷¹⁰ He explains: "Because the supply of money changes across time due to inflation and other factors, it is customary to utilize Consumer Price Index ("CPI") adjustment (i.e., based on the CPI for electricity prices) to a base year currency so that the analysis can be more easily evaluated for future years. Using nominal dollar figures for the assumed carbon cost is tantamount to assuming that

⁷⁰⁴ See *id.* at p. 19:1-2.

⁷⁰⁵ See *id.* at p. 19:5-7.

⁷⁰⁶ See *id.* at p. 19:10-11.

⁷⁰⁷ See *id.* at 19:13-15.

⁷⁰⁸ See *id.* at 19:16.

⁷⁰⁹ See *id.* at 20:1-2.

⁷¹⁰ See *id.* at 20:13-16.

compliance costs for these plants (holding all else constant) will decline annually by the rate of inflation.”⁷¹¹ Because of the implementation of the Clean Power Plan and other environmental regulations, the compliance costs of these PPA Units will most assuredly require more carbon reductions, which means that the analysis put forth by AEP Ohio likely understates the carbon cost burden that will be imposed on customers by the PPA Rider.⁷¹²

**iv. AEP Ohio’s attempt to rebut OCC
Witness Dormady’s testimony fails.**

In rebuttal, AEP Ohio does not address any of OCC Witness Dormady’s substantive critiques of the economic base model.⁷¹³ AEP Ohio’s silence on this score is deafening. Instead, in response to OCC Witness Dormady’s testimony that the economic base theory has gone largely forgotten since the 1970s, AEP Ohio cites to three instances in which the economic based model has been referenced.⁷¹⁴ One document was prepared over 12 years ago for the World Bank by someone unknown to AEP Ohio and with whom AEP Ohio has never spoken; one document was prepared in Texas over six years ago by someone unknown to AEP Ohio and with whom AEP Ohio has never spoken; and one document was prepared over five years ago in Utah by someone unknown to AEP Ohio and with whom AEP Ohio has never spoken.⁷¹⁵

⁷¹¹ See *id.* at 20:16-22.

⁷¹² See *id.* at 21:1-5.

⁷¹³ See Rebuttal Testimony of William A. Allen (AEP Ohio Ex. 51) filed October 27, 2015.

⁷¹⁴ See *id.* at p. 8:5-9:10; *id.* at 8:9, fn. 10 and 9:6-7, n. 11 and 12; see also “The Business Owner’s Guide to Discussing Economic Impacts” (OMAEG Ex. 21, admitted at Hearing Transcript Vol. XVII, p. 4410); Hearing Transcript at Vol. XVII, p. 4295:12-15 and 4296:1-3 (Texas), “Regional Economic Growth and the Economic Base Concept” (OMAEG Ex. 22, admitted at Hearing Transcript Vol. XVII, p. 4410); Hearing Transcript at Vol. XVII, p. 4305:25-4306:4 (Utah), and “Regional and Local Economic Analysis Tools” (OMAEG Ex. 23, admitted at Hearing Transcript Vol. XVII, p. 4410); Hearing Transcript at Vol. XVII, p. 4312:25-4313:4 (prepared for World Bank).

⁷¹⁵ See OMAEG Exs. 21-23.

Regarding the document prepared for the World Bank, OCC Witness Dormady explained: “The World Bank is tasked with economic development in lower developed countries. Particularly in countries such as Tanzania hypothetically where there is a lack of good economic and regional economic data.”⁷¹⁶ OCC Witness Dormady went on to acknowledge that when there is a lack of good economic and regional economic data, such as in developing countries, the best approach may be the economic base model.⁷¹⁷ But in countries like the United States, there is a great amount of sophisticated data available on regional economies, so newer economic models are much more appropriate and create more accurate results.⁷¹⁸

That AEP Ohio resorts to citing three documents from over five to twelve years old – none of which are from Ohio, none of which actually employ the economic base model,⁷¹⁹ none of which are related to the utility or generation industries, none of which are from peer-reviewed publications – confirms what OCC Witness Dormady described: the economic base model has gone “largely forgotten” since the 1970s.

⁷¹⁶ See Hearing Transcript at Vol. IX, p. 2332:3–7.

⁷¹⁷ See *id.* at p. 2332:8–10.

⁷¹⁸ See *id.* at p. 2332:13–16.

⁷¹⁹ It is noteworthy that although AEP Witness Allen cited to the Utah and Texas documents to support his assertion that the economic based model is still used, *see* Rebuttal Testimony of William A. Allen (AEP Ohio Ex. 51) filed October 27, 2015 at 9:4-7, he admitted that, in fact, the economic based model was *not* used in the documents. See Hearing Transcript at Vol. XVII, p. 4296:18-20 (Texas); *id.* at p. 4307:16-4308:1 (Utah).

- e. **AEP Ohio's vague promises of limited review of revenue and cost data does not satisfy the requirement of providing the PUCO with rigorous oversight, thus increasing consumer risk.**

AEP Ohio's proposal allows the PUCO only a vague and limited review of revenue and cost data used in determining the PPA Rider.⁷²⁰ To pursue prudence or rate issues related to the PPAs, the PUCO would be forced to complain to FERC.⁷²¹ OCC agrees with Staff's filed testimony that AEP Ohio has failed to prove that its Amended Application will provide the PUCO with the degree of rigorous oversight required. The Joint Stipulation does not cure this deficiency. But even an agreement to permit more rigorous review of AEP Ohio's, and even AEPGR's, revenue and cost data would not afford the PUCO meaningful oversight of AEP Ohio's proposal.

It is not disputed that the PUCO, in theory, has the authority to disallow recovery of PPA costs through the PPA Rider. But the PPA has an early termination clause that would permit AEP Ohio to terminate the PPA if the PUCO were to discontinue or disallow retail rate recovery.⁷²² In the event of such early termination, AEP Ohio would be required to pay AEPGR an amount equal to the sum of the net book value and related

⁷²⁰ See Direct Testimony of William A. Allen (AEP Ohio Ex. 10) filed May 15, 2015 at p. 10:2-11:2.

⁷²¹ See Direct Testimony of Dr. Hisham Choueiki (Staff Ex. 1) filed October 9, 2015 at p. 14:4-11.

⁷²² Were the Joint Stipulation approved, the early termination clause could be invoked if retail cost recovery were discontinued. See Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSCA Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at sec. 2.3.

retirement-related costs associated with the PPA Units (or liquidated damages, were the Joint Stipulation approved).⁷²³

The early termination provision would likely have a chilling effect on the PUCO's oversight considering that, if it were to make a substantial disallowance,⁷²⁴ the PPA could be terminated, leaving AEP Ohio on the hook for these substantial early termination costs. More likely, it is AEP Ohio's customers who would bear these costs because their enormity would harm AEP Ohio's financial solvency and decrease its ability to provide reliable service.⁷²⁵

Accordingly, the PUCO's practical ability to ensure reasonable rates to AEP Ohio's customers is seriously compromised by the PPA's early termination clause, even if it has rigorous oversight.

f. AEP Ohio's commitment to share "pertinent aspects of the Power Purchase Agreement with AEPGR" does not meet the requirement of full information sharing, thus increasing consumer risk.

AEP Ohio and AEPGR did not commit to "full information sharing" with the PUCO and Staff, but committed only to sharing "all pertinent aspects of the PPA contract

⁷²³ See, e.g., Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at KDP-1, p. 5. If the Joint Stipulation were approved, AEP Ohio would have to pay AEPGR "liquidated damages" of an annual payment equal to the most recent 12 months of actual fixed costs for the shorter of i) three years, or ii) the remainder of the Delivery Period, minus the amount of AEPGR's forecasted net revenues for Capacity (based on cleared BRA prices) during such shorter period. See Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSCA Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at Art. II, sec. 2.3; Art. V, sec. 5.7(B); Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at Attachment A para. 3.

⁷²⁴ Were the Joint Stipulation approved, the early termination clause could be invoked if retail cost recovery were discontinued. See Draft Power Purchase and Sale Agreement by and between AEP Generation Resources Inc. and Ohio Power Company (P3/EPSCA Ex. 10, admitted at Hearing Transcript Vol. XX, p. 5012) at sec. 2.3.

⁷²⁵ See generally Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 21:1-22:14.

with AEPGR.”⁷²⁶ Thus, the PUCO will not have the ability to fully review all purchasing and expenses of AEPGR. It will be difficult, if not impossible, for the PUCO to fully examine the activities of the non-regulated generation assets in the PPA.⁷²⁷

What AEP Ohio wants is to re-fashion regulation as it would imagine it to work for ensuring corporate profit. But it would do so without what it would consider the unwelcome side effects of government review to ensure protection of the people (Ohioans) paying the profit. In a real regulatory framework (contrasted with AEP Ohio’s construct), there would be a requirement for complete PUCO access to records such as what appears in R.C. 4905.15:

Each public utility shall furnish to the public utilities commission, in such form and at such times as the commission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

AEP Ohio’s approach to avoiding regulatory scrutiny of its re-regulatory plan should be denied.

g. The potential for disallowing Power Purchase Agreement costs does not constitute the sharing of financial risks for the protection of consumers.

To be sure, the PPA and PPA Rider completely transfer all risks associated with the continued operation of the PPA Units to AEP Ohio’s captive customers. AEP Ohio attempts to justify the proposal, in part, by projecting that the PPA Rider will result in a \$574 million credit (or \$721 million credit, were the Joint Stipulation approved) to

⁷²⁶ See Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 27:20-21.

⁷²⁷ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 31:19-23.

customers over the initial 10-year period (or eight and a half year period) of the PPA.⁷²⁸ This purported credit is based on an analysis using a set of PJM market price and load assumptions that are unlikely to materialize. Indeed, credible evidence of record shows that AEP Ohio's customers will be charged the staggering amount of \$2 billion (\$1.6 on a net present value basis) over the same ten year period.⁷²⁹ Thus, AEP Ohio customers will fully bear all of the cost and economic risk of the PPA Units through the PPA Rider. Such transfer of risk to captive monopoly customers is improper in a restructured market for generation services.

AEP Ohio's claim that the PPA could produce a \$574 million (or \$721 million) credit to ratepayers over its term is difficult to accept *prima facie*. AEP Ohio admits that the PPA Units may not be able to recover their costs from PJM market revenues today. If AEP Ohio believes its own analysis, that the PPA Units are likely profitable over the PPA Rider's term, one would expect that AEPGR would invest capital to keep the PPA Units operating. Because AEPGR (and presumably shareholders and investors) is unwilling to bear that risk, there is no rationale for why AEP Ohio's customers should be obliged to do so. The only assumption that is guaranteed to come to fruition throughout the course of the PPA is the ongoing (and most likely uneconomic) profits for the PPA Units. Under this proposal, these profits would be guaranteed by AEP Ohio's captive customers.

It is against this backdrop that the PUCO required AEP Ohio to include in its Amended Application/Modified Amended Application a plan to allocate the PPA Rider's

⁷²⁸ See Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at p. 13:1-7; Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2 (if Joint Stipulation approved).

⁷²⁹ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13:3-5; Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at p. 7 and Table 1 (\$1.9 billion, \$1.5 billion on net present value basis if Joint Stipulation approved).

financial risk between AEP Ohio and its ratepayers.⁷³⁰ AEP Ohio cavalierly suggests that it has complied with the risk-sharing requirement inasmuch as the PUCO would be permitted to disallow the recovery of PPA costs through the PPA Rider, while AEP Ohio remains financially obligated under the PPA to AEPGR.⁷³¹ OCC agrees with Staff's filed testimony that AEP Ohio has misinterpreted this factor, and that it has not satisfied the ESP III Opinion and Order's risk-sharing requirement. Indeed, AEP Ohio's reliance on the PUCO's ability to disallow costs to be passed through the PPA Rider (or terminate the PPA Rider) rings hollow, considering that this approach could trigger the early termination provision discussed above and subject AEP Ohio's customers to even more risk.

E. The PUCO should require AEP Ohio to demonstrate compliance with additional factors for the benefit of consumers before even considering approving the Amended Application/Modified Amended Application.

In the ESP III Opinion and Order, the PUCO listed the factors that AEP Ohio must address "at a minimum" in order for the PUCO to consider whether to approve cost recovery through the placeholder PPA Rider.⁷³² These minimal factors focus primarily on the PPAs and PPA Rider's benefit to AEP Ohio and AEPGR.

OCC submits that these minimal factors are inadequate for consumer protection and should be expanded. The PUCO should additionally consider whether the PPAs and PPA Rider benefit customers. With the balanced consideration of benefits of the PPA Rider to AEP Ohio and AEPGR, as well as to consumer interests, the PUCO will be in a position to evaluate the *net* benefits of the PPA and PPA Rider and, thus, determine

⁷³⁰ See ESP III Opinion and Order p. 25.

⁷³¹ See Direct Testimony of Pablo A. Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at p. 29:5-14.

⁷³² See ESP III Opinion and Order at p. 25.

whether the PPA Rider is in the public interest.⁷³³ The additional quantitative factors the PUCO should consider fall into two categories: (1) the PPA Rider's potential cost/detriment to consumers and (2) the cost of achieving the same benefits that the PPA and PPA Rider provide compared to alternatives that could provide greater benefits.⁷³⁴ Indeed, failure to consider these additional factors could result in unreasonable rates and violations of state policy.⁷³⁵

1. The PUCO must consider the PPA Rider's potential costs/detriments to customers.

Under the first five of the additional factors, consideration would be given to potential costs or detriments to AEP Ohio's customers. These include:

a. AEP Ohio should be required to provide an assessment of the Power Purchase Agreement and PPA Rider under independently produced future price scenarios so consumer interests are adequately protected.

As a threshold matter, the PUCO in its ESP III Opinion and Order reserved the right to select an independent third party to perform a study of pricing issues as they relate to the PPA Rider.⁷³⁶ To support its pricing analysis in this proceeding, AEP Ohio did not engage the services of an independent third party, nor did it even rely on independently produced pricing data. Rather, AEP Ohio sponsored an in-house witness, AEP Ohio Witness Bletzacker, who developed a set of assumptions regarding PJM market-prices and load.⁷³⁷ AEP Ohio's in-house witness Pearce then used these

⁷³³ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 32:13-33:23.

⁷³⁴ See *id.* at p. 33:12-23.

⁷³⁵ See R.C. sec. 4928.02(A).

⁷³⁶ See ESP III Opinion and Order at p. 25.

⁷³⁷ See Direct Testimony of Karl A. Bletzacker (AEP Ohio Ex. 6) filed May 15, 2015.

assumptions to argue that the PPAs and PPA Rider would result in a \$574 million net credit to customers over the first 10 years the PPA Rider is in effect.⁷³⁸

Conversely, OCC Witness Wilson conducted an independent analysis of the PPAs and PPA Rider using, among other factors, electricity prices that were adjusted to be consistent with recent AD Hub peak and off peak prices. Using these price forecasts, which are consistent with recent market data, he demonstrated that the PPA Rider would result in a charge to AEP Ohio's customers of \$2 billion (\$1.6 on a net present value basis) over the initial 10 year period of the PPA.⁷³⁹ OCC Witness Wilson's use of market price forecasts is supported by Sierra Club Witness Chernick⁷⁴⁰ and IGS Witness Leanza.⁷⁴¹

This vast difference in results using AEP Ohio's in-house witness (based on in-house assumptions) and the results provided by OCC Witness Wilson's independent analysis (based on market-derived prices) shows that the net impact of the PPAs and PPA Rider on customers is highly sensitive to input parameters. To accurately gauge the PPA Rider's net impact on customers, the PUCO should select an independent third party to conduct a pricing study, as contemplated in the ESP III Opinion and Order. But in this proceeding, in the absence of such an independent analysis, the PUCO should adopt the

⁷³⁸ See 5-15-15 Letter to Commission from Mr. Vegas (OCC Ex. 2, admitted at Hearing Transcript Vol. II, p. 365); Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at Exhibit KDP-2. In connection with the Joint Stipulation, such assumptions were used at the direction of AEP Ohio Witness Allen to create WAA-2, which reflects a purported credit of \$721 million for the eight and a half years. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2.

⁷³⁹ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 13:3-5; Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 36:6-11. Were the Joint Stipulation approved, OCC Witness Wilson projects that the costs would be \$1.9 and \$1.5 billion, respectively. See Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 7 and Table 1.

⁷⁴⁰ See Direct Testimony of Paul A. Chernick (Sierra Club Ex. 37) filed September 11, 2015.

⁷⁴¹ See Direct Testimony of Paul Leanza (IGS Ex. 6) filed September 11, 2015.

analysis of OCC Witness Wilson because it is based on independently produced market data and is consistent with the testimony of Sierra Club Witness Chernick and IGS Witness Leanza.

b. The PUCO also should consider how AEP Ohio's offer strategy into PJM affects customers.

The subsidy inherent to the PPA Rider could result in AEP Ohio and AEPGR adopting offer strategies into the PJM-operated markets that could undermine the markets' ability to ensure the short- and/or long-run efficiency of the electric power system. Further, the participation of affiliated generation assets in the PJM-operated markets also complicates the choice of offer strategy employed. As explained in detail above, AEP Ohio could adopt strategies to offer the PPA Units into the PJM market at a unit's respective cost that may exceed the clearing price or under a unit's costs. The offer strategies employed may undermine the short and/or long-run efficiency of the PJM-operated markets, could be anti-competitive, and could be harmful to customers.⁷⁴²

The record in this proceeding does not disclose the offer strategies that AEP Ohio will use for the PPA Units, and AEP Ohio provides no guarantee, or means to verify, that its offer strategies will not have anti-competitive effects on the PJM wholesale electric markets to the detriment of Ohio consumers. This critical omission supports the PUCO's rejection of the Amended Application/Modified Amended Application.

⁷⁴² See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 37:6-38:23.

c. The PUCO should consider the incentives, or lack thereof, for AEP Ohio to control the cost of the PPA Units so consumer interests are protected.

The PPA Rider permits 100 percent pass through of the PPA Units' actual fixed and variable costs (net of revenues) to AEP Ohio's captive customers. In addition, AEPGR is guaranteed to earn a return on investment through the PPA terms. As discussed previously, the design of the PPAs and PPA Rider significantly reduces any incentives for AEPGR to control or reduce the capital or operating costs of the PPA Units.⁷⁴³

The proposed PPA will destroy any incentive to keep energy and capacity prices relatively low.⁷⁴⁴ Given that AEP Ohio has a substantial amount of generation in the PJM footprint, the company already has strong incentives to attempt to raise energy and capacity prices.⁷⁴⁵ Because the revenues associated with a part of the portfolio can be passed through to customers through the PPA Rider, the incentive to not clear these resources in PJM's markets would be strengthened.⁷⁴⁶ That is, by fully subsidizing the operating and capital costs of the PPA Units, in addition to the guaranteed profit, the PPAs eliminate any incentives that the PJM-operated wholesale markets create to reduce operating and capital costs of the PPA Units.⁷⁴⁷ This means that the cost of supplying customers' energy and capacity needs using the PPA Units may be higher than they

⁷⁴³ See *id.* at p. 38:11-23.

⁷⁴⁴ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 15:6-13.

⁷⁴⁵ See *id.* at p. 15:9-11.

⁷⁴⁶ See *id.* at p. 15:11-13.

⁷⁴⁷ See *id.* at p. 61-62; p. 64:1-66:21.

otherwise would be without the PPA Rider subsidy.⁷⁴⁸ This is an unjust and unreasonable proposal for consumers.

- d. The PUCO should consider the incentives, or lack thereof, for AEP Ohio and AEPGR to make rational retirement decisions pertaining to the PPA Units so consumer interests are protected.**

When a plant no longer appears likely to recover its going forward costs over any future time frame (in the short- or long-term), the owner would retire or repower it. That is how markets work. And that is how Ohio works, under the General Assembly's law. But the guaranteed cost recovery in the PPAs eliminates any incentives for AEPGR to retire the PPA Units. Thus, even if the PPA Units are not economically viable, in the sense that they cannot recover their costs, there is no incentive mechanism within the proposed PPAs for these assets to be retired, regardless of how costly or uneconomic they may be. This retirement issue might not ordinarily be an issue for discussion in a PUCO case. But here the Utility wants consumers to subsidize a power plant even if the plant is uneconomic to operate.

Indeed, the PPA provides that retirement decisions regarding the PPA Units must be made by mutual agreement between AEP Ohio and AEPGR. Considering that AEPGR's costs plus a return on investment are fully covered by the PPA, AEPGR has a disincentive to agree to any PPA Unit retirement.

The PPA even entices AEPGR and AEP Ohio to keep the units operational because AEPGR would continue to receive a guaranteed return. This could result in higher costs to customers, because lower-cost alternatives may not be able to enter the market due to the subsidized PPA Units not being retired. Therefore, any proposed PPA

⁷⁴⁸ *Id.*

should be evaluated based on whether it provides incentives for owners to make rational retirement decisions. As stated above, 100 percent pass-through of costs and a guaranteed return on investment provides no incentive (or even disincentives) for rational and cost-efficient decisions under ratemaking principles or under markets, and the result is not in the public interest.⁷⁴⁹

e. The PUCO should consider the economic impact of higher retail rates that would be imposed on AEP Ohio's captive customers.

AEP Ohio Witness Allen's testimony purportedly includes analyses of direct and indirect employment and tax impacts of the PPA Units. The testimony of OCC Witness Dormady addresses the veracity of these analyses.⁷⁵⁰ Notwithstanding the issues raised therein, the analyses presented by AEP Ohio paint a very limited picture of the economic development effects of the PPA Units. The PUCO should consider other important economic development factors.

Any economic analysis should take into account the costs of keeping potentially inefficient plants running. Additionally, such an analysis should take into account the economic development associated with the potential entry of new generating or transmission assets if the PPA Units are retired. That is to say, if the PPA Units are retired they may be replaced with more efficient generating assets that will create employment, spur economic development, and provide a strong tax base for the local region and the state, which does not potentially require costly customer-funded subsidies. Thus, the PPA may have detrimental effects on economic development, job retention,

⁷⁴⁹ See generally *id.* at p. 39:1-40:2.

⁷⁵⁰ See Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015.

and the local and statewide tax base that are not captured at all in the limited analysis provided by AEP Ohio.⁷⁵¹

For example, the PPAs and PPA Rider would result in higher retail rates for AEP Ohio's customers. OCC Witness Wilson's analysis of the PPA costs under alternative price scenarios shows that it will likely result in net charges to AEP Ohio's captive customers.⁷⁵² These charges ultimately mean that AEP Ohio's customers have less disposable income available for consumption, investment, and other economic activity. If the PPA Rider results in a net charge to AEP Ohio's captive customers, the associated loss of economic activity may result in greater economic harm, ancillary job losses, and lost tax revenues than any economic benefits that may be provided by maintaining and operating inefficient plants. Similarly, potentially higher retail rates could also reduce the competitiveness of Ohio businesses in regional, national, and international markets, contrary to state policy.⁷⁵³

In addition to the reasons cited by OCC Witness Dormady, the analyses attached to AEP Ohio Witness Allen's Direct Testimony should be rejected because they completely neglect these impacts. The PUCO should take into account the costs of keeping potentially inefficient plants running. Additionally, such an analysis should take into account the economic development associated with the potential entry of new generating or transmission assets if the PPA Units are retired. Thus, in sum, the PPAs may have detrimental effects on economic development, job retention, and the local and

⁷⁵¹ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 29:11- 31:2.

⁷⁵² See Direct Testimony of James F. Wilson (OCC Exs. 15 and 35) filed September 11, 2015 and December 28, 2015, respectively.

⁷⁵³ See R.C. sec. 4928.02(N); Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 30:12-23.

statewide tax base that are not captured at all in the limited analysis provided by AEP Ohio.⁷⁵⁴

2. The PUCO should consider the cost of achieving the same benefits that the PPAs and PPA Rider provide compared to alternatives that could provide greater benefits to consumers.

Of equal importance to whether the PPAs and PPA Rider impose costs/detriments on AEP Ohio's customers is the question of whether alternatives are available that could deliver greater benefits at the same or lower costs than the PPAs and PPA Rider. If so, these alternatives should be pursued and AEP Ohio's Amended Application rejected. This is especially true if alternatives exist that do not rely on anti-competitive and inefficient captive customer-funded subsidies.⁷⁵⁵ The Consumers' Counsel is not here endorsing subsidy programs as reasonable or lawful. But OCC is noting that there are alternatives to AEP Ohio's plan that are much less expensive for Ohioans than AEP Ohio's proposal, if there exists some regulatory desire for the alleged benefits of the proposal.

a. The PUCO could consider an analysis of a least-cost combination of new and existing generation and/or transmission assets to protect consumer interests.

Proper consideration of the PPA Rider should include an analysis of what combination of existing/new transmission and generation assets could be added to the electric power system to deliver the claimed benefits of the PPAs and PPA Rider. As demonstrated above, the PJM-operated markets are designed to incent building generation and transmission assets to address cost stability, reliability, and other issues

⁷⁵⁴ See Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 40:4-20.

⁷⁵⁵ See *id.* at p. 41:11-15.

without the need for potentially anti-competitive and inefficient customer-funded subsidies such as the PPA Rider.⁷⁵⁶

b. The PUCO could consider the cost of achieving price stability through competitive solicitation to protect consumer interests.

Standard offer customers of AEP Ohio already have access to a price-stabilizing mechanism. This is achieved by having the supply needs of standard offer customers met through one- to three-year full-requirements contracts that result from competitive auctions. The rates that SSO customers pay are established through the blending of multiple auctions held months to years in advance of delivery. The rate resulting from each auction tends to reflect the then-prevalent forward price plus a markup. Because the forward prices for delivery months to years ahead tend to be relatively stable over time. Consequently, these auctions already stabilize prices paid by SSO customers.⁷⁵⁷

c. The PUCO could consider the cost of meeting current and expected environmental regulation with generation and/or transmission alternatives to the PPAs and PPA Rider to protect consumer interests.

The ESP III Opinion and Order requires AEP Ohio to prove that the PPA Units are compliant with all pertinent environmental regulations and AEP Ohio's and AEPGR's plans for compliance with pending regulations. As stated above, OCC Witness Jackson has reviewed AEP Ohio/AEPGR's proposed environmental compliance plan and recommended that AEP Ohio's proposal be denied because it did not satisfy this factor.⁷⁵⁸

⁷⁵⁶ See generally *id.* at p. 41:17-42:2.

⁷⁵⁷ See *id.* at p. 42:15-23.

⁷⁵⁸ See Direct Testimony of Sarah Jackson (OCC Ex. 13) filed September 11, 2015.

Even if AEP Ohio and AEPGR have a plan in place to meet current and expected future environmental regulations, that does not mean that there are no generation and transmission alternatives that could provide the purported benefits of the PPAs and PPA Rider while also meeting current and expected future environmental regulations at lower costs.

If transmission and generation alternatives exist to the PPAs and PPA Rider that could deliver their purported benefits and meet current and expected future environmental regulations at lower cost, these alternatives could be considered. Accordingly, the PUCO should adopt an additional factor under which AEP Ohio has to provide information regarding what combination of new transmission and competitive generation assets could be added to the electric power system to meet current and expected environmental regulations. A comparison of those benefits and costs then should be made to the compliance measures AEP Ohio proposed in its Amended Application/Modified Amended Application.⁷⁵⁹

F. The considerable uncertainty and the potential for consumer harm created by AEP Ohio's PPA Rider proposal confronting the PUCO in ESP III still exists here.

As explained earlier, the PUCO denied AEP Ohio's PPA Rider proposal in the ESP III case due to the considerable uncertainty surrounding the PPA Rider proposal's costs and purported benefits based on the record evidence before it.⁷⁶⁰ The Amended Application/Modified Amended Application should be denied here because, at best, the

⁷⁵⁹ See generally Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015 at p. 44:1-45:2.

⁷⁶⁰ See Background, *supra*. AEP Ohio Witness Fetter does not offer any opinions regarding the reasonableness of AEP Ohio's forecasts on energy or capacity prices. See Hearing Transcript at Vol. III, p. 847:12-15.

considerable uncertainty that caused the PUCO to reject AEP Ohio's PPA Rider proposal in ESP III still remains.

According to AEP Ohio Witness Pearce, the PPA Rider's credit/charge could range anywhere from a \$927 million charge over the forecast period to a \$2 billion credit.⁷⁶¹ AEP Ohio Witness Vegas admitted that AEP Ohio Witness Pearce's forecast, like all forecasts, is inherently uncertain.⁷⁶² In fact, AEP Ohio Witness Vegas acknowledged that:

Market conditions change every day. Forecasts would change every day. You could run a forecast every day between now and the end of the year and you'll get a different outcome in every single one of them.⁷⁶³

And even though AEP Ohio's proposals run for the life of the PPA Units, it has done no projections of the cost/benefits of the PPA Rider beyond 2024.⁷⁶⁴

AEP Ohio's projections did not include costs related to the filing, defense, and settlement of claims, suits, and causes of action,⁷⁶⁵ which would include (among other things) requiring AEP Ohio to cover the costs of any governmental penalties assessed against AEPGR due to legal violations at the PPA Units.⁷⁶⁶ Nor did the projections include capacity performance penalties.⁷⁶⁷ Any of which, if they materialize, would be charged to consumers.

⁷⁶¹ See Direct Testimony of Kelly D. Pearce (AEP Ohio Ex. 2) filed May 15, 2015 at KDP-2; *see also* Direct Testimony of William A. Allen (AEP Ohio Ex. 52) filed December 14, 2015 at WAA-2 (\$690 million cost to \$2.1 billion benefit).

⁷⁶² See Hearing Transcript at Vol. I, p. 272:15-19; *id.* at 172:15-19.

⁷⁶³ See *id.* at p. 170:25-171:4.

⁷⁶⁴ See *id.* at p. 232:21-233:1. While considering the Modified Amended Application, the PUCO should note that AEP Ohio does not rule out seeking an extension of the PPA Rider.

⁷⁶⁵ See *id.* at Vol. II, p. 328:13-19; 575:18-23.

⁷⁶⁶ See *id.* at p. 328:20-25.

⁷⁶⁷ See *id.* at p. 648:3-21.

Underscoring the uncertainty, OCC Witness Wilson estimated that AEP Ohio's PPA Rider proposal will cost customers \$2.0 billion over the period forecast by AEP Ohio.⁷⁶⁸ Importantly, OCC Witness Wilson's cost estimate is not based on a wholesale departure from AEP Ohio's estimates. His cost estimate is based on AEP Ohio's PPA Rider Forecast, Low Load scenario, with but three changes to reflect reasonably likely price outcomes in the energy and capacity markets.⁷⁶⁹ The very substantial difference between AEP Ohio's forecasts, and between AEP Ohio's forecasts and OCC Witness Wilson's, serves to highlight for the PUCO the uncertainty involved in AEP Ohio's Amended Application/Modified Amended Application.

Consistent with the uncertainty about the potential financial ramifications of the PPA Rider is the uncertainty surrounding one of the alleged primary benefits of the PPA Rider – reducing volatility and smoothing out rates.⁷⁷⁰ AEP Ohio did no quantitative analysis to determine the monetary value of the alleged benefits of smoothing the volatility (assuming the PPAs actually could smooth out and not exacerbate volatility).⁷⁷¹ AEP Ohio cannot even point to any information in the record showing that AEP Ohio's SSO customers have experienced retail rate volatility.⁷⁷² In fact, given all the forecasts, true-ups, over and under collection adjustments and yearly/quarterly reconciliations, it is more likely that AEP Ohio's PPA Rider proposal will increase rate volatility.

⁷⁶⁸ See Direct Testimony of James F. Wilson (OCC Exhibit No. 15) filed September 11, 2015; Hearing Transcript at Vol. XV, p. 3766:19-3767:6; *see also* Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015 at 7 (\$1.9 billion cost associated with PPA Rider term under the Joint Stipulation).

⁷⁶⁹ See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at p. 51:1-53:2; *see also* Direct Testimony of James F. Wilson (OCC Ex. 35) filed December 28, 2015.

⁷⁷⁰ See Hearing Transcript at Vol. I, p. 102:21-103:4. If anything, what with all the adjustments to “true up” AEP Ohio's projections with actual figures, the PPA Rider is going to increase volatility. *See* notes 82-87, *supra*.

⁷⁷¹ See Hearing Transcript at Vol. I, p. 103:11-15.

⁷⁷² See *id.* at Vol. VII, p. 1957:24-1958:19-21.

Although AEP Ohio asserted that the PPA Rider would act as a hedge, it did not quantitatively evaluate the value of the hedge.⁷⁷³ Staff itself has acknowledged the uncertainty of whether the PPA Rider will result in a charge or credit to customers and is unwilling to guarantee that the PPA Rider will be a net financial benefit to customers.⁷⁷⁴

The PUCO denied AEP Ohio's initial attempt at a PPA Rider due to uncertainty. The Amended Application/Modified Amended Application and the record evidence have done nothing to resolve that uncertainty. Accordingly, the Amended Application/Modified Amended Application should be denied.

G. Staff's alternative recommendations have the same problems underlying Staff's recommendation to deny the Amended Application.

The PUCO Staff's original and best recommendation for the PUCO's protection of Ohioans was its opposition to AEP Ohio's PPA proposal. The Staff opposed the PPA Rider in ESP III and did so again here during the first phase of this proceeding.⁷⁷⁵

If the PUCO finds that the PPA Rider proposed in the Amended Application is in the public interest, Staff has proposed an alternative based on the necessary conditions that the PUCO set in its ESP III Opinion and Order.⁷⁷⁶ Staff acknowledges that its alternative proposal is not an exhaustive list of factors that the PUCO should consider.⁷⁷⁷ Similarly, Staff acknowledges that meeting all of the factors in its alternative proposal

⁷⁷³ See *id.* at Vol. I, p. 103:24-104:4.

⁷⁷⁴ See *id.* at Vol. XVI, p. 3925:2-12.

⁷⁷⁵ See *id.* at p. 3892:2-10; see also, Direct Testimony of Dr. Hisham Choueiki (Staff Ex. 1) filed October 9, 2015 at 13-16. Notwithstanding the PUCO's finding in ESP III that a PPA Rider, properly conceived, could be in the public interest, Staff still opposes the PPA Rider that AEP Ohio proposes here. See Hearing Transcript at Vol. XVI, p. 3903:24-3904:4. As explained earlier, if the PUCO rejects the Joint Stipulation, it must evaluate the Amended Application. Thus Staff's alternative recommendations necessitate discussion.

⁷⁷⁶ See *id.* at Vol. XVI, p. 3892:6-3893:5.

⁷⁷⁷ See *id.* at p. 3894:21-3895:12.

does not, and should not, guarantee adoption were AEP Ohio to agree to the alternative proposal.⁷⁷⁸ Most significantly, Staff acknowledges that the problems underlying its recommendation to deny the Amended Application also underlie its alternative proposal.

Limiting the duration of the PPA Rider to the term of ESP III would still represent a move away from a fully competitive and fully functioning generation market.⁷⁷⁹

Further, Staff's alternative proposal regarding information sharing, a risk-sharing mechanism, and rigorous PUCO review are items to which AEPGR would have to agree.⁷⁸⁰ Such items would have to be incorporated as conditions in contracts – the PPAs – over which the PUCO has no subject matter jurisdiction and agreed to by a party – AEPGR – over whose operations the PUCO has no subject matter jurisdiction.⁷⁸¹

Because subject matter jurisdiction cannot be conferred by agreement if it is otherwise lacking, none of these items in Staff's alternative proposal would create any legally enforceable right at the PUCO (by the PUCO, consumers or, for that matter, AEP Ohio) to require AEPGR to adhere to Staff's proposed safeguards.⁷⁸² As the PUCO has itself declared, "parties cannot confer [on the PUCO] subject matter jurisdiction by mutual consent where none would otherwise exist, . . ."⁷⁸³ In short, Staff's alternative proposal

⁷⁷⁸ See *id.*

⁷⁷⁹ See *id.* at p. 3895:22-3896:10; *id.* at 3904:23-3905:14.

⁷⁸⁰ See Direct Testimony of Dr. Hisham Choueiki (Staff Ex. 1) filed October 9, 2015 at p. 17:16-19:5.

⁷⁸¹ See Hearing Transcript at Vol. XVI, p. 3901:2-3902:10.

⁷⁸² See, e.g., *Fox v. Eaton Corp.*, 48 Ohio St. 2d 236, 238 (1976), overruled on other rounds, *Manning v. Ohio State Library Board*, 62 Ohio St.3d 24 (1991); cited with approval *In re Dunn*, 101 Ohio App. 3d 1, 10 (Clinton 1995); *In re Kerry Ford, Inc.*, 106 Ohio App. 3d 643, 651 (Franklin 1995) ("parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court or administrative body where such jurisdiction does not otherwise exist."); see also *Rieser v. Rieser*, 191 Ohio App. 3d 616, 621 (Montgomery 2010) (parties may not "by agreement, confer jurisdiction on a court which by law it does not have.") (citation omitted).

⁷⁸³ See *In the Matter of the Complaint of Stand Energy Corp. v. The Cincinnati Gas and Electric Co.*, 2000 Ohio PUCO Lexis 1006, 5-6 (PUCO Case No. 99-960-GA-CSS).

regarding information sharing, a risk-sharing mechanism, and rigorous PUCO review do not legally or meaningfully vest in the PUCO authority to ensure that Staff's proposals are followed or enforced.⁷⁸⁴ Therefore, no consumer benefits should be assumed from Staff's settlement position in this case.

Consumers will still bear risk were AEP Ohio and AEPGR to submit to Staff's alternative proposal.⁷⁸⁵ And even under Staff's alternative proposal, customers would be forced to bear generation-related financial risk whether they wanted to or not.⁷⁸⁶

Staff opposed the concept of a PPA in ESP III and did so here in the first phase of this proceeding – even as it relates to Staff's alternative proposal.⁷⁸⁷ In fact, Staff believes that its alternative proposal would subsidize generation.⁷⁸⁸ Staff was concerned in ESP III that AEP Ohio would use the PPA Rider as a venue for other unregulated generation to be contracted and paid for by AEP Ohio distribution customers without it being competitively bid.⁷⁸⁹ Staff has the same concern in connection with its alternative proposal.⁷⁹⁰

In ESP III, Staff was concerned that the AEP regulated business unit that bids the OVEC generation into the PJM capacity, energy, and ancillary services markets may use

⁷⁸⁴ Hearing Transcript at Vol. XVI, p. 3905:21-25.

⁷⁸⁵ *See id.* at p. 3900:21-22.

⁷⁸⁶ *See id.* at p. 3924:1-22.

⁷⁸⁷ *See id.* at p. 3915:12-22.

⁷⁸⁸ *See id.* at p. 3924:23-3925:1.

⁷⁸⁹ *See id.* at p. 3912:9-19; Prefiled Testimony of Dr. Hisham M. Choueiki, Case No. 13-2385 (OCC Ex. 20, admitted at Hearing Transcript Vol. XVI, p. 4041) at p. 12.

⁷⁹⁰ *See* Hearing Transcript at Vol. XVI, p. 3910:21-3919:24. Based on the Amended Application, Staff asserts that AEP Ohio has committed to limiting the generation assets to be included in a PPA Rider to only those in the Amended Application. *See id.* at p. 3917:21-3918:12. But AEP Ohio in ESP III reserved the right to include additional generation assets in a PPA Rider. *See* ESP III Opinion and Order at 8. AEP Ohio's reserved right to include additional generation assets in the PPA Rider flows from ESP III. Nothing in AEP Ohio's Amended Application withdraws that reservation of right. *See* Amended Application.

different strategies than those used by its affiliate, AEPGR.⁷⁹¹ Staff has the same concern in connection with its alternative proposal.⁷⁹² Staff's alternative proposal removes none of the uncertainty regarding whether the PPA Rider will result in a charge or credit to customers – “[b]ecause it’s all in the future, no one knows.”⁷⁹³ Further, the reliability of the transmission system would still be under the auspices of PJM – even under Staff's alternative proposal.⁷⁹⁴

As Staff concedes, the reasons for its recommendation to deny the Amended Application are also applicable to its alternative proposal.

H. The Amended Application/Modified Amended Application must be rejected because including its costs would cause AEP Ohio's ESP to fail the ESP v. MRO test.

The General Assembly established a statutory test that must be met before the PUCO can approve, or modify and approve, an electric company's ESP. This test, according to R.C. 4928.143(C)(1), states that the PUCO cannot approve, or modify and approve, an ESP unless the PUCO finds that the ESP “including its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.” R.C. 4928.142 provides the rules for establishing a SSO under a MRO. The test should only be applied using quantitative factors.

⁷⁹¹ See Hearing Transcript at Vol. XVI, p. 3919:25-3920:11; Prefiled Testimony of Dr. Hisham M. Choueiki, Case No. 13-2385 (OCC Ex. 20, admitted at Hearing Transcript Vol. XVI, p. 4041) at p. 13.

⁷⁹² See Hearing Transcript at Vol. XVI, p. 3920:25-3921:8.

⁷⁹³ See *id.* at p. 3925:2-7.

⁷⁹⁴ See *id.* at p. 3921:9-12.

Earlier this year, the PUCO determined that AEP Ohio's ESP, as modified by the PUCO *and not including a proposed PPA Rider*, was more favorable in the aggregate than the expected results under an MRO.⁷⁹⁵ The PUCO clearly reserved judgment on the statutory MRO v. ESP test – “we affirm our finding that it is not necessary to attempt to quantify the impact of the PPA rider . . . in the MRO/ESP analysis, given that [the] placeholder rider[] ha[s] been set at zero, *and any future costs associated with these riders are unknown and subject to future proceedings.*”⁷⁹⁶ Because the PUCO did not consider, and could not have considered, the significant impact of the PPA Rider now proposed in this current proceeding on the statutory test, the PUCO's analysis – as the PUCO recognized – was inaccurate and incomplete.⁷⁹⁷

AEP Ohio Witness Vegas agreed that the costs/benefits of the PPA Rider have to be included in the ESP III MRO v. ESP analysis.⁷⁹⁸ He also agreed that the PPA Rider, if approved, will be subject to the MRO v. ESP test in the future.⁷⁹⁹ AEP Ohio Witness Vegas so agreed because he acknowledges that it is not technically possible to approve a rider beyond the term of an ESP.⁸⁰⁰

⁷⁹⁵ ESP III Opinion and Order at 94-95.

⁷⁹⁶ *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*, Case No. 13-2385-EL-SSO, Entry at 56 (May 28, 2015) (italics added).

⁷⁹⁷ *See id.*; *see also* Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at p. 5:4-7.

⁷⁹⁸ *See* Hearing Transcript at Vol. I, p. 187:16-23; *see also* 5-15-15 Letter to Commission from Mr. Vegas (OCC Ex. 2, admitted at Hearing Transcript Vol. II, p. 365). AEP Ohio Witness Vegas appears later to have changed his tune. *See* Hearing Transcript at Vol. I, p. 241:17-19. But the tune brought to mind by AEP Ohio Witness Vegas' changed answer is the hit single by country music superstar Waylon Jennings, “Wrong!” Given what is stated in his cover letter (OCC Ex. 2), his initial response to the question, the PUCO's confirmation that the costs of the PPA Rider would be subject to a future proceeding, and (not to mention) the governing law, AEP Ohio Witness Vegas's second apparent answer is clearly wrong.

⁷⁹⁹ *See* Hearing Transcript at Vol. I, p. 173:20-23.

⁸⁰⁰ *See id.* at p. 173:116:16-21.

OCC Witness Wilson found AEP Ohio's estimates of the benefits/costs of the PPA Rider unreliable and overstated.⁸⁰¹ Based on his analysis, OCC Witness Wilson estimated that the appropriate estimate for the PPA Rider for January 2016 through May 2018 (the term of ESP III) is a cost to customers of \$439 million.⁸⁰² Accordingly, were the PUCO to approve the PPA Rider, the estimated cost to customers of \$439 million more than offsets the \$53 million in benefits found in ESP III.⁸⁰³ The net cost to customers -- \$386 million -- would not exist under an MRO.⁸⁰⁴ The PUCO should take into consideration the significant cost impact that the PPA Rider, originally approved as a zero placeholder, will now have on customers.⁸⁰⁵ Based on that consideration, the PUCO should reject AEP Ohio's proposed PPA Rider because if it is approved the ESP is not more favorable than an MRO for customers.⁸⁰⁶

According to the Ohio Revised Code, the PUCO must compare what customers would pay or receive under an MRO to what customers would pay or receive under an ESP. In this case, the \$386 million (or the \$527 million were the PPA Rider as proposed in the Joint Stipulation analyzed) cost to customers under the PPA Rider would not exist under an MRO. This cost to customers over only 2 years and 5 months demonstrates that

⁸⁰¹ See Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at p. 6:4-10; Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015.

⁸⁰² See Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at p. 6:7-10. Were the Joint Stipulation approved, the relevant figure would be \$580 million. See Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 19:13-19.

⁸⁰³ See Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at p. 6:14-20; *see also* Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 19:13-20:9 (\$580 million cost would more than offset \$53 million benefit).

⁸⁰⁴ See Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at p. 6:19-7:3; *see also* Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed December 28, 2015 at 20:1-9 (net cost to consumers of \$527 million were PPA Rider as proposed in Joint Stipulation analyzed).

⁸⁰⁵ See Direct Testimony of Beth E. Hixon (OCC Ex. 9) filed September 11, 2015 at p. 7:4-6.

⁸⁰⁶ See *id.* at p. 7:6-9.

the costs of the PPA Rider would cause AEP's ESP to fail the statutory test. The PUCO must reject AEP Ohio's proposals because they fail to meet the legal standard set forth in R.C. 4928.143(C)(1).

I. The Commission should reverse certain rulings that were wrongly decided during the evidentiary hearing on the Joint Stipulation.

The PUCO is well-aware of the broad discovery permitted under the governing rules and law.⁸⁰⁷ The importance of this case and the corresponding need for a robust record has been acknowledged.⁸⁰⁸ Nevertheless, relevant, material evidence was kept out of the record during the evidentiary hearing on the Joint Stipulation. First, the settlement discussion confidentiality privilege was applied well beyond legal bounds. Second, OCC's subpoenas on Signatory Parties to appear and testify during the evidentiary hearing were quashed. Third, testimony was admitted that shouldn't have been. Such rulings should be reversed by the PUCO.

Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of an Examiner ruling by "discussing the matter as a distinct issue in its initial brief...." Accordingly, OCC seeks reversal of the rulings described herein.

The evidentiary hearing should be reopened to allow non-Signatory Parties to cross-examine witnesses on matters related to the three-prong test consistent with the proper bounds of the settlement discussion confidentiality privilege. The evidentiary

⁸⁰⁷ See generally Memorandum Contra by The Office of the Ohio Consumers' Counsel (Expedited Treatment Requested) filed in this docket on January 4, 2016, pp. 3-4; see also R.C. 4903.082 and OAC 4901-1-16.

⁸⁰⁸ See, e.g., Hearing Transcript at Vol. XVIII, pp. 4431-4433.

hearing should also be reopened to allow non-Signatory Parties to cross-examine the Signatory Parties subpoenaed.⁸⁰⁹

1. Settlement discussion confidentiality privilege is limited in scope and inapplicable to the questions asked during the evidentiary hearing by non-Signatory Parties.

The Signatory Parties had the burden during the evidentiary hearing to show that each part of the three-prong test was met. Non-Signatory Parties asked numerous questions to probe the degree to which each element of the three-prong test was met. Without exception, objections to such questions were sustained or a limiting instruction was given to the witness not to divulge matters discussed during settlement.⁸¹⁰ In fact, it was felt necessary to give a general directive that any questions necessitating disclosure, of any kind, regarding settlement discussions would be prohibited.⁸¹¹ Such broad applications of the settlement discussion confidentiality privilege extend well beyond the governing law.

Evidence Rule 408 provides limited confidentiality for settlement discussions. Thus, offering consideration in compromising or attempting to compromise a claim which was disputed is not admissible to prove liability, invalidity of the claim, or its amount.⁸¹² But the Rule “does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”⁸¹³

⁸⁰⁹ See O.A.C. sec. 4901-1-34. Although the evidentiary record to date necessitates denying AEP Ohio’s proposal, as described above, it does not, and cannot, support granting the proposal. As described in this section, material evidentiary matters were wrongly decided, thus excluding material evidence from the record.

⁸¹⁰ See, e.g., Hearing Transcript at Vol. XIX, p. 4688:10-19; 4695:7-14; 4813:12-20; 4816:11-4817:11; 4862:3-16.

⁸¹¹ See *id.* at 4695:7-4696:3.

⁸¹² Ohio R. Ev. 408.

⁸¹³ *Id.*

Further, the Rule “does not require exclusion when the evidence is offered for another purpose, . . .”⁸¹⁴ Ohio Administrative Code sec. 4901-1-26(E) is analogous to Rule 408. It provides limited confidentiality for settlement discussions. But it, too, provides that it “does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”⁸¹⁵ Also, it, too, provides that it “does not require exclusion when the evidence is offered for another valid purpose.”⁸¹⁶

The Ohio Supreme Court has held that there is no blanket “settlement privilege.”⁸¹⁷ It has acknowledged that “discovery of settlement terms and agreements is not always impermissible.”⁸¹⁸ Further, it has indicated that the nature of settlement meetings – for example, exclusionary settlement meetings – are matters of “grave concern[.]” to it.⁸¹⁹ As such, the Ohio Supreme Court has acknowledged that the nature of settlement meetings is not protected by the limited settlement discussion confidentiality privilege under Rule 408 or Ohio Administrative Code 4901-1-26(E). The PUCO has admonished against stipulation provisions that result in paying cash or cash equivalents to signatory parties out of consumers’ pockets – and forewarned parties that such provisions are likely to be stricken.⁸²⁰ As such, the PUCO itself has acknowledged that probing provisions resulting in paying cash or cash equivalents is appropriate.

⁸¹⁴ *Id.*

⁸¹⁵ O.A.C. sec. 4901-1-26(E).

⁸¹⁶ *Id.*

⁸¹⁷ *See Ohio Consumers’ Counsel v. PUC*, 111 Ohio St. 3d 300 (2006).

⁸¹⁸ *See id.* at 322.

⁸¹⁹ *See Time Warner v. PUC*, 75 Ohio St. 3d 229, n. 2 (1996).

⁸²⁰ *See 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 Generation Facility*, Case No. 05-376-EL-UNC Order on Remand at 11-12 (February 11, 2014).

The record demonstrates that the information sought by non-Signatory Parties was not within the limited scope of the settlement discussion confidentiality privilege. Instead, the information sought was for “another valid purpose” – has the three-prong test been met. For example: Was there serious bargaining? If so, was it among knowledgeable parties? What was the nature of the settlement meetings? Were they exclusionary? What, exactly, is in the “package” for the PUCO’s public interest review? Is the package in the public interest, or is it merely a compilation of cash or cash equivalent payments to Signatory Parties at consumers’ expense? What does the Joint Stipulation mean?⁸²¹ None of these areas – all proper under governing rules and law, as described above – were permitted to be fully and fairly explored during the evidentiary hearing due to the breadth with which the settlement discussion confidentiality privilege was applied.

The broad application of the settlement discussion confidentiality privilege during the evidentiary hearing effectively resurrected the blanket “settlement privilege” rejected by the Ohio Supreme Court. It will have far-reaching, prejudicial effects on non-signatory parties and the PUCO’s ability to decide the important matters before it based on a full, accurate, complete record. As happened here, in a very large, very important, multi-party case, signatory parties could use the three-prong test and associated, purported settlement discussion confidentiality privilege as a sword and a shield. The PUCO’s evaluation of a stipulation under the three-prong test would be limited to

⁸²¹ The Joint Stipulation, as a settlement agreement, is a contract like any other contract. *See, e.g., In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St. 3d 605, 613 (2004) (citations omitted); *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St. 3d 559, 564 (2004). “A settlement agreement is a contract to which general rules of contract law apply.” *Huffy Corp. v. MRED Properties*, 1993 Ohio App. Lexis 5620, *6 (Mercer 1993). “It is axiomatic that, where [as here] a contract is ambiguous, parol evidence may be employed to resolve the ambiguity and ascertain the intention of the parties.” *Illinois Controls v. Langham*, 70 Ohio St. 3d 512, 521 (1994) (citations omitted).

whatever “evidence” signatory parties choose to submit in direct testimony. There was serious bargaining among knowledgeable parties, a signatory party would assert, but non-signatory parties could not fully explore the assertion. The stipulation, as a package, does not violate any regulatory principle or practice, a signatory party would assert, but non-signatory parties could not fully explore the assertion. The stipulation, as a package, is in the public interest, a signatory party would assert, but non-signatory parties could not fully explore the assertion. But “one cannot assert a privilege as both a shield and a sword.”⁸²²

The breadth with which the settlement discussion confidentiality privilege was applied during the hearing exceeds legal bounds. It resurrects the blanket settlement privilege rejected by the Ohio Supreme Court. It will have far-reaching, prejudicial effects on non-signatory parties. And it will turn the three-prong test into an impregnable barrier. As a result, and most importantly, it will deprive the PUCO of the opportunity to decide the important matters before it on a full, accurate, complete record. The evidentiary hearing should be reopened to allow non-Signatory Parties to cross-examine witnesses on matters related to the three-prong test consistent with the proper bounds of the settlement discussions confidentiality privilege.⁸²³

⁸²² *Mota v. Gruszczynski*, 2011 Ohio Misc. Lexis 830, *14-15 (Cuyahoga Comm. Pls. 2011), citing *SS&D v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161 (holding, in part, that “a client may not rely on attorney-client communications to establish a claim against the attorney while asserting the attorney-client privilege to prevent the attorney from rebutting that claim”); *Vandenhoute v. Filer*, 2002 Ohio App. Lexis 3709, para. 9 (Cuyahoga 2002) (“Like all privileges, the physician-patient privilege is intended to be used as a shield of privacy, not a sword to escape liability or to otherwise gain an advantage.”); *Haydocy Pontiac, Inc. v. Lee*, 19 Ohio App. 2d 217, 219 (Franklin 1969) (allowing an infant to rescind a contract without requiring return of the property received would permit him to use his privilege as a sword rather than a shield).

⁸²³ The foregoing discussion underscores that the three-prong test is inherently unfair and unworkable. Signatory parties need do little more than assert that each prong of the three-prong test is met and then prohibit meaningful discovery and cross-examination by retreating behind the settlement discussion confidentiality privilege.

2. Hearing testimony, and other evidence submitted for the PUCO's consideration, should not be limited to that which signatory parties choose to submit.

A subpoena may be quashed if it is unreasonable or oppressive.⁸²⁴ OCC's subpoenas on Sierra Club, IGS, and Direct Energy – Signatory Parties all – were quashed as unreasonable.⁸²⁵ “We don't want to set a precedent that a non-signatory party could command the testimony of a signatory or that a signatory could command the testimony of a non-signatory party witness.”⁸²⁶ This decision will have far-reaching, prejudicial effects on non-signatory parties and should not stand.

First, it will undermine parties' ability to subpoena important witnesses. Commanding testimony is *exactly* what subpoenas are meant for.⁸²⁷

Second, it will allow signatory parties in a very large, very important, multi-party case to choose who files testimony to support the stipulation while allowing other signatory parties to evade questioning even where they are not similarly situated.⁸²⁸ Here, the only witness offered in support of the Joint Stipulation – AEP Ohio Witness Allen – acknowledged that “individual parties can speak for themselves as to why they support or do not oppose particular provisions or the Stipulation as a whole and the

⁸²⁴ O.A.C. sec. 4901-1-25(C).

⁸²⁵ Hearing Transcript at Vol. XXII, p. 5659:5-9.

⁸²⁶ *Id.* at 5659:10-20. Very importantly, the subpoenas were not quashed because the information sought by OCC was irrelevant, protected by the attorney-client privilege, protected by the settlement discussion confidentiality privilege, or protected under the First Amendment as argued by Sierra Club, IGS, and Direct Energy in their motions to quash. *See* Motions to Quash filed in this docket on December 31, 2015.

⁸²⁷ *See* O.A.C. sec. 4901-1-25(A) (“A subpoena shall *command* the person to whom it is directed to attend and give testimony at the time and place specified therein.”) (*italics added*).

⁸²⁸ O.A.C. sec. 4901-1-30(D) states: “Unless otherwise ordered, parties who file a full or partial written stipulation or make an oral stipulation must file or provide the testimony of at least one signatory party that supports the stipulation.” By its plain terms, it establishes a floor, not a ceiling, on signatory parties' testimony at a hearing on a stipulation. So it does not prevent non-signatory parties from subpoenaing signatory parties that do not file or provide the testimony required.

Company can only speak for itself.”⁸²⁹ Further, the Signatory Parties subpoenaed are not participating in, not opposing, or both, certain material provisions in the Joint Stipulation.⁸³⁰ Thus they have identified themselves as being different from other Signatory Parties – including AEP Ohio.

Third, it effectively cuts-off non-signatory parties from conducting *any* meaningful discovery. In addition to prohibiting hearing testimony from signatory parties that do not file written testimony, the ruling will practically prevent responses to written discovery from entering the record. Here, non-Signatory Parties received important responses to written discovery from the subpoenaed Signatory Parties. Without the testimony from the subpoenaed Signatory Parties, non-Signatory Parties cannot be assured of having the responses to written discovery in the record.⁸³¹ The PUCO is thus deprived of a record that includes what such responses were, how they compare to deposition testimony (including inconsistencies), and how they may inform the PUCO’s analysis under the three-prong test.⁸³²

Ultimately, the evidentiary ruling on the subpoenas will prevent the PUCO from deciding the important matters before it based on a full, accurate, complete record. Here, non-Signatory Parties are prevented from questioning the Signatory Parties subpoenaed, who clearly and unambiguously set themselves apart from other Signatory Parties by way of the footnotes, about the footnotes’ meaning, their position on the Joint Stipulation, the

⁸²⁹ See INT-S1-034, INT-S1-035, e-mail correspondence (OCC Ex. 25, admitted at Hearing Transcript Vol. XX, p. 5015).

⁸³⁰ See footnotes in Joint Ex 1.

⁸³¹ See, e.g., Ohio Rs. Ev. 401, 402, 403, 801, 802, 803, 804, and 901.

⁸³² OCC made this very point in describing why the Motions to Quash should be denied. See Hearing Transcript at Vol. XII, p. 5657:14-5658:3.

Joint Stipulation's meaning, and matters under the three-prong test.⁸³³ The subpoenaed Signatory Parties' responses to written discovery are excluded from the record. The implications are underscored here since AEP Ohio Witness Allen conceded that he would not, and could not, speak for the other Signatory Parties.⁸³⁴ The PUCO is thus left with no choice but to guess about material issues in the case.

The evidentiary hearing should also be reopened to allow non-Signatory parties to cross-examine the Signatory Parties subpoenaed.

3. AEP Ohio Witness Allen should not have been permitted to testify about the alleged economic analysis attached to his testimony because he was unqualified to do so.

As described earlier, AEP Ohio Witness Allen was not qualified to testify about the alleged economic analysis using the economic base model attached to his testimony.⁸³⁵ This is why OCC, among others, moved to strike such testimony during the evidentiary hearing.⁸³⁶ AEP Ohio Witness Allen admitted that he is not an expert in the economic base model.⁸³⁷ He does not even claim to be an economist.⁸³⁸ Given such admissions, and for the reasons more fully described above, the ruling allowing such testimony into the record should be reversed.

⁸³³ This would not be an exercise in futility, as noted earlier. *See, e.g.*, pp. 40-41, *supra*.

⁸³⁴ *See, e.g.*, INT-S1-034, INT-S1-035, e-mail correspondence (OCC Ex. 25, admitted at Hearing Transcript at Vol. XX, p. 5015).

⁸³⁵ *See* section pp. 84-85, *supra*.

⁸³⁶ *See* Hearing Transcript at Vol. VII, pp. 1739-64; 2054-2060.

⁸³⁷ *See id.* at p. 1787:8-11.

⁸³⁸ *See id.* at p. 1936:13-25.

VI. CONCLUSION

AEP Ohio's proposals are a frontal attack on electric markets and the benefits to Ohioans that flow from markets. AEP Ohio's proposals therefore are also an attempted invalidation of the Ohio law that years ago restructured utilities to give Ohioans market prices instead of government-set prices. The Ohio General Assembly determined as state policy that Ohio will "ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies[.]"⁸³⁹ And the General Assembly required that, with the termination of transition revenues, the electric "utility shall be fully on its own in the competitive market[.]"⁸⁴⁰ AEP Ohio cannot change that law by filing a case at the PUCO.

In any event, the PUCO is without jurisdiction under federal and state law to approve the PPA Rider. As to federal law, the Federal Energy Regulatory Commission is at this moment taking comments on whether to review the PPA.⁸⁴¹ The PPA Rider will hurt consumers by interfering with the competitive generation market, by awarding a subsidy that they (consumers) will pay, by setting wholesale market prices, and by distorting the wholesale market.

The Joint Stipulation should also be rejected because it fails all prongs of the PUCO's three-prong test for evaluating settlements. Further, the settlement standard should not be applied to the Joint Stipulation as a "package" because of the hodgepodge nature of this settlement that includes significant unrelated terms. Various of these terms

⁸³⁹ R.C. 4928.02(H).

⁸⁴⁰ R.C. 4928.38.

⁸⁴¹ See *Electric Power Supply Assoc., et al. v. AEP Generation Resources, Inc.*, EL16-33-000, Notice of Complaint (January 28, 2016); see also *Electric Power Supply Association v. FirstEnergy Solutions, Corporation*, FERC EL16-34-000, Notice of Complaint (January 28, 2016).

emerged at case-end unannounced and without earlier notice as a result of the concerning approach of utilities offering financial benefits (inducements) for settlement signatures.

The PUCO recently turned a critical eye to this practice in a case involving AEP Ohio.⁸⁴²

Further, according to AEP Ohio's own forecasts, the bail-out proposals in the Amended Application/Modified Amended Application do not serve the advertised purpose. The PPA Units are projected to be profitable for the duration of AEP Ohio's proposals.

In the interest of using electric markets, as intended by the Ohio General Assembly, and the benefits for Ohioans from those markets, the PUCO should dismiss AEP Ohio's case or deny its proposals.

⁸⁴² *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 Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (Feb. 11, 2015).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Post-Hearing Brief was served on the persons stated below via electronic transmission, this 1st day of February 2016.

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