

FILE

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 for Inclusion 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.)

JOINT INITIAL BRIEF OF
THE PJM POWER PROVIDERS GROUP
AND
THE ELECTRIC POWER SUPPLY ASSOCIATION

PUBLIC VERSION

RECEIVED-DOCKETING DIV
2016 FEB -1 PM 5:23
PUCO

February 1, 2016

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician SM Date Processed FEB 02 2016

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. Introductory Statement.....	1
B. The PJM Power Providers Group and the Electric Power Supply Association.....	3
C. AEP Ohio’s modified PPA proposal and summary of other Stipulation terms.....	4
D. Summary of P3/ESPA arguments.....	8
II. IMPORTANT FACTS THAT UNDERCUT AEP OHIO’S PROPOSAL.....	10
A. AEP Ohio does not fully own or control the AEPGR PPA plants and the OVEC plants	10
B. American Electric Power Company (the parent company) is pushing for the AEPGR PPA proposal – not AEP Ohio or its customers	13
C. AEPGR and AEP Ohio are not taking on any risk under the application as modified by the Stipulation.....	16
D. AEP Ohio cannot forecast whether the PPA Rider will be a credit or a charge.....	17
E. AEP Ohio’s claim that closing the PPA units will lead to \$1.6 billion in transmission upgrades is false.....	21
F. The PPA rider will cause the ratepayers’ generation charges to fluctuate more than today.....	23
G. The PJM Capacity Performance product further undercuts AEP Ohio’s proposal.....	25
H. No independent reliability study has been performed	26
III. THE STANDARD OF REVIEW FOR AEP OHIO’S APPLICATION AS MODIFIED BY THE STIPULATION CONSISTS OF SIX PRONGS	27
IV. THE PPA PROPOSAL FOR THE REMAINDER OF THE CURRENT ESP III TERM SHOULD BE DENIED	30

A.	The OVEC component of the PPA proposal is no different than the proposal that the Commission rejected in the ESP III proceeding, and does not meet the Commission’s minimum factors required for approval	30
B.	AEP Ohio has not met its burden of proof for the AEPGR PPA proposed for cost recovery through the PPA rider for the remainder of the ESP III term.....	35
1.	AEP Ohio has not established the financial need for any of the AEPGR generating plants	35
2.	AEP Ohio has not established the necessity during the remainder of the current ESP III term of any of the AEPGR PPA units in light of future reliability needs, including supply diversity	37
3.	AEP Ohio has not established the impact that closure of the AEPGR PPA units would have on electric pricing and the resulting effect on economic development within Ohio	39
4.	AEP Ohio’s PPA proposal does not provide for rigorous Commission oversight of the rider or full information sharing, despite the proposed process for a periodic review	41
5.	AEP Ohio’s PPA proposal does not include an alternative plan to allocate the PPA Rider’s financial risk.	43
C.	AEP Ohio has not demonstrated that the modified ESP III with the modified PPA Rider is more favorable in the aggregate than an MRO	45
V.	THE PPA PROPOSAL FOR A TERM BEYOND THE CURRENT ESP III TERM SHOULD BE DENIED	46
A.	The Commission should deny the OVEC component of the PPA proposal for the time period after the current ESP III period because it is no different than the ESP III proposal that the Commission rejected, and again it does not meet the Commission’s minimum PPA factors.....	47
B.	The Commission should deny the AEPGR component of the PPA proposal for the time period beyond the current ESP III period because it does not meet the Commission’s minimum PPA factors	47
C.	The Commission should deny the PPA proposal beyond the end of the current ESP III term because AEP Ohio has not demonstrated that a future ESP which includes the PPA proposal will be more favorable in the aggregate than an MRO	51
VI.	THIS COMMISSION HAS SUPPORTED THE DEVELOPMENT OF COMPETITIVE MARKETS AND SHOULD CONTINUE TO DO SO BY	

REJECTING AEP OHIO’S REQUEST FOR A SUBSIDY FOR ITS GENERATION AFFILIATE.....	53
A. This ratepayer guarantee is a subsidy and will harm both the wholesale and retail markets.....	53
B. The PPA Rider and PPA Proposal will discourage bidder participation in procurements for the SSO.....	56
C. The PPA Rider and PPA Proposal will discourage new independent gas- fired generation.....	56
VII. THE COMMISSION LACKS THE LEGAL AUTHORITY TO APPROVE AND IMPLEMENT THE PPA PROPOSAL.....	57
A. The Commission cannot authorize the PPA Proposal beyond the current ESP III period because it lacks authority to establish a generation-related rider “outside” of an ESP proceeding and beyond the current ESP III term	57
B. The Commission cannot authorize the PPA proposal because it will not comply with Ohio’s corporate separation statute.....	60
C. The Commission cannot authorize the PPA proposal because the stipulated commitments to environmental and renewable energy projects violate R.C. 4928.143(D)(2)(c), bind Commission decision-making related to these projects for future ESPs, and conflict with other language in the Stipulation.....	62
D. The Commission cannot authorize the PPA proposal because the AEPGR PPA is a contract for the procurement of electricity that will be resold at wholesale.....	65
VIII. THE PROPOSED STIPULATION FAILS THE COMMISSION’S THREE- PRONG TEST	66
A. The Stipulation was not the product of serious bargaining.....	67
B. The PPA proposal is the center of the Stipulation and it will not benefit ratepayers and is not in the public interest.....	69
C. Multiple terms of the Stipulation are simply money inducements for agreeing with the PPA proposal, and they will not benefit ratepayers and are not in the public interest.....	69
D. Multiple terms of the Stipulation are hardly commitments on AEP Ohio’s behalf, and bring forth minimal benefits (if any), and as such, they will not benefit ratepayers and are not in the public interest	71
E. Other terms in the Stipulation are unreasonable and unlawful	72

IX.	THE COMMISSION SHOULD NOT APPROVE THE PPA PROPOSAL ABSENT ASSURANCES THAT AEP OHIO WILL SEEK TO MAXIMIZE REVENUES THAT OFFSET RATEPAYER OBLIGATIONS	76
X.	THE POST-STIPULATION PROCEDURAL SCHEDULE FAILED TO ADHERE TO DUE PROCESS REQUIREMENTS	78
XI.	CONCLUSION.....	81

I. INTRODUCTION

A. Introductory Statement

Despite Ohio law enacted in 1999 that requires Ohio's electric utilities to separate generation assets from their non-competitive retail electric service and despite this utility's 2012 commitment to fully separate its generation assets by transferring those generation assets to another entity, Ohio Power Company ("AEP Ohio" or "Company") has not fully divested and has filed with the Public Utilities Commission of Ohio ("Commission") yet another proposal that will entangle AEP Ohio in those very same generation assets for at least eight more years.¹

AEP Ohio's proposal in this case comes on the heels of the Commission's refusal to shift the responsibility for AEP Ohio's entitlement to output from the Ohio Valley Electric Corporation ("OVEC") units from the Company's shareholders to its ratepayers. More specifically, in the Company's third electric security plan proceeding ("ESP III"),² AEP Ohio sought to establish a power purchase agreement ("PPA") rider that it claimed would act as a hedge and provide its ratepayers with rate stability. The Commission agreed to establish a "placeholder" rider with no rates ("PPA Rider") for the term of AEP Ohio's ESP III (June 2015 through May 2018), but the Commission rejected AEP Ohio's OVEC-only PPA rider proposal because it would not "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."³

¹ AEP originally proposed in this docket to be entangled with its affiliate generation assets for 36 years. That position changed during the pendency of this proceeding. A timeline of major events starting in 1999 continuing through this case is attached hereto as Attachment A.

² *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 Nos. 13-2385-EL-SSO et al.

³ *ESP III*, Opinion and Order at 25 (February 25, 2015). Nothing herein should be construed as agreement with the Commission's determination therein that the PPA rider is a term, condition or charge "relating to limitations on customer shopping for retail electric generation service * * * as would have the effect of stabilizing or providing certainty regarding retail electric service" under R.C. 4928.143(B)(2)(d). P3/EPSC reserve the right to challenge any such determination by the Commission in this and any other proceeding.

Not daunted by that Commission's ruling, AEP Ohio presented another PPA proposal just three months later – the October 2014 application in the instant case. AEP Ohio amended the application in May 2015, and then again amended its proposal in December 2015 through a Joint Stipulation and Recommendation (“Stipulation”).⁴

As the proposal currently stands, AEP Ohio is asking for the Commission to (a) find it prudent for AEP Ohio to enter into a PPA with its affiliate AEP Generation Resources Inc. (“AEPGR”), (b) approve AEP Ohio recovering from its ratepayers the net costs of purchasing generation under the AEPGR PPA, and (c) approve AEP Ohio recovering from its ratepayers the net costs of generation from the existing OVEC entitlement.⁵ AEP Ohio seeks authority to collect these generation costs through the PPA Rider from the time of Commission approval through May 2024.⁶ That is asking the Commission to approve the PPA Rider for the remainder of the existing ESP III term (roughly 2.25 years are left) and then for the continuation of the AEPGR PPA arrangement and the PPA Rider for six years afterward.

AEP Ohio's proposal is an attempt to shift the generation risk of AEPGR and AEP Ohio's parent company to AEP Ohio's ratepayers so that the parent company's self-interest is satisfied. The purpose of this proposal is not to establish rate stability for the AEP Ohio ratepayers. The PPA proposal will not provide ratepayers with a sufficient hedging benefit (or rate stability) or any other benefit that is commensurate with the potential costs and risks. It is not lawful, reasonable or in the public interest. In addition, the Company has not satisfied the factors required by the Commission in the *ESP III*. The proposal also conflicts with the existing

⁴ In addition to the December 2015 Stipulation, AEP Ohio entered into separate side agreements with the Industrial Energy Users-Ohio (“IEU”) and the Sierra Club, which both relate to this proceeding. P3/EPSC Exhibit (“Ex.”). 11 and OMAEG Ex. 26.

⁵ AEP Ohio Ex. 13 (see, especially, ¶¶4, 7 and 11).

⁶ Joint Ex. 1 at 4-7.

Commission directive to AEP Ohio⁷ (which was reaffirmed in 2015 in the *ESP III* decision) to divest itself of the OVEC entitlement. Further, the proposal will violate important regulatory principles or practices.

The reasons why the Application should be denied are many and obvious, putting this Commission at a crossroads in its tenure. Does it follow Ohio law and what is best for Ohio ratepayers, or does it allow AEP Ohio and its affiliates to profit at the expense of Ohio's captive ratepayers? The PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA") respectfully submit that AEP Ohio's proposal will harm AEP Ohio's captive ratepayers and the sanctity of the wholesale markets. As natural gas prices recently declined (which event has a significant impact on the anticipated effect of AEP Ohio's PPA proposal),^[1] P3/EPSA witness Cavicchi so succinctly and accurately observed: "[a]lthough the Company may be tempted to argue that keeping its captive ratepayers' rates high results in increased rate stability, it is frightening to think that consumers should be shielded from welcome electricity rate declines on the false perception of a future payoff."^[2] AEP Ohio's application as modified by the Stipulation should be rejected.

B. The PJM Power Providers Group and the Electric Power Supply Association

P3 and EPSA both intervened and actively participated during the hearing process (both phases) and strongly oppose AEP Ohio's amended application as modified by the Stipulation. P3 and EPSA promote properly designed and well-functioning electricity markets, including competitive generation markets. They bring forth a wealth of expertise because their members regularly participate in the wholesale competitive markets, own generation, purchase generation, and supply end-use customers:

⁷ *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order (December 4, 2013).

^[1] Hearing Transcript ("Tr.") Volume ("Vol.") 21 at 5271, 5275, 5294-5295.

^[2] P3/EPSA Ex. 13 at 19.

- P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC (“PJM”) region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts (“MWs”) of generation assets produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia.
- EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

This brief does not necessarily reflect the specific views of any particular member of P3 or EPSA with respect to any argument or issue, but collectively presents P3’s and EPSA’s positions.

C. AEP Ohio’s modified PPA proposal and summary of other Stipulation terms

AEP Ohio’s proposal in this proceeding centers on its intent to enter into the AEPGR PPA, pursuant to which it would acquire the capacity, ancillary services and energy output of nine generating plants in Ohio. A smaller part of the proposal involves AEP Ohio’s acquisition of capacity, ancillary services and energy of two OVEC generating plants.¹⁰ AEP Ohio would resell that capacity and energy output into PJM’s wholesale markets, and is seeking Commission imposition of the PPA Rider to bless that action and provide for the recovery of the net PPA costs from all ratepayers receiving power via AEP Ohio’s distribution system, both from AEP Ohio and other load serving entities (“LSEs”). AEP Ohio asserts that the Commission’s jurisdiction applies to the PPA rider only, and that the Commission does not have jurisdiction over the AEPGR PPA contract itself (or the OVEC arrangement) because PPA contracts are wholesale arrangements subject to the jurisdiction of the Federal Energy Regulatory Commission

¹⁰ Details about the generating plants involved in this PPA proposal are summarized later in this brief.

(“FERC”).¹¹ Notwithstanding that AEP Ohio intends to resell at wholesale all of the energy and capacity it receives under the AEPGR PPA, AEP Ohio and the Stipulating Parties recommend that the Commission find it is prudent for AEP Ohio to enter into the AEPGR PPA today and it will remain prudent through the current ESP III and through May 2024.¹² Also, AEP Ohio is seeking Commission approval of “the retail effect of the PPA proposal.” In other words, AEP Ohio wants authority to pass 100% of the net costs under the AEPGR PPA and OVEC entitlement to ratepayers through the PPA Rider.¹³ The Stipulating Parties recommend that the Commission approve the modified PPA proposal and a whole host of other non-PPA terms and conditions.

As related specifically to the PPA proposal, the following additional terms and conditions are included in the Stipulation:¹⁴

- The PPA rider will be reconciled quarterly with a rider adjustment to occur in the next full quarter.
- The PPA rider will be allocated to rate classes based on their five coincident peak demands from the prior year.
- The PPA rider will be billed to customers on a kilowatt-hour basis.
- For PJM planning years 2020/2021 to 2023/2024, if the charge or credit to a customer is less than a designated amount, AEP Ohio will provide an additional credit to customers.
- AEP Ohio agrees to annual compliance reviews to ensure its actions were not unreasonable.
- AEPGR fleet information will be available to Staff upon reasonable request, and treated as highly sensitive, proprietary trade secrets.
- If a PPA unit is sold or transferred to a non-affiliate, the Commission may exclude it from rate recovery under the PPA Rider.
- AEP Ohio will file annual compliance reports.

¹¹ Tr. Vol. 1 at 274; Tr. Vol. 2 at 349, 353-356.

¹² Tr. Vol. 1 at 54, 115, 230-231, 274; Tr. 2 at 354, 356; Jt. Ex. 1 at 4; Tr. 18 at 4475. AEP Ohio’s position is that the Commission can *propose* provisions/elements that would govern how the PPA rider will work, and that the Commission can *suggest* terms/conditions for the AEPGR PPA. Tr. Vol. 2 at 352-353, 356.

¹³ Tr. Vol. 1 at 55, 115.

¹⁴ Joint Ex. 1 at 6-8.

In exchange for the other Stipulating Parties' recommendation of or non-opposition to the modified PPA proposal, AEP Ohio agreed to a host of non-PPA-specific terms in the Stipulation, including:

- ESP III Extension: AEP Ohio will apply to extend its ESP III through May 2024 and agreed to include several specific terms in its application (including, extension of its Distribution Investment Rider, additional funding commitments; continued competitive bidding for the standard service offer ("SSO"); testing for significantly excessive earnings; the ESP versus market rate offer ("MRO") test; extension and expansion of the IRP tariff and credit; an automaker credit; a pilot program under its Basic Transmission Cost Rider; and a pilot program establishing a Competition Incentive Rider).
- Federal Advocacy: AEP Ohio will advocate for federal market enhancements, and will annually update the Commission on the wholesale electricity markets.
- Money Payments: AEP Ohio will provide (a) \$500,000 to a research and development program for clean energy technology; (b) \$400,000 in energy efficiency ("EE") and peak demand reduction ("PDR") funding each year to the Ohio Hospital Association ("OHA"); (c) up to \$600,000 in additional EE/PDR funding each year under an annual EE program for OHA members; and (d) \$200,000 to OPAE for the Community Assistance Program.¹⁵
- New Rate for OHA Members: AEP Ohio will decrease its Alternative Feed Service rates for OHA members to \$2.50 per kilowatt. This rate adjustment is estimated to save OHA members approximately \$100,000 each year.¹⁶
- OPAE Given Management Position: OPAE will manage the Community Assistance Program for 2017 under an \$8 million budget, and will be paid with a five percent management fee. This payment is roughly \$400,000.¹⁷
- Nexus in Ohio: AEP Ohio will maintain a nexus of operations in Ohio for the duration of the PPA Rider. AEP Ohio intends to keep its corporate headquarters in Columbus, Ohio.
- Supplier-Consolidated Billing Pilot: AEP Ohio will work on a pilot for competitive retail electric service ("CRES") providers who are Signatory Parties. Fifty percent of the costs of the pilot will be eligible for recovery from AEP Ohio's ratepayers in a future proceeding.
- Pilot for Call Transfer Process and Discount Offering: AEP Ohio will propose (a) a third-party call transfer process for customers who are

¹⁵ In the side agreement with IEU, AEP Ohio will pay IEU \$8 million, which is related in part to IEU's agreement therein to not oppose this PPA proposal. P3/EPSC Ex. 11 at 2.

¹⁶ Tr. 18 at 4551.

¹⁷ Tr. 18 at 4558-4559.

moving or initiating service, and (b) offer a percent-off-the-SSO CRES product.¹⁸

- Changes at Conesville Units 5 and 6: AEP Ohio will apply to convert these units to natural gas co-firing, with cost recovery through the PPA rider; will limit the coal heat input at the units; and will retire, refuel or repower both units to 100% natural gas by the end of 2029.
- Changes at Cardinal Unit 1: AEP Ohio will retire, refuel or repower this unit to 100% natural gas by the end of 2030 and provide information to the Commission about load flow, transmission upgrades, non-transmission alternatives, and provide a plan for transmission upgrades or non-transmission alternatives.
- Changes at Co-Owned PPA Units: AEP Ohio will annually report on steps taken to secure retirement, repowering or refueling to 100% natural gas, or to consolidate ownership by a single entity. AEP Ohio will provide information to the Commission about load flow, transmission upgrades, non-transmission alternatives, establishing renewable energy companies in Ohio, property tax payments, and employment figures. Any transfer or sale of AEP Ohio's entitlement at OVEC or the co-owned PPA units will be subject to a separate agreement between AEP Ohio and Sierra Club.
- New SmartGrid Proposal: AEP Ohio will propose to deploy twice as many Volt/Var Optimization circuits as it has currently proposed in Case No. 13-1939-EL-RDR and to file a cost/benefit study for full deployment of that equipment with a cost recovery proposal. The proposal will highlight specific future initiatives.
- Working Group for SSO Auctions: AEP will form a working group that will discuss a pilot program allowing EE providers to competitively bid as well.
- Carbon Emission Reduction Plan: AEP Ohio will file a plan to promote fuel diversification and carbon emission reduction. AEP Ohio will implement programs as well.
- New Wind and Solar Projects: AEP Ohio and affiliates will develop, via competitive bid, wind energy projects in Ohio of at least 500 MW of nameplate capacity, and AEP Ohio will develop solar projects in Ohio of at least 400 MW of nameplate capacity. AEP Ohio affiliates will have the right to initially own up to 50% of such projects in the aggregate. AEP Ohio will buy the power via a long-term PPA from each project and full cost recovery will occur through the PPA rider.

The Commission allowed AEP Ohio to establish a "placeholder PPA rider" in the *ESP III* proceeding for the term of the ESP III (expiring May 2018).¹⁹ The Company is not recovering

¹⁸ On January 6, 2016, AEP Ohio filed that proposal in *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI and *In the Matter of the Market Development Working Group*, Case No. 14-2074-EL-EDI.

any costs thereunder at this time. AEP Ohio and the other Stipulating Parties are recommending that termination of the ESP III does not “affect the continued cost recovery under the PPA Rider.”²⁰ But AEP Ohio acknowledges the Commission will have to issue a future approval(s) for recovery.²¹ AEP Ohio expects the Commission to continue to approve the PPA Rider as demonstrated through the following testimony from Mr. Vegas, the President and Chief Operating Officer of AEP Ohio:²²

Our expectation is that the Commission would continue to approve * * * the rider itself so that the retail effect could continue. This is specifically addressing the prudence of the contract itself. * * * [O]ur expectation is that the up-front approval of this contract, which has a life beyond the ESP, would continue to support the PPA rider in the future as this contract relies on the PPA rider for the benefits to the consumers.

* * *

I think there’s an expectation that the Commission will renew the rider in future hearings. I think that expectation is being asked for and being set by approving the prudence review of this.

The long list of items included in the Stipulation gives the appearance of weight to the Stipulation. That list, however, represents a series of soft commitments by AEP Ohio and favor trading with Signatory Parties solely to keep AEP Ohio’s PPA proposal alive. The Commission should not be deceived. The Stipulation is simply window dressing for AEP Ohio’s attempt to re-regulate the Ohio-sited affiliate generation.

D. Summary of P3/ESPA arguments

Since AEP Ohio’s PPA proposal is the heart of this proceeding, P3/EPSPA will first address the modified PPA proposal, which involves two components – the OVEC entitlement

¹⁹ *ESP III*, Opinion and Order at 25.

²⁰ Joint Ex. 1 at 33. Similarly, AEP Ohio noted that nothing in the proposed Stipulation precludes AEP Ohio from seeking an extension of Rider PPA, from seeking to extend the AEPGR PPA, or from requesting a determination of prudence as to AEP Ohio extending the PPA with AEPGR. Tr. Vol. 18 at 4478-4479

²¹ Tr. Vol. 1 at 59-60, 116.

²² Tr. Vol. 1 at 41, 62-63.

and the AEPGR PPA. Each of those components must be reviewed and evaluated. In addition, there are separate time periods for the PPA request – first, for the remainder of the current ESP III term during which the placeholder rider is in effect, and second, for the following years through May 2024.

The Commission should reject the PPA proposal for the remainder of the current ESP III term because:

- The OVEC component of the PPA proposal is no different than what AEP Ohio proposed and the Commission rejected it in the *ESP III* proceeding.
- AEP Ohio did not present sufficient evidence for either the OVEC component or the AEPGR component of the PPA proposal to meet the minimum factors that the Commission has required for PPA proposals.
- AEP Ohio did not demonstrate that the current ESP III with the PPA proposal will be more favorable in the aggregate than an MRO.

As to the PPA proposal for the period after the current ESP III, that request also fails because:

- The OVEC component of the PPA proposal is no different than what AEP Ohio proposed and the Commission rejected it in the *ESP III* proceeding.
- AEP Ohio did not present sufficient evidence for either the OVEC component or the AEPGR component of the PPA proposal to meet the minimum factors that the Commission has required for PPA proposals.
- AEP Ohio did not demonstrate that a future ESP which includes the PPA proposal will be more favorable in the aggregate than an MRO.

The Commission should also reject AEP Ohio's PPA proposal and the Stipulation based on additional policy and legal arguments:

- The PPA proposal is a subsidy that will harm the wholesale and retail competitive markets.
- The Commission does not have authority to establish a generation-related charge outside of an ESP proceeding and beyond the current ESP III term.
- The PPA proposal will not comply with Ohio's corporate separation statute.
- The stipulated environmental and renewable energy projects violate R.C. 4928.143(D)(2)(c), bind Commission decision-making, and conflict with other language in the Stipulation.

- The Commission does not have authority to authorize the PPA proposal because the AEPGR PPA is one for procurement of electricity to be resold at wholesale.
- The Stipulation does not meet the Commission's three-prong test for evaluating settlements.
- The Commission should not approve the PPA Proposal absent assurances that AEP Ohio will seek to maximize revenues that offset ratepayer obligations.
- The post-Stipulation procedural schedule failed to adhere to due process requirements.

II. IMPORTANT FACTS THAT UNDERCUT AEP OHIO'S PROPOSAL

The Commission should be aware of a number of particularly crucial facts that undercut AEP Ohio's proposal. These crucial facts are undisputed in the record and should be kept in mind when weighing the evidence and ruling on AEP Ohio's application as modified by the Stipulation.

A. **AEP Ohio does not fully own or control the AEPGR PPA plants and the OVEC plants**

Under AEP Ohio's proposal, it will purchase the generation output (capacity, energy, and ancillary services) from nine power plants, involving 20 different units, until May 31, 2024. AEP Ohio has been a Sponsoring Company of the OVEC plants, but it does not fully own or control them. Regarding the AEPGR PPA plants, AEP Ohio was their owner, but transferred them to AEPGR at the end of 2013 and has had no involvement in operation of those plants since that time.²³ *Neither AEP Ohio (nor its affiliate AEPGR) owns or controls all of the involved plants.* This is an important fact because (1) co-ownership affects the ability to direct the operation of the plants and the capital investments of the plants, and (2) the PPA proposal will have a significant impact on the other owners of the plants.

²³ Tr. Vol. 18 at 4525.

The following table²⁴ presents fundamental information regarding the PPA plants:²⁵

Plant and Unit	Annual Capacity	Owner-ship %	Ownership Capacity	Other Owners
Cardinal Unit 1	592 MWs	100%	592 MWs	None
Conesville Unit 4	779 MWs	43.5%	339 MWs	Dynegy, Inc. & DP&L
Conesville Unit 5	405 MWs	100%	405 MWs	None
Conesville Unit 6	405 MWs	100%	405 MWs	None
Stuart Unit 1	577 MWs	26%	150 MWs	Dynegy, Inc. & DP&L
Stuart Unit 2	577 MWs	26%	150 MWs	Dynegy, Inc. & DP&L
Stuart Unit 3	577 MWs	26%	150 MWs	Dynegy, Inc. & DP&L
Stuart Unit 4	577 MWs	26%	150 MWs	Dynegy, Inc. & DP&L
Zimmer Unit 1	1,300 MWs	25.4%	330 MWs	Dynegy Inc.
Kyger Creek 5 Units	1,086 MWs (nameplate)	19.93%	216MWs (based on nameplate)	12 others ²⁶
Clifty Creek 6 Units ²⁷	1,304 MWs (nameplate)	19.93%	260MWs (based on nameplate)	12 others ²⁸

There is no dispute that, out of the nine AEPGR PPA units, AEPGR only owns three units outright. The rest are co-owned with Dynegy, Inc. (“Dynegy”)²⁹ and The Dayton Power

²⁴ A more detailed table, reflecting operational and ownership details of the PPA plants, is included with this Initial Brief as Attachment B.

²⁵ AEP Ohio Ex. 2at KDP-1 page 7; AEP Ohio Ex. 5 at 3-4; AEP Ex. 4 at 3-4; AEP Ohio Ex. 10 at WAA-3 page 1; Tr. Vol. 1 at 88-89, 122, 259-262, 268-270, 272; P3/EPSCA Ex. 10 at 31; AEP Ohio Ex. 16 at 104; Dynegy Ex. 1 at 9.

²⁶ The twelve other “Sponsoring Companies” of OVEC are: Allegheny Energy Supply Company LLC, Appalachian Power Company, Buckeye Power Generating LLC, The Dayton Power and Light Company, Duke Energy Ohio Inc., FirstEnergy Solutions Corp., Indiana Michigan Power Company, Kentucky Utilities Company, Louisville Gas and Electric Company, Monongahela Power Company, Peninsula Generation Cooperative, and Southern Indiana Gas and Electric Company. (Sierra Club Ex. 12 at 1)

²⁷ The Clifty Creek units are located outside Ohio, in Indiana. (AEP Ohio Ex. 10 at WAA-3 page 1; Tr. Vol. 1 at 122; AEP Ohio Ex. 4 at 15; Sierra Club Ex. 12 at 1.

²⁸ They are the same 12 entities identified above in Footnote 26.

and Light Company (“DP&L”). Moreover, the majority of the AEPGR PPA plants are not operated by AEPGR.³⁰ Similarly, AEP Ohio only has a 19.93% share to the OVEC units, and the remaining shares are owned by other companies.³¹

As to the AEPGR plants, AEP Ohio witness Vegas stated that each of the owners vote, based on their ownership share, on decisions related to capital investments, budgets, and operations of the units.³² Similarly, as to the OVEC plants, Mr. Vegas explained that each of the OVEC “Sponsoring Companies” sits on the board of directors, which makes decisions around capital investments and investments, and AEP Ohio does not have control over that board.³³ As a result, a myriad of decisions regarding the involved plants will be made by other entities that are not subject to this proceeding, including:

- the manner in which the involved plants will operate over the next 8+ years;
- the day-to-day decision-making over the next 8+ years; and
- AEPGR’s and AEP Ohio’s ability to address unknown future issues with the involved plants.

Dynegy witness Dean Ellis testified from the perspective of a joint owner of the involved PPA units. He convincingly explained that the PPA proposal will severely harm the other joint owners.³⁴

Should one owner receive an out-of-market subsidy such as the PPA rider, it will greatly distort the ownership arrangement. For example, if AEPGR were to receive an out-of-market PPA at above-market rates, the perverse effect would be that the PPA owner would be at a significant cost advantage, with the non-PPA owner at a disadvantage. Said differently, if one were to co-own a business with a business partner, and that partner

²⁹ Dynegy is a merchant generator that owns and operates numerous generating plants in Ohio, including a portion of the PPA plants involved here. Dynegy Ex. 1 at 2; AEP Ohio Ex. 16 at 103-104.

³⁰ AEP Ohio Ex. 5 at 3-5.

³¹ Sierra Club Ex. 12 at 1.

³² Tr. Vol. 1 at 89, 265. The joint owners would also have to agree in order to retire the units. Tr. Vol. 1 at 128.

³³ Tr. Vol. 1 at 90-92.

³⁴ Dynegy Ex. 2 at 6-7. *See, also*, Tr. Vol. 21 at 5334.

were to receive a guaranteed, above-market subsidy, the subsidized partner would become agnostic to the prices at which the business sells its product eliminating any incentive for the subsidized partner to improve efficiency in operations. The result would be an increase in the cost of operations for the joint owners ultimately putting the non-subsidized partner's ability to compete in jeopardy. In the case of AEPGR, it will not only receive its costs under the PPA but also a set return on equity of 10.38% -- both disincentives to the efficient operation and capital investment in the PPA units. AEPGR will also have less incentive to consider any consolidation of ownership of the joint-owned PPA units with the long-term PPA in place. Approval of the Stipulated PPA proposal will also discourage efforts to maximize efficiency, reliability and profitability of the units due to diverging motivations and objectives of the joint owners.

Moreover, Mr. Ellis explained how the PPA proposal will be particularly harmful during certain weather circumstances like those we have experienced this winter:³⁵

[T]he combination of the PPA and the PPA rider eliminates much of the cost focus and discipline required of a merchant generator to ensure cost recovery plus an appropriate return over the continued life of the asset. For example, if low gas prices and warm weather this winter depress prices in the Duke Ohio Zone, Dynegy will have to reduce or possibly eliminate its margin, carefully control costs and carefully watch the market in order to make a profitable sale into the market for the 46.5% portion of the Zimmer plant it owns. By contrast, with the stipulated PPA proposal in place, AEPGR will simply bill AEP Ohio its costs for its 25.4% portion of Zimmer plant and collect its 10.38% rate of return.

The fact that many of the PPA units are co-owned undercuts AEP Ohio's proposal.

B. American Electric Power Company (the parent company) is pushing for the AEPGR PPA proposal – not AEP Ohio or its customers

The driving force behind AEP Ohio's application is not AEP Ohio or its customers. American Electric Power Company ("AEP Parent") is pushing for the AEPGR PPA proposal as part of *its* overall business strategy. This case is not about providing customers and Ohio with rate stability, it is about satisfying the utility's parent company and helping the parent meet its business strategies and the expectations of the Wall Street investment community. This

³⁵ Dynegy Ex. 2 at 8.

Commission has not and should not be imposing billions of costs on Ohio ratepayers for the purpose of supporting the AEP Parent's business plans that ultimately benefit the AEP Parent's shareholders.

The record is clear on this point. AEP Ohio witness Pablo Vegas testified in the following exchange that, without a sustainable financial support model for the involved AEPGR plants, AEP Parent desires to divest the plants:³⁶

- Q. [Ms. Henry] * * * Now, American Electric Power Company or AEP the parent company, they have communicated the strategy to divest itself of volatile unregulated assets which includes the unregulated generation units that are part of the proposed PPA; is that correct?
- A. [Mr. Vegas] That's correct.
- Q. And based on your general understanding, AEP has a fiduciary duty to its shareholders, right?
- A. That's correct.
- Q. Okay. So given that AEP's stated intent is to divest from these units and it has this fiduciary obligation, do you believe that AEP – do you believe that AEP is making that decision because it's in the best interests of shareholders not to maintain those obligations at those units?
- A. Making which decision, to divest? **It's making the decision to divest because absent having a more sustainable financial support model for these power plants, they don't fit the profile of the investments and assets that AEP is looking to maintain.** So it's because of that characteristic that they would look to divest of these units.
- Q. So they have an obligation to their shareholders, correct?
- A. That's correct.
- Q. And they want to divest, correct?
- A. Absent this PPA being in place, that's correct. (Emphasis added.)

³⁶ Tr. Vol. 1 at 100-101.

Toby Thomas, the Vice President of Competitive Generation at AEPGR, confirmed this crucial point, stating: “our executive leadership including Mr. Akins has decided to begin a strategic review of the entire competitive business to look at whether or not it’s **best for the shareholders of American Electric Power** to keep the business, to put the business or spin the business into its own company or spin-merge with another company or divest.”³⁷ (Emphasis added.) This business strategy is now being implemented concurrent with this proceeding and the proposed Stipulation. In addition, AEP Parent hired an outside consultant to conduct an evaluation of the sale of the AEPGR PPA units and the non-PPA units, and that evaluation is underway.³⁸

After the corporate directive was handed down to Mr. Vegas, AEP Ohio then developed the idea of the PPA Rider.³⁹ Perhaps it is too obvious, but the genesis of the PPA proposal indicates that AEP Parent wants to protect/enhance its interests *for its shareholders* and that AEP Ohio has developed this PPA proposal to meet the desires of AEP Parent. In other words, AEP Ohio is seeking to divest the AEPGR PPA units not through a sale, but instead by transferring all of the risks of operations and market conditions to AEP Ohio’s ratepayers through the AEPGR PPA. The PPA Rider is simply the final mechanism needed to complete this “risk divestiture.”

This evidence conclusively demonstrates that the true purpose of the PPA proposal is not rate stability for the customers. And as AEP Ohio witness Vegas testified, the PPA proposal and PPA Rider has been presented at the behest of AEP Parent, not the customers. Given that (a) AEP Parent is pushing for a sustainable financial support model for the involved plants, (b) AEP Ohio’s customers have not asked for this proposal and (c) numerous customers oppose it, the

³⁷ Tr. Vol. 6 at 1231-1232.

³⁸ Tr. Vol. 1 at 258. AEP’s strategy to divest and sell its non-PPA units continues based on a January 28, 2016 investor call transcript, available at <http://seekingalpha.com/article/3844456-american-electric-powers-aep-ceo-nick-akins-q4-2015-results-earnings-call-transcript?part=single>.

³⁹ Tr. Vol. 1 at 46; Tr. Vol. 2 at 591.

Commission should reject AEP Ohio's skeptical claim that its customers are "alleged" beneficiaries of the PPA proposal, recognizing that this proposal is intended to bolster AEP Parent's bottom line profits for its shareholders. That is not rate stability.

C. AEPGR and AEP Ohio are not taking on any risk under the application as modified by the Stipulation

A review of the AEPGR PPA and the OVEC Amended and Restated Inter-Company Power Agreement ("ICPA") shows that AEP Ohio's attempt to obtain cost recovery through the PPA Rider is a complete transfer of risk to AEP Ohio's ratepayers.⁴⁰ The scales are tipped against the AEP Ohio ratepayers, while AEPGR and AEP Ohio would no longer be exposed to any substantial risk associated with the generation from the involved plants for numerous years.

The transfer of risk is obvious from the deal being proposed by AEP Ohio. AEPGR will be able to receive full cost recovery and a guaranteed return under its respective contract with AEP Ohio for the entire term and not be subject to market risk.⁴¹ Under the latest version of the AEPGR PPA, AEP Ohio will pay AEPGR at a rate of "cost plus a return on equity" (10.38%) for the capacity, energy and ancillary services that each plant can provide.⁴² More shocking is the fact that AEP Ohio wants the Commission to endorse the AEPGR PPA when that agreement states that AEP Ohio will pay AEPGR even when the energy, capacity and ancillary services are unavailable, such as during to an outage, force majeure or a failure to perform.⁴³ Under the terms of the OVEC ICPA, AEP Ohio will continue to pay OVEC at a rate of cost plus a return on equity for the capacity, energy and ancillary services available to AEP Ohio through its OVEC entitlement share while receiving full reimbursement from ratepayers. These payment and guaranteed return provisions transfer the market risks associated with all of these plants to AEP

⁴⁰ P3/EP SA Ex. 10; Sierra Club Ex. 3.

⁴¹ Tr. Vol. 2 at 592, 595.

⁴² P3/EP SA Ex. 10 at 7, 14-15.

⁴³ *Id.* at 8, 10, 14; Tr. Vol. 2 at 374-375, 459-460, 463-464. *See, also*, Tr. Vol. 1 at 111.

Ohio, which in return is going to use the PPA Rider to transfer the market risks to its customers. Without AEPGR and AEP Ohio exposed to any substantial risk under the proposed application, the Commission should be highly skeptical of the alleged benefits of the PPA Rider. The transfer of real and substantial risk to ratepayers easily undercuts any claim by AEP Ohio that the Stipulation's benefits outweigh the negatives.

D. AEP Ohio cannot forecast whether the PPA Rider will be a credit or a charge

In sharp contrast to the non-existent risks that would be faced by AEPGR and AEP Ohio under this proposal, the risk that AEP Ohio's ratepayers will bear as a result of the PPA Rider is real. AEP Ohio witness Pearce presented four different forecasts depicting possible outcomes for the PPA Rider, all of which estimate large swings between charges and credits. Following the Stipulation, the forecast amounts were modified to reflect the stipulated return on equity (10.38%) and to include PJM Capacity Performance ("CP") auction results.⁴⁴ The possible annual outcomes under the forecasts still contain large swings. During the Stipulation-related portion of the hearing, AEP witness Allen testified that the likely outcome of the PPA Rider was listed in the row designated "Net PPA Rider Credit/(Charge) incl. PJM CP, including CO2 tax" and that the credit/charge each year could fluctuate between the amounts listed in the 5% Lower Load Forecast and the 5% Higher Load Forecast in Settlement Exhibit WAA-2.⁴⁵

⁴⁴ Tr. Vol. 18 at 4568-70.

⁴⁵ Tr. Vol. 18 at 4575, 4582-4584.

The following table shows the wild variations between the two forecasts:

Year	Range of Forecasted Rider PPA (Charges)/Credits	Differential Swing
2016	5% Low: (\$84 million) 5% High: \$267 million	\$351 million
2017	5% Low: (\$102 million) 5% High: \$294 million	\$396 million
2018	5% Low: (\$104 million) 5% High: \$207 million	\$311 million
2019	5% Low: (\$111 million) 5% High: \$197 million	\$308 million
2020	5% Low: (\$79 million) 5% High: \$242 million	\$321 million
2021	5% Low: (\$40 million) 5% High: \$382 million	\$422 million
2022	5% Low: (\$77 million) 5% High: \$503 million	\$580 million
2023	5% Low: (\$69 million) 5% High: \$511 million	\$580 million
2024 through May 31	5% Low: (\$24 million) 5% High: \$205 million	\$229 million (5 months)

As the above table clearly illustrates, AEP Ohio's own forecasts do not indicate whether the impact of this PPA proposal on its ratepayers will be a credit or a charge each year. This is because AEP Ohio does not know what will happen each year except believing that the result should be somewhere between the 5% Low and 5% High forecasts. These forecasts differ over the term of the PPA Rider in magnitudes ranging from \$308 million up to \$580 million. In other words, the AEP annual projections could vary by up to \$580 million, over a half a billion dollars.

AEP Ohio's forecasts also have inherent uncertainty. Mr. Vegas stated the forecasts represent only the costs and prices at a certain point in time, and as such they have inherent

uncertainty.⁴⁶ Mr. Allen testified similarly, stating: “What the company’s committing is that those are the best estimates of costs that existed and net revenues that existed at the time the company prepared the case.”⁴⁷ Significantly, AEP Ohio’s forecasts rely upon energy pricing forecasts from 2013 – forecasts that are almost three years old.⁴⁸ AEP Ohio’s forecasts also do not account for the imposition of PJM CP penalties,⁴⁹ which can be significant if the penalties exceed PJM capacity performance bonuses.

In recent months, fuel and power market prices have declined significantly, which will impact the PPA Rider rates.⁵⁰ P3/EPSA witness Cavicchi noted that these recent declines “wholly invalidat[e] the entire analysis upon which the Joint Stipulation is based.”⁵¹ Mr. Cavicchi concluded that, now, AEP Ohio has no prospect of providing the ratepayers with a financial hedge. Mr. Cavicchi cited to multiple more recent energy forecasts that show a dramatically lower price for natural gas prices as compared to what AEP Ohio had used for developing its forecasts, and noted that these lower natural gas prices are expected to persist for some time.⁵² Additionally, OCC witness Wilson estimated the costs of the PPA Rider as stipulated – determining that it will cost ratepayers \$1.9 billion.⁵³

Mr. Cavicchi added that the stipulated, quarterly reconciliations will make the retail rates even less stable, resulting in larger swings in the retail rates. He estimates that the first few reconciliations to the rider will result in substantial rate increases for ratepayers as follows:⁵⁴

- \$1.80/MWh for the initial reconciliation in June 2016
- \$7/MWh for the next reconciliation in late 2016

⁴⁶ Tr. Vol. 1 at 170-172.

⁴⁷ Tr. Vol. 18 at 4593.

⁴⁸ Tr. Vol. 18 at 4567; AEP Ohio Ex. 6 at 4.

⁴⁹ Tr. Vol. 7 at 2042; Tr. Vol. 18 at 4569-4570.

⁵⁰ Tr. Vol. 21 at 5271, 5275, 5294-5295.

⁵¹ P3/EPSA Ex. 13 at 7.

⁵² P3/EPSA Ex. 13 at 12-16.

⁵³ OCC Ex. 34 at 10.

⁵⁴ P3/EPSA Ex. 13 at 18-19.

- \$10/MWh for the first reconciliation in 2017

Mr. Cavicchi concluded that AEP Ohio is relying on out-of-date inputs and its forecasts are wrong.

AEP Ohio and the Stipulating Parties added more window dressing to the Stipulation by agreeing that the initial rider rate would be based on a \$4 million credit for 2016.⁵⁵ This “starting point,” however, does not establish that AEP Ohio ratepayers will receive a \$4 million credit (or any credit at all) in 2016 under the PPA Rider.⁵⁶ This is because the Stipulating Parties have also requested that the rider be reconciled on a quarterly basis and it is unknown what impact the true-ups will have in 2016, or thereafter. AEP Ohio admitted this point as well.⁵⁷ Once again, we are left with AEP Ohio’s guess, but that does nothing more than tell us that, for the eight-year time period, the PPA Rider will be either a credit or a charge. AEP Ohio’s forecasts do not show with any degree of certainty whether the PPA Rider will be a charge or a credit to customers during those years. This is not rate stability.

Additionally, AEP Ohio did not present any evidence to show that the proposal will provide rate stability for the ratepayers via a comparison between (a) what the ratepayers’ rates will be without the PPA proposal and (b) what the ratepayers’ rates will be with the PPA proposal. AEP Ohio only provided a final estimate that, at the end of the PPA term, it believes the aggregate credit will equal \$721 million in nominal dollars. Making an eight-year prediction but not being willing to guarantee that prediction shows that AEP Ohio’s forecasts are

⁵⁵ Joint Ex. 1 at 6.

⁵⁶ P3/EPSC is aware that AEP Ohio witness Allen testified that the *Stipulation* (as a package) will result in an increase in residential customer rates of approximately \$0.62 in March 2016. AEP Ohio Ex. 52 at 14; Tr. Vol. 18 at 4595. This evidence is insufficient evidence of what financial impact the PPA proposal will have on ratepayers. However, if it were relied upon, it demonstrates that the Stipulation will be detrimental to the majority of customers in AEP Ohio’s territory.

⁵⁷ Tr. Vol. 18 at 4521; Tr. Vol. 19 at 4682, 4725.

uncertain.⁵⁸ Even Staff believes forecasts beyond three years have little value.⁵⁹ The record is devoid of crucial, reliable evidence as to whether the PPA Rider will provide rate stability as AEP Ohio claims.

If AEP Ohio really believed in its projections and was really concerned with providing rate stability to its ratepayers, it would stand behind its projections instead of agreeing to an initial rate for 2016 that will be adjusted further, and insufficient credits for years 2020-2024. One way to make that assurance was recommended by RESA witness Bennett, as follows: (a) Rider PPA to not exceed a specific ceiling amount at any time during the time period and (b) the aggregate credit be at least equal to any Rider PPA charges plus carrying costs by the end of the time period.⁶⁰ The lack of such a commitment, plus the other above-noted facts undercut AEP Ohio's proposal.

E. AEP Ohio's claim that closing the PPA units will lead to \$1.6 billion in transmission upgrades is false

In response to the Commission's directive to address reliability concerns in any PPA proposal, American Electric Power Service Corporation's Vice President of Grid Development, Robert Bradish testified that closing the AEPGR plants would require transmission upgrades in the AEP transmission zone and that the cost would be \$1.6 billion.⁶¹ In his testimony, he was asked the question "[w]hat transmission upgrades would be necessary to mitigate the impact of the [AEPGR] generation unit retirements?"⁶² He provided a general description of the upgrades and, then in response to a follow-up question on the estimated cost of those upgrades, stated

⁵⁸ Tr. Vol. 18 at 4593 ("What the company's committing is that those are the best estimates of costs that existed and net revenues that existed at the time the company prepared the case. So the willingness of the company to make a commitment to a specific set of forecasted credits has no bearing on whether or not the company stands behind those forecasts * * * .")

⁵⁹ Tr. Vol. 16 at 3932-3933, 3936-3937, 3957-3958, 4017.

⁶⁰ RESA Ex. 1 at 7.

⁶¹ AEP Ohio Ex. 7 at 1. *See, also*, AEP Ohio Ex. 10 (Direct Testimony of William Allen) at 12; and AEP Ohio Ex. 1 at 14-15.

⁶² AEP Ohio Ex. 7 at 8-9.

“[t]he estimated cost for the minimum upgrades required is \$1.6 billion.”⁶³ This statement is false.

It was not until cross-examination that Mr. Bradish admitted that the \$1.6 billion figure did not represent the transmission upgrades that would result from the retirement of all of the AEPGR PPA units; rather, the \$1.6 billion figure included a host of additional upgrades resulting from the closure of units AEP Ohio believes will close as a result of the Clean Power Plan rules.⁶⁴ In fact, the majority of the unit retirements that AEP Ohio modeled in its transmission study were retirements that may occur if the Clean Power Plan is implemented. 11,800 megawatts of the closures modeled in Mr. Bradish’s study were from Clean Power Plan units, while only 4,036 megawatts (roughly 25% of the megawatts) were attributable to the AEPGR units.⁶⁵ The end result, as Mr. Bradish admitted, was that he did not know how much of the \$1.6 billion figure would be attributable to the Clean Power Plan units versus the AEPGR PPA units.⁶⁶

Mr. Bradish tried to explain away his lack of disclosure to this Commission by claiming that it would be “improper” to not consider the modeling of the Clean Power Plan units.⁶⁷ Even AEP Ohio witness Allen tried to help Mr. Bradish, claiming that Mr. Bradish’s \$1.6 billion figure was the cost related only to closures of the AEPGR PPA units, and that the modeling was conducted with the assumption that the Clean Power Plan units had closed.⁶⁸ Mr. Allen’s testimony was not forthright because Mr. Bradish clearly testified that he did not conduct any

⁶³ *Id.* at 9.

⁶⁴ *See*, Tr. Vol. 6 at 1551, 1553 and 1559; Sierra Club Ex. 23. The Clean Power Plan rules became final on October 23, 2015 (Fed. Reg. Vol. 80, No. 205).

⁶⁵ Tr. Vol. 6 at 1553.

⁶⁶ Tr. Vol. 6 at 1644.

⁶⁷ Tr. Vol. 6 at 1556.

⁶⁸ Tr. Vol. 7 at 1916-1917.

analysis of what the transmission upgrade costs would be if only the AEPGR units were retired.⁶⁹ He also made it clear that the model that was run turned off both the AEPGR units and the Clean Power Plan units to represent a closure and that the resulting transmission upgrades represented the upgrades necessary to address all closures.⁷⁰

AEP Ohio cannot explain away this major discrepancy on the \$1.6 billion figure in its witnesses' testimony. The record is clear that Mr. Bradish could have easily turned on the Clean Power Plan units in its transmission model and run the model to determine exactly what transmission upgrades (if any) would be required if only the AEPGR units closed. Alternatively, Mr. Bradish could have turned off the Clean Power Plan units first, run the model and then run the model again with both the Clean Power Plan units and the AEPGR units turned off. In fact, he could have gone one more step and modeled what transmission upgrades would be necessary for closure of each AEPGR unit individually. AEP Ohio did not take the time to ask Mr. Bradish to do this analysis.⁷¹ Instead, AEP Ohio's witnesses presented the \$1.6 billion figure to this Commission as the dollars that would be spent if only the AEPGR units closed. This was a misrepresentation to the Commission by AEP Ohio and its witnesses, and should provide a fatal blow to AEP Ohio's proposal.

F. The PPA rider will cause the ratepayers' generation charges to fluctuate more than today

The PPA Rider will result in rate *instability*. The charge/credit under the PPA rider will be a separate identifiable charge on the bills, separate from the amount charged to the ratepayers for purchasing generation either from the SSO or from a CRES provider or from an aggregator.⁷² Generally speaking, AEP Ohio's ratepayers will experience greater fluctuations in generation

⁶⁹ Tr. Vol. 7 at 1559.

⁷⁰ Tr. Vol. 7 at 1552-1553 and 1560.

⁷¹ See, e.g., Tr. Vol. 7 at 1553-15560.

⁷² Tr. Vol. 1 at 220-221.

charges from the PPA proposal because the rider amounts will change quarterly and may not change in a corresponding fashion with the SSO or the generation charge from a CRES provider or aggregator. As to the SSO customers specifically, AEP Ohio agreed that they do not experience short-term volatility with the competitive markets because they are supplied from fixed contracts resulting from periodic competitive auctions.⁷³ AEP Ohio believes the SSO customers do experience volatility each time the auction results are layered into the SSO auction price.⁷⁴ Even if we were to accept that proposition, the PPA proposal will nonetheless amount to greater fluctuations. As explained by P3/EPSC witness Cavicchi, the PPA Rider charge/credit will change the total amount paid for generation more than it would without the PPA proposal.⁷⁵ Plus, the quarterly reconciliation process will adjust the rate to capture the difference between annual forecasted and actual revenues/costs, and will not do so until at least one full quarter after the quarter in which the rider revenue and costs are netted.⁷⁶ As a result, SSO customers' generation charges will fluctuate more than they do today and in a way that does not match the customer's usage or weather conditions.

As for shopping customers under fixed-price contracts, AEP Ohio acknowledges that they do not have real-time energy price volatility, but may experience volatility when they enter into later fixed-price contracts.⁷⁷ As applied to these customers, the PPA Rider charge/credit for the shopping customers will change the total amount paid for generation more than it would without the PPA proposal⁷⁸ and, on top of that, the periodic reconciliations will adjust the rate

⁷³ Tr. Vol. 1 at 133.

⁷⁴ Tr. Vol. 1 at 133, 215.

⁷⁵ P3/EPSC Ex. 1 at 12.

⁷⁶ *Id.*

⁷⁷ Tr. Vol. 1 at 134. AEP Ohio argues that shopping customers under fixed-priced contracts are subject to capacity price volatility because most of the fixed-priced contracts are one-year to two-year in duration and those customers are subject to changes in capacity markets sooner. P3/EPSC does not concur with this aspect of AEP Ohio's analysis, but finds it inconsequential to the larger issue at hand.

⁷⁸ Tr. Vol. 2 at 444-447.

even further. As a result, the shopping customers' generation charges will also fluctuate more than they do today, and also in a way that does not match the customer's usage or weather conditions.⁷⁹ The swings caused by AEP Ohio's true-up mechanism undercut any claim that customers will receive a hedge when wholesale market prices are higher or lower.

G. The PJM Capacity Performance product further undercuts AEP Ohio's proposal

Since the filing of AEP Ohio's amended application in this proceeding in May 2015, the FERC approved the PJM Capacity Performance Resource tariff.⁸⁰ It has been implemented for several recent auctions – the transitional auction for 2016/2017, the transitional auction for 2017/2018, and the 2018/2019 base residual auction.⁸¹ CP is intended to lower energy prices relative to the existing market design through a long-term increase of capacity prices, which then would enable new generation to be built that would in theory have a lower real-time energy price.⁸² The effect is to enhance reliability within PJM and provide additional revenues to generation resources.⁸³ The Independent Market Monitor ("IMM") for PJM testified that the result of those recent auctions was a significant increase in capacity prices for all capacity resources in PJM.⁸⁴

AEP Ohio's proposal and claims of financial duress are undercut by CP. More importantly, and this Commission should take note, AEP Ohio's PPA proposal will unfairly expose the ratepayers to penalties under the new capacity market design. The new capacity market design seeks to increase performance incentives, and it requires payment of substantial penalties for units that do not perform as required, which would be paid to the units that did

⁷⁹ For example, the second quarter PPA results will not be included in the PPA Rider until the beginning of the fourth quarter. *See* Tr. Vol 18 at 4521.

⁸⁰ Tr. Vol. 1 at 144.

⁸¹ Tr. Vol. 1 at 145; IMM Ex. 1 at 3.

⁸² Tr. Vol. 1 at 197.

⁸³ Exelon/RESA Ex. 1 at 20.

⁸⁴ IMM Ex. 1 at 3; IMM Ex. 2 at 3-4.

perform.⁸⁵ The IMM testified that the proposed PPA Rider would require ratepayers to pay for performance penalties associated with the PPA units in the PPA rider.⁸⁶ AEP Ohio witnesses Allen and Pearce confirmed this possibility, noting that circumstances exist where CP penalties could be reasonable.⁸⁷ The Stipulation also allows AEP Ohio to net any disallowed CP penalties against CP bonuses, meaning the ratepayers must pay disallowed CP penalties up to the amount of any CP bonuses.⁸⁸

The IMM also added that he expects that AEP Ohio would retain any performance payments at other AEP units and not include them in the PPA Rider.⁸⁹ The PPA proposal exposes AEP Ohio's ratepayers to significant market risks related to CP, especially since under the Stipulation any disallowed costs related to CP penalties are first netted against bonuses.⁹⁰ The ratepayers and not AEPGR or AEP Ohio, will bear the brunt of CP penalties. The facts surrounding CP undercut AEP Ohio's proposal.

H. No independent reliability study has been performed

As noted earlier, AEP Ohio prepared one transmission impact study as part of its amended application to analyze how the electric transmission system would be affected and what upgrades would be needed if the AEPGR PPA plants were to retire.⁹¹ This was done in direct response to the Commission's directive in the *ESP III* decision. AEP Ohio witness Bradish presented the results of that study.⁹² Mr. Vegas told Mr. Bradish to assume for the transmission study that all the AEPGR PPA plants would retire at the same time.⁹³ Mr. Bradish's staff

⁸⁵ IMM Ex. 2 at 4.

⁸⁶ *Id.*

⁸⁷ Tr. Vol. 2 at 603; Tr. Vol. 18 at 4618.

⁸⁸ Joint Ex. 1 at 7. *See, also*, RESA Ex. 1 at 7.

⁸⁹ IMM Ex. 2 at 4.

⁹⁰ Joint Ex. 1 at 7; *See, also*, RESA Ex. 1 at 7.

⁹¹ Sierra Club Ex. 23 is a summary of that transmission impact study.

⁹² AEP Ohio Ex. 7 at 6-10.

⁹³ Tr. Vol. 1 at 107, 185.

performed the study and his staff is employed by AEP Service Corporation.⁹⁴ There was no outside consultant or entity involved in the preparation of this study. The Commission's order in *ESP III* required an independent study. The lack of an independent study undercuts AEP Ohio's proposal.

III. THE STANDARD OF REVIEW FOR AEP OHIO'S APPLICATION AS MODIFIED BY THE STIPULATION CONSISTS OF SIX PRONGS

AEP Ohio is proposing in this proceeding to change its current electric security plan – ESP III – from what was approved by the Commission in February 2015. In particular, AEP Ohio asks to modify the following components of its current ESP III: its PPA rider, the requirement to divest its OVEC asset, and the manner in which IRP credits (from the EE/PDR Rider) will be applied to customers. These three items were decided in the *ESP III* case, and through this proceeding, AEP Ohio wants to change them. AEP Ohio is also seeking a blessing of the AEPGR PPA and approval of the Stipulation.

Considering the nature of the approval AEP Ohio seeks, the Commission's standard of review for this proceeding consists of the following six prongs:

(1) Because AEP Ohio seeks to modify its current ESP III, AEP Ohio has the burden of proof in this proceeding per R.C. 4928.143(C).

(2) Because the Commission rejected AEP Ohio's prior PPA proposal (OVEC only), AEP Ohio must prove anew as to the current PPA proposal that "... considering the plain language of [R.C. 4928.143(B)(2)(d)], ... there are three criteria with which the PPA mechanism must comply. Specifically an ESP component approved under R.C. 4928.143(B)(2)(d) must first be a term, condition, or charge; next, relate to one of the enumerated types of terms, conditions,

⁹⁴ AEP Ohio Ex. 7 at 1; Tr. Vol. 6 at 1549-1550.

and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service.”⁹⁵ (Emphasis added.)

(3) The Commission must determine whether AEP Ohio has complied with the Commission’s directive in the *ESP III* Opinion and Order that AEP Ohio “be required in a future filing, to justify any requested cost recovery” and “at a minimum”, address the following eight factors which shall be balanced by the Commission:⁹⁶

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;
- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state;
- In the PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit;
- Commit to full information sharing with the Commission and its Staff;
- Include an alternative plan to allocate the rider’s financial risk between both the Company and its ratepayers; and
- Include 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.

(4) Assuming that the Commission can modify the ESP III in a rider proceeding,⁹⁷ the Commission must evaluate, with the modified PPA Rider and other terms, whether the ESP III will be more favorable in the aggregate than an MRO. The Commission is required by R.C.

⁹⁵ *ESP III*, Opinion and Order at 20.

⁹⁶ *ESP III* Opinion and Order at 25-26.

⁹⁷ The Commission, as a state agency, can only exercise that authority which has been specifically delegated to it by the General Assembly. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 706 N.E.2d 1255, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers’ Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051. Nothing in R.C. §4928.143 expressly allows for piecemeal modifications of ESPs once they have gone into effect unless significant earnings occur, in which case the Commission can order the refund of the excessive amounts. That exception is not involved in this case. Accordingly, P3/EPSCA does not believe that the Commission can modify the approved ESP III in this rider proceeding.

4928.143(C)(1) to approve, or modify and approve, an ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.” (Emphasis added.) AEP Ohio admitted during cross-examination that the placeholder PPA rider will be modified as a result of this new PPA proposal.⁹⁸ The Stipulation also modifies components of the ESP III including the rider cost allocation. As a result, the ESP III will be modified and the ESP versus MRO analysis conducted previously for the ESP III will not be valid because Rider PPA will not have a zero value during the remainder of the ESP III. Thus, the Commission must determine anew whether the modified ESP III will be more favorable in the aggregate as compared to a MRO under R.C. 4928.142.

(5) Because a stipulation is present, the Commission must find that the Stipulation satisfies the three-prong test.

(6) Lastly, the Commission’s decision must be based on the evidence in the record. *ESP III*, Order at 24, citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) (“[t]he Commission must base our decision on the record before us”).

As discussed in greater detail below, AEP Ohio has failed to meet its burden of proof to justify the PPA proposal, to modify its ESP III as requested, and to justify approval of the Stipulation.

⁹⁸ Tr. Vol. 18 at 4474-4475.

IV. THE PPA PROPOSAL FOR THE REMAINDER OF THE CURRENT ESP III TERM SHOULD BE DENIED

- A. The OVEC component of the PPA proposal is no different than the proposal that the Commission rejected in the ESP III proceeding, and does not meet the Commission's minimum factors required for approval**

As part of its *ESP III* decision, AEP Ohio proposed that the Commission approve a PPA mechanism, including a PPA rider, based on the generation purchased from just the OVEC plants.⁹⁹ AEP Ohio's PPA proposal includes the exact same OVEC plants and includes the exact same rate recovery mechanism – through the PPA Rider. In other words, AEP Ohio has not presented anything different with regard to the OVEC plants than what it presented in the PPA proposal in its ESP III.

R.C. 4928.143(B)(2)(d) allows ESPs to include terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service. (Emphasis added). The Commission relied on the above language to find that statutory authority existed sufficient to allow the Commission to authorize a placeholder PPA rider at an initial rate of zero for the term of the ESP.¹⁰⁰

In the *ESP III* decision, the Commission reviewed the OVEC component of that PPA proposal, and rejected it. The Commission analyzed whether the OVEC component would have the effect of stabilizing or providing certainty regarding retail electric service, whether the proposal was reasonable, whether customers would sufficiently benefit from the rider's financial

⁹⁹ *ESP III*, Opinion and Order at 8-9.

¹⁰⁰ *ESP III*, Opinion and Order at 25. P3/EPSC reserve all rights to dispute that conclusion.

hedging mechanism, and whether the proposal would be in the public interest.¹⁰¹ The Commission reached three key conclusions when rejecting AEP's proposal to recover OVEC costs through the PPA Rider:

- “[T]here is no question that the rider would impact customers’ rates through the imposition of a new charge on their bills.”¹⁰²
- “[T]he Commission is unable to reasonably determine the rate impact of the rider. * * * [T]he evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider’s intended purpose as a hedge against market volatility.”¹⁰³
- “[W]e are not persuaded that the PPA rider proposal put forth by AEP Ohio in the present proceedings would, in fact, promote rate stability, as the Company claims, or that it is in the public interest.”¹⁰⁴

AEP Ohio’s projections of the net impact for the OVEC PPA rider in the ESP III proceeding ranged from a \$52 million net cost to an \$8.4 million net benefit over the ESP III term. This is a range that led the Commission to find that “... the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider’s intended purpose as a hedge against market volatility.”¹⁰⁵ In this case, AEP Ohio has presented nothing different for the OVEC component of its Rider PPA proposal for the remainder of the ESP III term. Indeed, AEP Ohio presented no new cost information on the OVEC costs or market sales in this proceeding.

¹⁰¹ *ESP III*, Opinion and Order at 23.

¹⁰² *ESP III*, Opinion and Order at 23.

¹⁰³ *ESP III*, Opinion and Order at 24.

¹⁰⁴ *ESP III*, Opinion and Order at 24.

¹⁰⁵ Relying on AEP Ohio’s *ESP III* projection of a net benefit of \$8.4 million over the ESP III term shows that an AEP Ohio residential customer (average load of 1,000 kilowatt hours a month) would receive a net credit over the three years of 6.42 cents per month attributable to the OVEC entitlement. Going the other way, relying on AEP Ohio’s *ESP III* projection of a net cost of \$52 million over the ESP III term results in a net charge of \$0.397 per month for the average residential customer. A sample calculation is \$8.4 million divided by AEP Ohio’s load (43,643,000 megawatt hours), which gives an average credit of 6.42 cents over the ESP III term absent the reconciliations. *See*, Tr. Vol. 12 at 4382-4384.

In addition, AEP Ohio has ignored multiple Commission directives to address at a minimum, the factors set forth in the *ESP III* order.

- AEP Ohio has failed to show the financial need of any of the OVEC generating plants – in fact, AEP Ohio did not present any evidence as to any financial need of the OVEC plants.
- AEP Ohio has failed to show a complete plan for compliance with current and future environmental regulations for the OVEC units. AEP Ohio presented no witnesses or documents establishing an OVEC “plan for compliance” with environmental regulations. AEP Ohio witness Thomas only addressed environmental compliance for the plants in the AEPGR PPA. AEP Ohio witness McManus discussed what environmental control equipment is already installed at the OVEC plants,¹⁰⁶ but his testimony does not amount to an OVEC “plan for compliance” with future environmental regulations. Moreover, Mr. McManus’ testimony cannot even be construed as satisfying this factor since no entity in the AEP family operates the OVEC units and Mr. McManus does not represent OVEC.¹⁰⁷
- AEP Ohio has failed to show the OVEC units are required for future reliability. Mr. Bradish’s reliability impact study was limited to the AEPGR PPA plants and did not include information related to the OVEC units being required for future reliability.¹⁰⁸
- The modified PPA proposal provides for periodic reviews by the Commission of the OVEC component of the PPA proposal, but provides no different oversight by the Commission than what has been in place as to the OVEC plants.¹⁰⁹ The Stipulation simply states “AEP Ohio agrees to participate in annual compliance reviews before the Commission to ensure that actions taken by the Company when selling the output from generations units included in the PPA Rider into the PJM market were not unreasonable.”¹¹⁰ This does not amount to “rigorous Commission oversight” and, does not satisfy the Commission’s directive on this factor.
- AEP Ohio did not present any evidence on the impact that a closure of both OVEC plants would have on electric prices in Ohio. AEP Ohio only presented an economic impact study on the OVEC Ohio plant. AEP Ohio did not present any information on the impact on economic development in Ohio of the OVEC plant.¹¹¹
- AEP Ohio is not proposing full information sharing with the Commission or its Staff for the OVEC units – it is proposing only the status quo as to the OVEC component, which is information to which AEP Ohio has

¹⁰⁶ AEP Ohio Ex. 4 at 4-5, 7, 9.

¹⁰⁷ AEP Ohio Ex. 4 at 2.

¹⁰⁸ AEP Ex. 7 at 2; Tr. Vol. 6 at 1552-1153; Sierra Club Ex. 23.

¹⁰⁹ AEP Ohio Ex. 1 at 28; Tr. Vol. 1 at 72.

¹¹⁰ Joint Ex. 1 at 7.

¹¹¹ AEP Ohio Ex. 10 at WAA-3.

access.¹¹² In the Stipulation, the provision related to information sharing addresses only the AEPGR information.¹¹³

Moreover, assuming that the Commission can modify the ESP III through a rider proceeding,¹¹⁴ the Commission will need to re-review the ESP versus MRO test, per R.C. 4928.143(C)(1), to find that the modified ESP would be more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. AEP Ohio has taken the position that the ESP versus MRO test does not need to be re-done because the Commission already did the analysis when it approved the ESP III,¹¹⁵ but at that time the assumption was that Rider PPA had a zero value.¹¹⁶ With this new proposal, the PPA rider will likely have a negative value during the remainder of the ESP III.¹¹⁷ No competitive bidding process was put forth to procure the PPA, but it is clear that a competitive process would result in a PPA with more favorable terms and at a lower cost.¹¹⁸ As such, AEP Ohio was required in this proceeding to present evidence that the ESP III as modified per its request is more favorable in the aggregate than an MRO.

Although AEP Ohio witness Allen testified that he had evaluated the qualitative and quantitative benefits of the PPA proposal, a specific analysis was not presented by the Company:¹¹⁹

When I evaluated the benefits of populating the PPA, I don't think that my – the way I think about it is so narrowly constructed. I look at the price-stabilizing benefits that this is going to have. It's going to have them in the short term and it's going to have them in the long term. And both of

¹¹² AEP Ohio Ex. 1 at 28; Tr. Vol. 1 at 72.

¹¹³ Joint Ex. 1 at 7-8.

¹¹⁴ Nothing in R.C. §4928.143 expressly allows for piecemeal modifications of ESPs once they have gone into effect unless significant earnings occur, in which case the Commission can order the refund of the excessive amounts. That exception is not involved in this case. Accordingly, P3/EPSCA does not believe that the Commission can modify the approved ESP III in this rider proceeding.

¹¹⁵ Tr. Vol. 18 at 4599-4600.

¹¹⁶ See *ESP III*, Opinion and Order at 94.

¹¹⁷ See e.g. P3/EPSCA 12 Supplemental Testimony of A. Joseph Cavicchi at 11; OCC Ex. 34 at 10.

¹¹⁸ See e.g. Dynegy Ex. 2 Supplemental Direct Testimony of Dean Ellis at 17.

¹¹⁹ Tr. Vol. 18 at 4603-4604.

those elements can be considered in evaluation -- or, the longer-term benefits should be considered as we evaluate the extended ESP.

* * *

When we are talking about how the stipulation enhances the current ESP, that's focused on the period of the current ESP.

* * *

But also when we file the next ESP, one of the factors that will be looked at is the price-stabilizing effects of the extension of the PPA rider mechanism that will be included in that filing.

* * *

What I looked at is that the initial credit would be \$4 million. The other elements, the 5 percent lower load case or the 5 percent higher load case, would be the impact of the price-stabilization aspect of the PPA rider.

So there's two things you have to look at.

A PPA Rider credit of \$4 million,¹²⁰ the current 5 percent lower load forecast and the current 5 percent higher load forecast were never considered during the Commission's ESP III's ESP versus MRO test.¹²¹ AEP Ohio has not presented a new ESP versus MRO analysis, nor any analysis specific to the OVEC component.

The Stipulation (provision III.L) states "[t]he Signatory Parties agree that the Stipulation preserves and advances the positive results of the MRO v. ESP test under R.C. 4928.143(C) as found in the *ESP III Order*." This statement is inadequate to satisfy the plain statutory requirement -- no specific comparison between the modified ESP and an MRO has been provided in the record. With no other evidence presented by AEP Ohio, it has not satisfied its burden of proof and the Commission cannot determine whether the ESP III, as modified, will be more favorable in the aggregate. This statutory requirement has not been satisfied.

¹²⁰ Given the convincing testimony from P3/EPSC witness Cavicchi that the reconciliations will alter any agreed upon initial rider rate for 2016, P3/EPSC do not accept that, in 2016, the PPA Rider will be a \$4 million credit. This is addressed in greater detail later in this Initial Brief.

¹²¹ The 5 percent lower load case forecasts a charge of \$84 million to customers. Tr. Vol. 18 at 4605.

Taken altogether, AEP Ohio has not met its burden of proof as to the OVEC component of the PPA proposal for the remainder of the ESP III. Accordingly, as it did in the ESP III hearing, the Commission should deny AEP Ohio's request to add the OVEC PPA to the PPA rider. AEP Ohio has the burden of proof, and as the record shows, it has not met that burden of proof under the applicable standard of review.

B. AEP Ohio has not met its burden of proof for the AEPGR PPA proposed for cost recovery through the PPA rider for the remainder of the ESP III term

Like the analysis of the OVEC component of the PPA Rider proposal for the remainder of the ESP III term, the same five-prong analysis applies to the AEPGR component of the PPA Rider proposal. This means that AEP Ohio has the burden of proof, must satisfy the ESP statute, must satisfy the Commission-identified factors set forth in the *ESP III* decision, the modified ESP III must be more favorable in the aggregate than an MRO, and the AEPGR component must be supported by evidence in the record. We will first review this component in light of the Commission's minimum factors for a PPA rider proposal from the *ESP III* decision. The record in this proceeding establishes that AEP Ohio's proposal as to the AEPGR plants does not meet multiple minimum factors. For this reason alone, the Commission should deny AEP Ohio's request to add the AEPGR plants' cost recovery to the PPA Rider for the rest of the ESP III term.

1. AEP Ohio has not established the financial need for any of the AEPGR generating plants

AEP Ohio claims that the AEPGR plants were selected because, in part, they allegedly are economically at risk.¹²² P3/EPSC do not contest that AEP Ohio might well intend to retire or otherwise dispose of the AEPGR plants because they are insufficiently profitable to meet AEP's

¹²² Tr. Vol. 1 at 47-48.

internal corporate criteria. But the substantive evidence in the record shows that the AEPGR plants are not in financial need for purposes of Ohio law.

The record establishes that the [CONFIDENTIAL INFORMATION REDACTED].¹²³ And several witnesses have noted AEPGR's performance in recent PJM auctions. As noted by Dynegy witness Dean Ellis:¹²⁴

On September 10, 2015, AEP disclosed results for all of its AEP Generation Resources (AEPGR), stating that all of the capacity that was offered into the auction actually cleared the auction, representing approximately 7,000 MW. Of that capacity, AEP's share of the PPA units (excluding OVEC) represents approximately 2,700 MW. Given the clearing process mentioned above, AEP's share of the PPA units (excluding OVEC) had the potential to earn an additional \$74 million for the 12 months beginning June 1, 2016, and an additional \$31 million the 12 months beginning June 1, 2017. For the 12 months beginning June 1, 2018, the PPA units (excluding OVEC) had the potential to earn a total of \$162 million in capacity revenue.

All of this evidence runs counter to any claim by AEP Ohio that the AEPGR units are in "financial need."

It is also important to understand that the AEPGR plants have committed to operate through the 2018/2019 PJM planning year and thus, are obligated to either perform or to cover the capacity performance obligation.¹²⁵ And as previously noted, AEP Ohio does not own most of the AEPGR plants.¹²⁶ Also telling is the fact that the PPA plant co-owners are incentivized to continue the operation of the plants as evidenced by the testimony of Dynegy witness Dean Ellis, who stated that "Dynegy intends to continue to operate and invest in the plants."¹²⁷ This evidence also does not show that any of the AEPGR PPA plants are in financial need.

¹²³ Tr. Vol. 3 at 755-756.

¹²⁴ Dynegy Ex. 1 at 19. *See, also*, RESA/Exelon Ex. 1 at 23 and Attachment A.

¹²⁵ *Id.*

¹²⁶ *See*, Section II.A above for details.

¹²⁷ Dynegy Ex. 1 at 12.

Altogether, AEP Ohio has presented no evidence that any of the AEPGR PPA plants are in financial need, or that AEPGR cannot absorb any possible losses or cannot make any capital expenditures required for continued plant operation. To the contrary, the evidence in the record as supported by the Dynegy testimony shows that these plants have value and will continue to operate into the future.

Indeed, AEP Ohio has acknowledged that it does not know whether AEPGR would retire any of the AEPGR PPA units, if the Commission does not approve the PPA proposal and in the related cost recovery through PPA Rider.¹²⁸ Second, AEP Ohio does not know whether any of the AEPGR PPA units would be sold if the Commission does not approve the PPA proposal and the related cost recovery through PPA Rider.¹²⁹ Third, Mr. Vegas testified that AEPGR is performing profitably and performing very well, with lots of profits and earnings in the last few years.¹³⁰ Moreover, in recent financial reports, AEP Parent has stated that its AEPGR fleet “is well positioned from a cost and operational perspective to participate in the competitive market.”¹³¹

2. AEP Ohio has not established the necessity during the remainder of the current ESP III term of any of the AEPGR PPA units in light of future reliability needs, including supply diversity

AEP Ohio has not established the necessity during the remainder of the ESP III of any of the AEPGR PPA generating facilities in light of future reliability needs, including supply diversity. While the record establishes that the AEPGR units are committed to PJM to operate through 2018/2019,¹³² AEP Ohio has not established that, in light of transmission grid reliability needs, each AEPGR PPA plant is needed to maintain reliability including on the basis of supply

¹²⁸ Tr. Vol. 1 at 95-96.

¹²⁹ Tr. Vol. 1 at 97.

¹³⁰ Tr. Vol. 1 at 236.

¹³¹ OCC Ex. 6 at 28; OCC Ex. 7 at 28. See, also, Tr. Vol. 3 at 674. See also, Tr. Vol. 1 at 268 “We believe that these plants are going to be profitable over the long run.”

¹³² Dynegy Ex. 1 at 19; RESA/Exelon Ex. 1 at 23 and Attachment A.

diversity. The Company only presented a transmission system upgrade study that assumed that all the AEPGR PPA plants would retire along with an estimate of closures under the Clean Power Plan. That study not only was flawed (by including the Clean Power Plan closures and assuming all PPA units closed at the same time), but the study also did not consider the necessity of any particular plant in light of future reliability needs, which is what the Commission had instructed. Simply put, AEP Ohio has presented no evidence that any of the AEPGR PPA units are necessary for grid reliability for the remainder of the ESP III term (and beyond for that matter).¹³³

As to the issue of supply diversity to support reliability, AEP Ohio failed to present convincing evidence on this point as well. The PJM IMM summarized the issue of whether supply diversity impacts reliability well when he testified “* * * simply having different fuels is not a basis for or requirement of reliability * * * All fuels have issues. Coal has issues. Gas has issues. Oil has issues.”¹³⁴ He added: “There are frozen coal piles. There are issues with trains, issues with barge traffic. There are issues with oil in terms of delivery, getting delivery by trucks, and in the case of gas, there are certainly pipeline constraints, so there are issues.”¹³⁵ Mr. Bowring’s testimony should hold significant weight because as the PJM IMM, he pays attention to fuel-supply issues across the PJM region.¹³⁶

Moreover, if the Commission credits testimony in this proceeding as showing that the AEPGR units will not close, that fact alone would rule out any concern about reliability and supply diversity. As noted above, AEP Ohio acknowledged that it does not know whether

¹³³ Also, there has been no notice given to PJM as to any retirement of any AEPGR PPA plants and thus, there has been no determinations made by PJM as to future reliability needs associated with any of the AEPGR PPA plants.Tr. Vol. 1 at 97.

¹³⁴ Tr. Vol. 12 at 3090.

¹³⁵ Tr. Vol. 12 at 3090-3091.

¹³⁶ Tr. Vol. 12 at 3093.

AEPGR would retire any of the AEPGR PPA units¹³⁷ and Mr. Vegas testified that AEPGR is performing profitably and performing very well, with lots of profits and earnings in the last few years.¹³⁸ AEP Ohio's co-ownership of many of the PPA plants also weighs against a premature closure of the AEPGR units especially with Dynegy witness Ellis' statements that "Dynegy sees value in its share of the units it purchased, and did not make the investment with any intention to retire or otherwise shut down the plants"¹³⁹ and that "Dynegy intends to continue to operate and invest in the plants."¹⁴⁰ For that reason, the Commission should find that this factor weighs against approving the inclusion of the AEPGR cost recovery in the PPA Rider for the term of the ESP III.

3. AEP Ohio has not established the impact that closure of the AEPGR PPA units would have on electric pricing and the resulting effect on economic development within Ohio

The next Commission factor is the impact that the closure of each generating plant would have on electric prices and the resulting effect on economic development within Ohio during the remainder of the ESP III. AEP Ohio only presented testimony from Mr. Allen claiming that AEP Ohio's customer rates would increase by approximately \$2/MWh if all of the AEPGR PPA units were prematurely closed.¹⁴¹ That cost increase, however, was based on Mr. Bradish's flawed \$1.6 billion transmission upgrade number, a number that represented both the closure of all AEPGR PPA units (4,036 megawatts) but also the closures anticipated to occur under the pending Clean Power Plan (an additional 11,800 megawatts).¹⁴² Mr. Bradish admitted that he did not know how much of the \$1.6 billion figure would be attributable to the Clean Power Plan

¹³⁷ Tr. Vol. 1 at 95-96.

¹³⁸ Tr. Vol. 1 at 236.

¹³⁹ Dynegy Ex. 1 at 11.

¹⁴⁰ Dynegy Ex. 1 at 12.

¹⁴¹ AEP Ohio Ex. 10 at 13.

¹⁴² Tr. Vol. 6 at 1553.

units versus the AEPGR PPA units.¹⁴³ And, Mr. Allen then admitted that if Mr. Bradish's \$1.6 billion dollar figure changed, so would the numbers in his testimony including the claimed cost increase.¹⁴⁴ Bottom line, AEP Ohio has not presented any evidence showing the cost increase to electric prices that would occur if each AEPGR plant closed.

As to economic development, AEP Ohio only presented a study on the economic benefits of the AEPGR and OVEC plants.¹⁴⁵ While P3/ESPA takes issue with the admission of that study given that Mr. Allen did not prepare the study or direct the study (it was done by Dr. Randy Holiday who did not appear at the hearing), that study did not address the effect of any particular AEPGR PPA plant's closure on electric prices or on economic development generally in the state of Ohio.

In fact, the PPA proposal will harm Ohio, making it less attractive for industry to locate/relocate and deter power companies from locating new power plants in Ohio during the remainder of the ESP III. AEP witness Allen acknowledged that the new quarterly true-ups will result in the actual credits/charges from PJM market activities being added to the PPA rider one full quarter after the credits/charges are received.¹⁴⁶ In other words, high wholesale prices that could exist in August and any net revenues resulting from PPA unit output sales will not be incorporated into the PPA rider until the first quarter of the following year. The delay in adjustment will not lead to rate stability.

Likewise P3/EPSPA witness Cavicchi also testified that the actual credit/charge amount for each year and quarter is unknown (could be a charge or credit depending on load and wholesale prices) and that customer rates would fluctuate with a quarterly true-up under the PPA

¹⁴³ Tr. Vol. 6 at 1644.

¹⁴⁴ Tr. Vol. 7 at 2040-2041.

¹⁴⁵ AEP Ohio Ex. 10 at WAA3 and WAA-4.

¹⁴⁶ Tr. Vol 18 at 4521.

proposal. Rate fluctuations are exactly the type of issue customers seek to avoid. Rather than providing rate stability, AEP Ohio's proposal is certain to hinder economic development in the short term, whether that is new companies relocating to Ohio or existing companies considering new investments in Ohio.

4. AEP Ohio's PPA proposal does not provide for rigorous Commission oversight of the rider or full information sharing, despite the proposed process for a periodic review

Any suggestion that retail ratepayers will benefit from the netting process associated with AEP Ohio's sales of the electricity obtained under the PPA proposal into PJM wholesale markets ignores that AEP Ohio has offered no assurance that there will be any such revenues, or any commitment regarding how, if at all, it will bid its capacity and energy into those markets.

AEP Ohio's PPA proposal does not provide for rigorous Commission oversight as to the AEPGR PPA plants. First of all, while AEP Ohio requests approval of its proposal to enter into the AEPGR PPA and to include the costs associated with the AEPGR PPA in Rider PPA, AEP Ohio has not even presented the AEPGR PPA itself to the Commission. AEP Ohio's application and its evidence in this proceeding only include an incomplete eight-page term sheet of the AEPGR PPA.¹⁴⁷ Only through discovery was a draft, unsigned PPA produced. AEP Ohio has not fulfilled its burden of proof by providing the "best evidence" because its application and its evidence do not include the full executed terms of the PPA. Second, the AEPGR PPA is a FERC-jurisdictional contract. AEP Ohio witness Vegas testified that Commission has no jurisdiction over the AEPGR PPA.¹⁴⁸ While he stated that the Commission could make suggestions for that PPA, the Commission could not require any provisions be included in the

¹⁴⁷ AEP Ohio Ex. 2 at Exhibit KDP-1.

¹⁴⁸ Tr. Vol. 1 at 274; Tr. Vol. 2 at 349, 353-356.

AEPGR PPA.¹⁴⁹ As a result, the Commission has no reason to accept that it will have the rigorous oversight over the PPA rider that it desires – the document itself does not ensure such oversight.

Also, the Stipulation provides no further support for concluding that rigorous Commission oversight will occur. The Stipulation (provision III.A.5.a) states that “AEP Ohio **agrees to participate** in annual compliance reviews before the Commission to ensure that actions taken by the Company when selling the output from generation units including the PPA Rider into the PJM markets were not unreasonable.”¹⁵⁰ (Emphasis added.) This provision commits AEP Ohio to participate in an annual review, but only a limited review regarding AEP Ohio’s selling activities. This is not a commitment to rigorous review of the PPA rider.

On the related point of information sharing, the Stipulation has established that AEPGR “fleet information on any cost component” will be provided if the Staff makes a reasonable request.¹⁵¹ While AEP Ohio assuredly will argue that the Commission will be able to review information as to AEP Ohio’s decision-making, there are several flaws with that contention. First, the AEPGR draft PPA itself does not provide the Commission with the right to audit the books of AEPGR.¹⁵² Second, as the Stipulation is worded, the Staff will have to know what to ask for in order to receive information. This establishes a loophole, allowing the possibility that a multitude of documents may never be part of the rigorous Commission review. Third, the AEPGR PPA, the PPA proposal and the Stipulation do not address access to AEPGR bilateral contracts, other bidding, or plant sales to a new owner, all which would be important to ensure

¹⁴⁹ Tr. Vol. 2 at 352-353.

¹⁵⁰ Joint Ex. 1 at 7.

¹⁵¹ Joint Ex. 1 at 7. Until the Stipulation, there was no clear right for the Commission Staff to have access to or subpoena documents from AEPGR during the remainder of the ESP III. AEP Ohio itself had only committed to full information sharing with the Commission and Staff on “all pertinent aspects” of the AEPGR PPA, noting that the party responsible for keeping the books and records will be AEPGR and it will remain in the possession of AEPGR documents. AEP Ohio Ex. 1 at 27; Tr. Vol. 1 at 67.

¹⁵² Tr. Vol. 1 at 69.

fair dealings vis-à-vis the AEPGR PPA plants. This is no small point because AEPGR (on AEP Ohio's behalf) will be bidding the PPA units into the PJM markets at the very same time that AEPGR will be bidding the other units into the PJM markets.¹⁵³ AEP Ohio witness Allen testified that bidding information will be kept separate and the AEPGR employees will conduct these bids consistent with a code of conduct.¹⁵⁴ Yet, all these AEPGR employees will be in the same building, will work for the same corporate group and be under the same chain of command.¹⁵⁵ Fourth, there is no filing requirement with respect to the information to be shared.

As to AEPGR's fleet information, the Stipulation even goes much further – declaring all of that information will be given protective treatment indefinitely, regardless of its actual content.¹⁵⁶ Given the limited information sharing, the loophole created by the language in the Stipulation and the intertwined workforce that will exist, the flaws in Commission oversight are glaring. The proposal creates the opportunity for serious problems to occur not only with the bidding process, but also with the Commission's review. AEP Ohio has not included an appropriate and balanced commitment to full information sharing with the Commission or its Staff. Window dressing will not protect the ratepayers who will be the new "owners" of the AEPGR PPA units, bearing all of the financial risks.

5. AEP Ohio's PPA proposal does not include an alternative plan to allocate the PPA Rider's financial risk

The Commission should note that AEP Ohio did not include, in the amended application or the Stipulation, a designated alternative plan to allocate the PPA rider's financial risk associated with the AEPGR component of the PPA proposal for the remainder of the ESP III between both it and its ratepayers. Also, this was not addressed in the Stipulation. As a result,

¹⁵³ Tr. Vol. 18 at 4486, 4659.

¹⁵⁴ Tr. Vol. 18 at 4486-4487.

¹⁵⁵ *Id.*

¹⁵⁶ Joint Ex. 1 at 7-8.

AEP Ohio's customers will be subject to numerous risks under the proposal to include the AEPGR cost recovery in the PPA Rider. As previously noted, that PPA is a "cost-plus" contract giving AEPGR complete cost recovery along with a return on equity (10.38%). Additional risks to the AEP Ohio ratepayers per the AEPGR PPA during the remainder of the ESP III include:¹⁵⁷

- If the AEPGR PPA units are not able to run, the ratepayers pay for all of the costs to continue operating the units, including the capital and fixed O&M costs;
- If the AEPGR PPA units are dispatched less than projected, then the cost impact of that lower dispatch would be borne by AEP Ohio ratepayers;
- If the AEPGR PPA units suffer a prolonged outage, AEP Ohio ratepayers would continue paying the fixed costs;
- If the AEPGR units incur performance penalties under PJM's new Capacity Performance rules, AEP Ohio ratepayers will pay for those costs and will pay for any disallowed costs up to the amount of any CP bonuses;
- If the heat rate increases, AEP Ohio ratepayers would pay for the higher fuel cost per megawatt-hour;
- If an AEPGR PPA unit is sold or transferred, AEP Ohio ratepayers could continue to pay for the energy capacity and ancillary services of the unit if the Commission does not exclude the unit from the PPA rider;
- If the AEPGR weighted average cost of capital goes up, then the cost of the PPA rider could go up too;
- Any risks regarding an increase in the weighted cost of capital are borne by the AEP Ohio ratepayers; and
- Any costs or charges incurred by AEP Ohio on a bilateral contract that it enters into to sell the AEPGR PPA output (instead of selling the output into the PJM markets).

AEP Ohio may claim that the PPA rider will benefit ratepayers because credits will be passed to the ratepayers when the revenues from the sales in the PJM markets exceed the cost to purchase the AEPGR PPA generation. That claim, however, does not amount to an alternative

¹⁵⁷ Tr. Vol. 1 at 111-112, 176-177; Tr. Vol. 19 at 4735; Tr. Vol. 18 at 4663.

plan to allocate the risk that the PPA Rider will be a charge versus a credit, and the risk of excessive charges being recovered through the PPA Rider. The only arguable risk that AEP Ohio is taking on under its proposal is the risk that the Commission may deny certain cost recovery through the PPA Rider along with a small credit contribution in the last years of the proposed PPA term. Per AEP Ohio, however, the Commission does not have jurisdiction over AEPGR. The Commission is also unable to fully audit and review both the practices and operations of AEPGR under the PPA. That does not amount to appropriate risk allocation.

C. AEP Ohio has not demonstrated that the modified ESP III with the modified PPA Rider is more favorable in the aggregate than an MRO

As previously explained, R.C. 4928.143(C)(1) requires the Commission to approve, or modify and approve, the ESP, if the ESP (including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals) is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. P3/EP SA assert that the Commission does not have the authority to modify the ESP III through this rider proceeding. If the Commission disagrees, the PPA proposal in this case modifies the ESP III and AEP Ohio has the burden of showing that the modified ESP is more favorable in the aggregate as compared to an MRO. To accomplish that, AEP Ohio had to show that either the PPA Rider portion of the ESP III will remain at zero (which it cannot), or show that the PPA Rider will be a credit for the remainder of the ESP III term (which it cannot). As argued earlier, AEP Ohio made no such showing nor presented a specific ESP versus MRO analysis.

Moreover, the evidence in the record shows that no competitive bid process was conducted by AEP Ohio.¹⁵⁸ This initially demonstrates a lack of due diligence, if AEP Ohio was truly interested in procuring a long-term PPA for the purported benefit of customers. Moreover,

¹⁵⁸ Tr. Vol. 1 at 48.

as to the ESP versus MRO analysis, a competitive bid process would demonstrate the market rate. Without that information, there is nothing in the record to conclude that modified ESP will be more favorable in the aggregate than an MRO. Also, as Exelon/RESA witness Campbell testified a competitive bid process would ensure that the customers pay the least for the benefits that AEP Ohio purports the PPA Rider provides.¹⁵⁹ If AEP Ohio is truly interested in procuring a long-term PPA for the purported benefit of customers, any such procurement must be done through a competitive bid process.¹⁶⁰

There is one sentence in the Stipulation (provision III.L), which states “[t]he Signatory Parties agree that the Stipulation preserves and advances the positive results of the MRO v. ESP test under R.C. 4928.143(C) as found in the *ESP III Order*.” As argued earlier, this statement is inadequate to satisfy the plain statutory requirement. No comparison between the modified ESP and an MRO has been provided in the record, which is contemplated by the statute. In fact, multiple parties in this case have recommended a competitive process to procure a PPA at a significantly lower cost, but the evidence reflects that AEP Ohio did not consider such a competitive bidding process. As a result, AEP Ohio has failed to fulfill this statutory requirement in order to modify the ESP III.

V. THE PPA PROPOSAL FOR A TERM BEYOND THE CURRENT ESP III TERM SHOULD BE DENIED

We now evaluate both components of the PPA Proposal for the period of time starting in June 2018, which follows the current ESP III. The Stipulating Parties agree (provision III.C) that AEP Ohio will file a separate application in 2016 to extend the ESP III through May 2024.

¹⁵⁹ RESA/Exelon Ex. 1 at 20.

¹⁶⁰ The State of Ohio has even recognized the value of competitive bidding. The policy for state agencies is that, for sizeable purchases, supplies and services be obtained via competitive bid. *See*, R.C. 125.05 (“A state agency shall make purchases of supplies and services that cost fifty thousand dollars or more through the department of administrative services and the process provided in section 125.035 of the Revised Code * * *.”)

However, despite that future application, AEP Ohio is requesting now as to the AEPGR component: (a) a binding determination that it is prudent to enter into the AEPGR PPA from June 2018 through May 2024, and (b) approval of the AEPGR component's inclusion in the PPA rider.

A. The Commission should deny the OVEC component of the PPA proposal for the time period after the current ESP III period because it is no different than the ESP III proposal that the Commission rejected, and again it does not meet the Commission's minimum PPA factors

Just like its failure to demonstrate that the OVEC component will lead to rate stability during the ESP III, AEP Ohio has again failed to show that cost recovery for its OVEC component will lead to rate stability between June 2018 and June 2024. AEP Ohio's forecasts only show that, between June 2018 and June 2024, the PPA Rider will lead to either another charge or another credit on customer bills. There are no other conclusions to reach – AEP Ohio's evidence includes nothing at all and fails to demonstrate after the ESP III the following:

- how the OVEC component of the PPA proposal will impact the ratepayers;
- that the OVEC component will be reasonable;
- that the OVEC component will be sufficiently beneficial as a hedge;
- that the OVEC component will be in the public interest;
- that the OVEC component will be more favorable in the aggregate as compared to an MRO; and
- how the OVEC component will satisfy the Commission minimum factors after the ESP III.

Moreover, there is nothing in the Stipulation that cures this lack of evidence.

B. The Commission should deny the AEPGR component of the PPA proposal for the time period beyond the current ESP III period because it does not meet the Commission's minimum PPA factors

As noted above, AEP Ohio failed to present sufficient evidence specific to demonstrate that each generating plant in the PPA proposal satisfied the Commission's minimum factors during the ESP III. AEP Ohio likewise failed to present evidence that each generating facility

satisfied the Commission's minimum factors beyond the current ESP III term, despite the plain language of the Commission's ESP III order.

In addition, AEP Ohio has not established the financial need for any of the generating plants beyond the current ESP III term. Whether or not AEP might choose to retire or otherwise dispose of the plants, the statements from the Company indicate that the AEPGR plants have been profitable, and are expected to be profitable in the future. [CONFIDENTIAL INFORMATION REDACTED] Moreover, AEP does not own most of the PPA proposal plants and, thus, cannot unilaterally close the plants. Further, AEP appears capable of absorbing any losses during short term. Moreover, the PJM Base Residual Auction ("BRA") results (incremental auctions and CP) have placed the PPA plants in a fine position for the time period following the ESP III.¹⁶¹ Public announcements from AEP reflect that AEPGR bid into the 2018/2019 BRA and incremental auctions, and cleared.¹⁶² Lastly, P3/EPSCA posits that, even in concept, it cannot be reasonable or in the public interest to require the ratepayers to pay a cost-plus amount after the ESP III through May 2024. This essentially amounts to continual investing, which will be more than what the economics of the plants will dictate. For all of these reasons, the financial need of the PPA plants has not been established for the time period following the ESP III.

As to the factor regarding the necessity of each PPA generating facility in light of future reliability needs, AEP Ohio has not satisfied this factor for the period following the ESP III. AEP Ohio only presented a study that assumed all the AEPGR PPA plants would retire to demonstrate what specific transmission upgrades that would be needed. This study, however,

¹⁶¹ As Exelon/RESA witness Campbell explained, if a resource offers into the PJM capacity market and clears above their offer, there should be no financial need because that resource will be compensated for its reliability value and is assumed to be recovering its costs and not at risk for retirement. Exelon/RESA Ex. 1 at 22.

¹⁶² Exelon/RESA Ex. 1 at 23 and Attachment A.

does not actually consider the necessity of any particular PPA plant in light of future reliability needs for the time period following the ESP III. In addition, there have been no determinations made by PJM as to future reliability needs associated with any of the AEPGR PPA plants starting in June 2018 and beyond.

As to the issue of need in light of supply diversity, AEP Ohio's evidence was not convincing for the period June 2018 and beyond, for the same reason it was not convincing evidence during the remainder of the ESP III term. Plus, if the PPA plants do not close during the time period involved, this is not an issue.

The next Commission factor is the impact that the closure of each generating plant would have on electric prices and the resulting effect on economic development within the state. AEP Ohio has not established the impact that a closure of each PPA plant would have on electric prices and the resulting effect of the rider on economic development within the state. AEP Ohio's studies of the economic benefits of the OVEC plants¹⁶³ and the AEPGR PPA plants¹⁶⁴ did not address the effect of any particular PPA plant's closure on electric prices or on economic development for the period following the ESP III. As a result, the studies presented by Mr. Allen cannot be relied upon to satisfy this Commission factor. Plus, just as the PPA proposal will harm Ohio during the remainder of the ESP III, the PPA proposal will be devastating to Ohio for the 8+ years after the ESP III, making it increasingly less attractive for industry and deterring power companies from locating new power plants in Ohio. Customers having to possibly pay additional amounts for generation service for numerous years will not be enticed to bring their new businesses to Ohio. In addition, entities considering Ohio for purposes of constructing new power plants will turn away, rather than compete against local generating plants with ratepayer-

¹⁶³ AEP Ohio Ex. 10 at WAA-3.

¹⁶⁴ AEP Ohio Ex. 10 at WAA-4.

guaranteed cost recovery on a cost-plus basis with no incentive to act rationally. And as noted earlier, AEP Ohio's study of the transmission upgrades is flawed and not evidence upon which the Commission can determine the impact of each PPA proposal plant's closure on electric prices or economic development.

Regarding the Commission's rigorous oversight factor, AEP Ohio's PPA proposal does not provide for rigorous Commission oversight as to the PPA plants after the current ESP III for the same reasons identified earlier regarding the remainder of the ESP III period. First, just as noted previously, AEP Ohio did not even present the AEPGR PPA itself to the Commission – its application and the evidence in this proceeding only include a draft unsigned, eight-page PPA term sheet with AEPGR.¹⁶⁵ AEP Ohio has not fulfilled its burden of proof as to this factor because its application and its presented evidence do not include the “best evidence” -- the full terms of a binding PPA proposal. Second, both the OVEC PPA and the AEPGR PPA are FERC-jurisdictional contracts. AEP's position is that the Commission cannot dictate the terms of those PPAs and, as a result, the Commission has no reason to accept that it will have the rigorous oversight that it desires. The Stipulation contains a section (provision III.A.5) addressing the Commission reviews, but it simply commits AEP Ohio to participate in those reviews. That provision does not establish a rigorous oversight process.

AEP Ohio's PPA proposal does not include a sufficient and balanced commitment to “full information sharing” with the Commission or its Staff for the time period after the current ESP III because of the limitation and loophole in the Stipulation, and the joint AEPGR personnel who will be involved with bidding the power into the PJM markets. This is the same situation as discussed previously. The AEPGR PPA itself does not provide the Commission with the right to

¹⁶⁵ AEP Ohio Ex. 2 at Exhibit KDP-1.

audit the books of AEPGR.¹⁶⁶ The Staff will have to know what to ask for in order to receive information because of the wording used in the Stipulation. This establishes a loophole, allowing the possibility that a multitude of documents may never be part of the rigorous Commission review. The AEPGR PPA, the PPA proposal and the Stipulation do not address access to AEPGR bilateral contracts, other bidding, or plant sales to a new owner, all which would be important to ensure fair dealings vis-à-vis the AEPGR PPA plants. Access to this other information is important because the record establishes that AEPGR (on AEP Ohio's behalf) will be bidding the PPA units into the PJM markets at the very same time that AEPGR will be bidding the other non-PPA units into the PJM markets.¹⁶⁷

Finally, just as described before for the remainder of the current ESP III, AEP Ohio has not included an alternative plan for after the current ESP III to allocate the PPA rider's financial risk between both AEP Ohio and its ratepayers. Instead, the ratepayers will be exposed to numerous risks for many years.

C. The Commission should deny the PPA proposal beyond the end of the current ESP III term because AEP Ohio has not demonstrated that a future ESP which includes the PPA proposal will be more favorable in the aggregate than an MRO

As previously explained, R.C. 4928.143(C)(1) requires the Commission to approve, or modify and approve, a proposed ESP, if the proposed ESP (including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals) is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. P3/EPSC assert that the Commission does not have the authority to implement this rider for the time period beyond the current ESP III period because the Commission cannot make

¹⁶⁶ Tr. Vol. 1 at 69. Similarly, the OVEC ICPA does not give the Commission access to the books, records and accounts of OVEC, or a right to audit. Sierra Club Ex. 3.

¹⁶⁷ Tr. Vol. 18 at 4485.

the ESP versus MRO analysis as there is no proposed future ESP proposal pending before the Commission. This is a classic situation of putting the cart (PPA Proposal for the years mid-2018 through mid-2024) before the horse (future ESP proposal). AEP Ohio has the burden, but it cannot show that its yet-to-be-proposed future ESP, which includes the PPA rider, will be more favorable in the aggregate as compared to an MRO. As pointed out earlier, AEP Ohio made no such showing nor presented a specific ESP versus MRO analysis at all, yet alone for the second time period involved. P3/EPSC also incorporate their earlier argument that the evidence in the record shows that no competitive bid process was conducted by AEP Ohio, which would demonstrate the market rate.¹⁶⁸ Without that information as well, there is nothing in the record to conclude that the yet-to-be-proposed future ESP, which includes the PPA Proposal, will be more favorable in the aggregate than an MRO. Additionally, the Stipulation does not fix the problem. Provision III.L, which states “[t]he Signatory Parties agree that the Stipulation preserves and advances the positive results of the MRO v. ESP test under R.C. 4928.143(C) as found in the *ESP III Order*,” cannot constitute evidence that a yet-to-be-proposed future ESP, which includes the PPA Proposal, will be more favorable in the aggregate than an MRO. As a result, AEP Ohio has failed to fulfill this statutory requirement in order to implement the PPA proposal beyond the end of the current ESP III term.

¹⁶⁸ Tr. Vol. 1 at 48.

VI. THIS COMMISSION HAS SUPPORTED THE DEVELOPMENT OF COMPETITIVE MARKETS AND SHOULD CONTINUE TO DO SO BY REJECTING AEP OHIO'S REQUEST FOR A SUBSIDY FOR ITS GENERATION AFFILIATE

A. This ratepayer guarantee is a subsidy and will harm both the wholesale and retail markets

RESA witness Bennett provided a good test for determining if the PPA proposal will be a subsidy.¹⁶⁹

I think -- well, I think the important aspects about this case in looking at whether or not this is a subsidy is specifically around whether or not the risk associated with the generation rests with the ratepayers or the generation shareholders, and whether or not payment is being made in order to make sure that a guaranteed return is -- is achieved.

I think if I was asking the Commission to think through whether or not this is a subsidy, I would ask them to look at where the risk is, and is there an unregulated entity that is guaranteed a return on their asset in almost every situation.

Using that test, it is clear that AEP Ohio's PPA proposal is an unabashed guarantee of cost-plus recovery for AEPGR and AEP Ohio to the benefit of the AEP Parent, all being paid for by AEP Ohio's ratepayers for numerous years. As such, it provides both AEPGR and AEP Ohio with extensive pecuniary assistance which is nothing short of a long-term subsidy. The IMM concurred and noted that this is a subsidy analogous to other subsidies found to be inconsistent with competition in the wholesale power markets and accordingly, should be rejected.¹⁷⁰ Moreover, the IMM stated that the PPA proposal will create an incentive for generators to present a "zero offer" in the PJM markets to maximize the revenue offset to the customers, which will have price-suppressive effects and make it difficult for generating units without subsidies to compete in the market.¹⁷¹ Exelon/RESA witness Campbell agreed, and added that the PPA Proposal also has the potential to eliminate a generator's incentive to perform on a

¹⁶⁹ Tr. Vol. 22 at 5549.

¹⁷⁰ IMM Ex. 1 at 3-4, 5.

¹⁷¹ IMM Ex. 1 at 4.

capacity obligation committed to PJM.¹⁷² Furthermore, Mr. Campbell noted that this proposal also undermines the CP product, which tries to make generators (a) financially accountable for non-performance during peak demand periods and (b) require them to invest to ensure performance.¹⁷³

P3/EPSC witness Cavicchi also testified that the PPA Proposal is a subsidy, stating that it would create incentives for AEPGR to sustain inefficient operations, such as operations and investment that would not be economic under PJM's market-determined prices. He added that AEPGR would seek to make investments to support continued operations even when the investments are economic relative to market alternatives, all because the costs are being borne by the ratepayers.¹⁷⁴

Dynegy witness Ellis expressed similar concerns and as a co-owner of one of the PPA plants, reflected how detrimental this subsidy will be to other market participants.¹⁷⁵ Additionally, Mr. Ellis explained that both the operating committee envisioned by the AEPGR PPA and the limited Commission oversight were insufficient mechanisms to incent AEPGR (a non-regulated entity) to act in a rational, economic and efficient fashion.¹⁷⁶ Mr. Ellis provides a significant perspective as Dynegy is a merchant generator in Ohio with 5,332 MW of net capacity in Ohio.¹⁷⁷

The IMM also explained that the Stipulation has further heightened concerns about the impact of the PPA proposal on the competitive market:¹⁷⁸

Well what's happened is the proposed settlement has forced the issue, and one of the potentials is that if this is accepted and passes whatever legal

¹⁷² Exelon/RESA Ex. 1 at 8.

¹⁷³ Exelon/RESA Ex. 1 at 8.

¹⁷⁴ P3/EPSC Ex. 8 at 7.

¹⁷⁵ Dynegy Ex. 1 at 21.

¹⁷⁶ Tr. Vol. 21 at 5325-5326, 5331.

¹⁷⁷ AEP Ohio Ex. 16 at 103-104.

¹⁷⁸ Tr. Vol. 21 at 5228,

challenges there are, then it could create a precedent for other -- other utilities in other states to do exactly the same thing, which would have very significant consequences, additional incremental consequences for the way the markets work. In fact, **potentially a threat to the way competitive markets work entirely**. So, yes, I think that is something the Commission should think about. (Emphasis added.)

Mr. Bennett likewise expressed grave concerns with the PPA proposal in the following testimony.¹⁷⁹

It's the idea that any subsidy can create a negative impact and that negative impact can be minor or that negative impact can be excessive. That negative impact can have a real financial impact on suppliers. For a small supplier, it could be enough to drive them out of business.

So the reality is we've seen incentives, we've seen subsidies impact the market. Is the market folding in on itself? No. But, you know that doesn't mean that the subsidies that exist haven't caused negative impacts to this point and that the subsidies in this application could be even worse going forward.

* * *

I think, again, the idea is that the market -- the wholesale market that underlies the retail market, the sustainability and the robustness of it is important because, without a wholesale market, the retail market doesn't exist.

Exelon/RESA witness Campbell also pointed out that the PPA Proposal is contrary to the progress made toward full retail and wholesale competition, and could erase the progress made to date.¹⁸⁰ The PPA proposal will eviscerate the benefits that ratepayers currently have from their fixed-price contracts because they will be exposed to the varying PPA rider.¹⁸¹ He explained that the PPA Proposal will cause ratepayers to pay two generation-related charges, thus being double-billed for generation-related costs, contrary to R.C. 4928.02(H) and undermining the market.¹⁸²

¹⁷⁹ Tr. Vol. 22 at 5558-5559.

¹⁸⁰ Exelon/RESA Ex. 1 at 6.

¹⁸¹ Exelon/RESA Ex. 1 at 7.

¹⁸² Exelon/RESA Ex. 1 at 11.

B. The PPA Rider and PPA Proposal will discourage bidder participation in procurements for the SSO

Exelon/RESA witness Campbell pointed out that AEP Ohio affiliates have participated in multiple wholesale SSO supply procurement auctions in Ohio.¹⁸³ He testified that, with the PPA proposal, AEPGR will be subsidized and will be dispatching the power (on behalf of AEP Ohio). He opined that wholesale suppliers may become hesitant to bid against generation receiving cost plus a return on equity. Moreover, Mr. Campbell stated that this could spill over and affect the outcomes in Ohio's SSO auctions.¹⁸⁴

C. The PPA Rider and PPA Proposal will discourage new independent gas-fired generation

The IMM stated that the PPA proposal will also negatively affect the market incentives for building new generation and "likely result in a situation where only subsidized units would ever be built."¹⁸⁵ The IMM is not alone in this opinion. Dynegy witness Ellis shares this opinion. He testified that:¹⁸⁶

One of the desired outcomes from competition in any market is that the most cost-effective and efficient suppliers will prevail, and the oldest, least efficient and most obsolete suppliers will exit the market. When the oldest, most expensive and least efficient suppliers are artificially kept in the market, market signals that would incentivize the development of newer, cheaper, cleaner plants are suppressed.

RESA witness Bennett echoed this opinion.¹⁸⁷

¹⁸³ Exelon/RESA Ex. 1 at 15.

¹⁸⁴ Exelon/RESA Ex. 1 at 15-16.

¹⁸⁵ IMM Ex. 1 at 4.

¹⁸⁶ Dynegy Ex. 1 at 21-22.

¹⁸⁷ RESA Ex. 1 at 4.

VII. THE COMMISSION LACKS THE LEGAL AUTHORITY TO APPROVE AND IMPLEMENT THE PPA PROPOSAL

A. The Commission cannot authorize the PPA Proposal beyond the current ESP III period because it lacks authority to establish a generation-related rider “outside” of an ESP proceeding and beyond the current ESP III term

The Commission previously ruled, in the *ESP III* order, that, whether a credit or a charge, the PPA Rider would be considered a generation rate.¹⁸⁸ AEP Ohio’s request is asking the Commission to approve today, up front, the PPA proposal for a period beyond AEP Ohio’s current ESP III, when no future ESP is being proposed. Furthermore, the Stipulating Parties have agreed (provision III.A.5) that the PPA rider recovery will extend through May 2024.¹⁸⁹ Without an ESP application pending before it, the Commission cannot approve terms and conditions for future ESPs (whether as part of an ESP IV or an extension of ESP III). The facts are simple: (1) AEP Ohio’s current ESP III ends in May 2018, (2) AEP Ohio is asking the Commission to approve today a new ESP rate/term/condition for a time after the approved ESP III ends, and (3) AEP Ohio has not filed a new ESP application or filed to amend or extend its current ESP III.

This case is not following the processes established by law to establish generation-related rates – the ESP process or the MRO process.¹⁹⁰ This is also not a rate/price phase-in, under R.C. 4928.144 because there is no approved PPA rider – the Commission rejected the last proposal put before it. The Commission does not have before it the statutorily required application in order to approve an ESP rate/term/condition for a future ESP. Additionally, nothing in the ESP statute, in particular, gives the Commission authority to establish the PPA proposal as an ESP

¹⁸⁸ *ESP III*, Opinion and Order at 26.

¹⁸⁹ Joint Ex. 1 at 7.

¹⁹⁰ The Commission has previously held that a PPA rider is a generation-related rate. *ESP III*, Opinion and Order at 26.

rate/term/condition outside the context of an ESP proceeding or for a future ESP(s).¹⁹¹ See, R.C. 4928.143. In addition, the Commission is required by law to make a determination that a future proposed ESP is more favorable in the aggregate than an MRO, which it cannot do in this proceeding.

The Commission should not construe AEP Ohio's PPA proposal for the term beyond the current ESP III as seeking advice or requesting to make a future application that includes the PPA proposal in the next ESP application. First, that simply is not what AEP Ohio has sought and is not what the Stipulating Parties are recommending. Second, the Commission should not give advisory opinions. Only the actual controversies should be ruled upon.¹⁹² Third, this Commission has concluded that it does not issue advisory opinions.¹⁹³

This matter is not akin to completing or "populating" an approved placeholder rider, as some parties may argue. In two prior ESP cases the Commission approved placeholder riders at a zero level and later, when the necessarily data became available, those riders' rates were fully developed and implemented.¹⁹⁴ These two prior cases are vastly different from the instant proceeding. They involved a SmartGrid rider and a Delta Revenue Recovery rider that were to take effect upon receiving the data needed to develop the involved rider rates. Here, AEP Ohio

¹⁹¹ Nor should the Commission read jurisdiction into Title 49. See, *Bates v. United States*, 522 U.S. 23, 29, 118 S. Ct. 285 (1997) (stating, courts must "resist reading words or elements into a statute that do not appear on its face"); *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, 873 N.E.2d 1305, ¶¶ 13-15 (Ohio 2007) (stating we cannot add words or delete words from a statute); and *Iddings v. Jefferson Cry. School Dist. Bd. of Edn.*, 155 Ohio St. 287, 290, 98 N.E.2d 827 (Ohio 1951) ("[t]o construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts").

¹⁹² See, *Allen v. Totes/Isotoner Corp.*, 123 Ohio St. 3d 216, 2009-Ohio-4231, 915 N.E.2d 622, ¶ 10 (Ohio 2009) (O'Donnell, J., concurring) ("It is well-settled law that this court will not issue advisory opinions."); and *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (Ohio 1970) ("It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect.")

¹⁹³ *Consumers' Counsel v. The Western Reserve Telephone Company*, Nos. 92-1525-TP-CSS and 93-230-TP-ALT, 1994 Ohio PUC LEXIS 384, *3, Entry on Rehearing (May 18, 1994) ("The Commission does not give advisory opinions on issues not before us.").

¹⁹⁴ *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO et al, Opinion and Order at 17 (December 17, 2008) and *In re Ohio Edison Company etc.*, Case No. 08-935-EL-SSO, Second Opinion and Order at 15 (March 25, 2009).

has proposed an entirely different PPA proposal for Commission approval and for pass through to ratepayers for several reasons:

- 1) The Commission actually rejected the PPA proposal presented by AEP Ohio in *ESP III*, stating “[w]e conclude that AEP Ohio has not demonstrated that its PPA rider proposal, as put forth in these proceedings, should be approved under R.C. 4928.143(B)(2)(d).”¹⁹⁵ AEP cannot be completing or populating a rejected proposal.
- 2) AEP Ohio has asked that this proposal be part of AEP Ohio’s current *ESP III* and also be part of the future *ESP(s)* that is effective between June 2018 and June 2024. The two AEP Ohio proposals are different in scope and duration – two key attributes to the rider:

Trait	PPA Proposal in <i>ESP III</i>	Current PPA Proposal
Scope	432 MWs	3,100 MWs
Duration	3 years	8+ years ¹⁹⁶

- 3) The Stipulation presented in this case includes other new attributes unique to this Rider proposal, including: credit commitment for years 2020-2024, quarterly reconciliations, allocation among rate classes, use of the classes five monthly coincident peaks from the prior year, billing on a kilowatt-hour basis, alleged “rigorous review of the Rider, information sharing of AEPGR fleet information, and option for exclusion upon sale of a PPA unit.

¹⁹⁵ *ESP III*, Opinion and Order at 25.

¹⁹⁶ Originally, AEP Ohio requested a 36-year PPA proposal, but the Stipulating Parties have agreed and are now recommending a PPA proposal that ends at the end of May 2014. Depending upon when a Commission ruling is issued that could be an 8.25 year PPA.

AEP Ohio's proposal in this case is a brand new proposal and AEP Ohio is asking for approval for future ESPs. This proceeding cannot be viewed as a simple rider calculation proceeding and any such argument along that line should be rejected outright. As a result, the Commission does not have the authority to approve the PPA proposal for any time after the current ESP III and as a matter of law, the Commission cannot approve the PPA proposal.

B. The Commission cannot authorize the PPA proposal because it will not comply with Ohio's corporate separation statute

If the Commission believes it has authority to approve the PPA proposal (which P3/EPSC have argued is not authorized), then the Commission must evaluate and find that the Rider PPA and PPA proposal are authorized by and do not violate Ohio's corporate separation statute. R.C. 4928.17 states in pertinent part:

(A) * * * [N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

R.C. 4928.17 requires a separation between competitive and non-competitive services, but the generation under the PPA proposal will not be separated from AEP Ohio.

As to the generation from the AEPGR plants, multiple AEP Ohio witnesses explained how there will be an intermixing of personnel. AEP Ohio witness Pearce testified that Ohio Power would be heavily involved in plant operations.¹⁹⁷ That oversight is written into the draft AEPGR PPA that was produced by AEP Ohio during discovery. Under Section 10.4 of the proposed PPA, AEP Ohio, AEPGR and American Electric Power Service Corporation will be members of an Operating Committee that will have oversight under the PPA and will develop operating procedures for the generation, delivery and receipt of the energy under the PPA. Section 10.4 also states:¹⁹⁸

The Operating Committee will review and approve decisions regarding the retirement dates of the Facilities for depreciation or other purposes, annual budgets, capital expenditures, procedures and systems for dispatch and notification of dispatch, procedures for communication and coordination with respect to Facility capacity availability, discuss scheduling of outages for maintenance, as well as the return to availability following an unplanned outage, approval of material contracts for Fuel, establishment of specifications for Fuels, and other duties as assigned by agreement of the Representatives.

AEP witness Allen acknowledged that the Operating Committee will discuss significant issues related to the operation of the units, but claimed the existing code of conduct will address AEP Ohio's direct involvement with the generation assets.¹⁹⁹ Those two concepts are mutually exclusive and Mr. Allen's attempt to rely on a code of conduct to justify AEP Ohio's operation of the generation assets is contrary Ohio's corporate separation statute.

Moreover, AEP Ohio witness Allen testified that AEPGR (on AEP Ohio's behalf) will be bidding the PPA units into the PJM markets at the very same time that AEPGR will be bidding the other units into the PJM markets.²⁰⁰ Mr. Allen testified that bidding information will be kept

¹⁹⁷ Tr. Vol. 2 at 602, 603.

¹⁹⁸ P3/EPSCA Ex. 10 at 25 of 32.

¹⁹⁹ Tr. Vol. 18 at 4489.

²⁰⁰ Tr. Vol. 18 at 4486, 4659.

separate and the AEPGR employees will conduct these bids consistent with a code of conduct.²⁰¹ Yet, these AEPGR employees all will be in the same building, will work for the same corporate group and be under the same chain of command.²⁰² These employees would not be fully separated and a code of conduct will not be sufficient to protect against errors and abuses.

Altogether, it is clear that AEP Ohio will have extensive oversight and direct involvement in AEPGR's generation assets. The evidence and the Stipulation also make clear that the statutorily required separation between competitive and non-competitive services will not be maintained under the PPA proposal and Stipulation. That constitutes a direct violation of Ohio's corporate separation statute and for that reason alone, this Commission cannot approve AEP Ohio's amended application and the Stipulation.

C. The Commission cannot authorize the PPA proposal because the stipulated commitments to environmental and renewable energy projects violate R.C. 4928.143(D)(2)(c), bind Commission decision-making related to these projects for future ESPs, and conflict with other language in the Stipulation

As part of the Stipulation (provision III.I), AEP Ohio agreed to develop, via competitive bid, wind energy projects in Ohio of at least 500 MW nameplate capacity and solar projects in Ohio of at least 400 MW nameplate capacity. AEP Ohio affiliates will have the right to initially own up to 50% of such projects in the aggregate. AEP Ohio will buy the power via a long-term PPA (10 years or longer) from each project and full cost recovery will occur through the PPA rider.²⁰³ The Stipulating Parties have agreed that AEP Ohio and its affiliates will develop these wind and solar projects, but this part of the Stipulation does not comport with Ohio law. R.C.

²⁰¹ Tr. Vol. 18 at 4486-4487.

²⁰² *Id.*

§4928.143(B)(2)(c) is the specific statute on point. R.C. 4928.143(B)(2)(c) states, in part, that an ESP application may include:

the establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, * * *. However, **no such surcharge shall be authorized unless the commission first determines in the proceeding that there is a need for the facility based on resource planning projections** submitted by the electric distribution utility. (Emphasis added.)

The plain language of R.C. §4928.143(B)(2)(c) says the request for the electric generation surcharge must be made in an ESP application. The Stipulating Parties, however, have not requested an electric generation surcharge for a new electric generating facility in an ESP application – there was nothing on this topic in AEP Ohio’s ESP III proceeding and this case is a rider proceeding. The statute also says that the surcharge cannot be authorized until need for the facility is found. Need for these unknown, future wind and solar projects has not been demonstrated in any proceeding. Thus, the Commission cannot now approve the Stipulation’s cost recovery using the PPA Rider or the design of the cost recovery.

Two years ago, the Commission reviewed R.C. 4928.143(B)(2)(c) and specifically addressed the “need” component. At that time, AEP Ohio had proposed an electric generation facility, the Turning Point solar project, and AEP Ohio had entered into a stipulation with the Staff, agreeing that need for that project had been demonstrated.²⁰⁴ The Commission reviewed R.C. 4928.143(B)(2)(c) and rejected the stipulation. The Commission concluded that the

²⁰⁴ *In the Matter of the Long-Term Forecast Report of the Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR, Opinion and Order (January 9, 2013).

stipulation would not benefit ratepayers and was not in the public interest because AEP Ohio had not demonstrated a need for the solar project.²⁰⁵

Others may argue that the details of need and cost recovery for these wind and solar projects will be the subject of a future proceeding, and that no substantive decisions about these projects need be made in this proceeding. Such an argument ignores the plain wording in the Stipulation.. The instant Stipulation provision binds the Commission to using (a) the PPA Rider and (b) the Stipulation's rate design for the cost recovery for any later-approved project costs .²⁰⁶ These provisions of the Stipulation, like other troublesome provisions, would bind future Commissions to terms that are required to be presented in ESP proceedings for future generation-related charges. The Commission often notes in its rate-related decisions that nothing therein "shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation."²⁰⁷ This Commission language reflects its desire to not tie the hands of future Commissions. Nothing in this proceeding should cause the Commission to depart from that long standing policy.

Also, this part of the Stipulation effectively extends the PPA rider beyond May 2024, which is the time period that the Stipulating Parties agreed upon for the extended ESP III term. Thus, there is a conflict between parts of the Stipulation as to the period of time in which the PPA rider is to be in place.

²⁰⁵ *Id.* at 25-27.

²⁰⁶ Joint Exhibit 1 at 31-32.

²⁰⁷ See, e.g., *In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2011 Under the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, No. 12-1544-EL-UNC, 2013 Ohio PUC LEXIS 32, *10, Opinion and Order (Feb. 13, 2013) (while adopting the stipulation the Commission found that "nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation."); *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, No. 10-2929-EL-UNC, 2012 Ohio PUC LEXIS 666, *96-97, 298 P.U.R.4th 233, Opinion and Order (July 02, 2012) (in approving an interim capacity pricing mechanism, the Commission also found that nothing in the opinion and order was binding upon the Commission in any future proceeding).

In summary, this part of the Stipulation impermissibly establishes terms/conditions contrary to Ohio law, binds Commission decision-making related to these projects for future ESPs and conflicts with other language in the Stipulation. This is another basis for rejecting the Stipulation.

D. The Commission cannot authorize the PPA proposal because the AEPGR PPA is a contract for the procurement of electricity that will be resold at wholesale

The AEPGR PPA is a FERC-jurisdictional sale for resale contract, just like the agreement addressing the OVEC entitlement.²⁰⁸ AEP Ohio has also acknowledged that the AEPGR PPA is a FERC jurisdictional contract.²⁰⁹ This fact alone would not remove it from a state commission's purview, given states' authority to review for prudence the sourcing of electricity for resale at retail.

But the PPA is not such a contract.²¹⁰ This is not a circumstance where AEP Ohio is "obtaining" generation for its ratepayers. Instead, it is obtaining capacity and energy to be resold (potentially) into the PJM wholesale markets. AEP Ohio and other LSEs will source the energy and capacity they sell to retail customers in AEP Ohio's service territory from PJM, or via separate bilateral agreements. The fact that AEP Ohio is not "obtaining" generation for its ratepayers distinguishes any Commission action in this proceeding from a traditional vertically integrated setting. Under the PPA rider, the Commission is being asked to guarantee that AEP

²⁰⁸ Cf. Complaint Requesting Fast Track Processing, FERC Docket No. EL16-33-000 (filed Jan. 27, 2016) (complaint urging FERC to rescind a previously-granted waiver of its affiliate power sales restrictions and to require the filing of the AEPGR PPA for FERC review under Section 205 of the Federal Power Act).

²⁰⁹ Tr. Vol. 1 at 274; Tr. Vol. 2 at 349, 353-356.

²¹⁰ Even if it were the appropriate subject of a prudence review, the review sought and received here cannot be characterized as one addressing the "prudence" given that there are ample alternative sources of supply (including from the PJM market) that are more economical than the supplies governed by the proposed PPA and there was no competitive procurement pursuant to which the PPA was entered.. See, e.g., *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (establishing three methods for determining whether a wholesale power arrangement between affiliates is at an acceptable market price that can be passed on to ratepayers).

Ohio will receive revenues from its wholesale market sales sufficient to cover its contractual payments to AEPGR and OVEC.

As a result, the AEPGR contract does not fall within the scope of the Commission's statutory authority. The Commission's jurisdiction is limited to the authority expressly granted to it under Title 49 of the Ohio Revised Code.²⁰⁹ Since Title 49 is silent as to wholesale arrangements, the Commission cannot find it prudent to enter into it or otherwise sanction it.²¹⁰ To the contrary, any proposed regulation of wholesale market transactions as contemplated here would be the exclusive domain of FERC, and any state regulation would be preempted.²¹¹

VIII. THE PROPOSED STIPULATION FAILS THE COMMISSION'S THREE-PRONG TEST

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into a stipulation, but the stipulation is not binding on the Commission. The standard of review for considering the reasonableness of a stipulation has been discussed in numerous Commission proceedings.²¹² The ultimate issue is whether the agreement is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?

²⁰⁹ See *State ex rel. Columbus S. Power Co. v. Fais* (2008), 117 Ohio St.3d 340, 343, 2008 -Ohio- 849, ¶18.

²¹⁰ Additionally, the Commission should not read jurisdiction into Title 49. See, *Bates v. United States*, 522 U.S. 23, 29, 118 S. Ct. 285 (1997) (stating, courts must "resist reading words or elements into a statute that do not appear on its face"); *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, 873 N.E.2d 1305, ¶¶ 13-15 (Ohio 2007) (stating we cannot add words or delete words from a statute); and *Iddings v. Jefferson Cry. School Dist. Bd. of Edn.*, 155 Ohio St. 287, 290, 98 N.E.2d 827 (Ohio 1951) ("[t]o construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts").

²¹¹ See *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 475 (4th Cir. 2014); *FERC v EPSA*, No. 14-840, --- U.S. -- -, Slip Op. at 26 (2016).

²¹² See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985).

- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed these criteria.²¹³

While the Stipulation has been presented as a package, the Stipulation is composed of multiple components that require review and analysis.

A. The Stipulation was not the product of serious bargaining

The Ohio Supreme Court has addressed the first prong of the Commission's test in the past. In *OCC v. Pub. Util. Comm.*, the Court said that the Commission cannot just rely on the terms of a stipulation, but must determine whether there is sufficient evidence that the stipulation was the product of serious bargaining.²¹⁴ The Court added that concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted. *** If there were special considerations, in the form of side agreements among the signatory parties, one or more parties may have gain an unfair advantage in the bargaining process.”²¹⁵

In this matter, the Stipulation was signed and filed on December 14, 2015. That stipulation referenced a separate side agreement between AEP Ohio and Sierra Club, and thus all parties were put on notice about that separate side agreement.²¹⁶ However, as was later disclosed, there was another separate side agreement between AEP Ohio and IEU, executed on the same day as the Stipulation – December 14, 2015. That separate side agreement does relate to this proceeding – it contains terms specifically about this proceeding. The AEP Ohio/IEU side

²¹³ *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559 (citing *Consumers' Counsel*, *supra*, at 126.)

²¹⁴ *OCC v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, 321, 2006-Ohio-5789.

²¹⁵ *Id.*

²¹⁶ Mr. Allen testified that the AEP Ohio/Sierra Club side agreement “essentially memorializes an agreement -- in an agreement between Sierra Club and AEPGR, the commitments that are included within the stipulation relating to the commitment to pursue co-firing of Conesville Units 5 and 6, the commitment to cease coal burning at Conesville 5 and 6 by December of 2029, for Conesville 5 and 6, and the ceasing of coal burning at the Cardinal Unit -- Cardinal Unit 1 at the end of December 31, 2030.” Tr. Vol. 19 at 4820.

agreement was not disclosed to all the parties until much later through a discovery response; it was not filed along with the Stipulation.²¹⁷ Mr. Allen testified, from his own personal knowledge, that some (but not all) parties were aware of the AEP Ohio/IEU side agreement before it was signed.²¹⁸ As noted earlier, that AEP Ohio/IEU agreement includes a payment of \$8 million to IEU, in part, for IEU's agreement to no longer oppose the modified PPA proposal.²¹⁹ Some parties were aware of this side agreement while other parties were not aware or informed about it until much later. This evidence makes clear that some parties were left in the dark about and essentially excluded from other settlement terms on the "table."

The Ohio Supreme Court has expressed its grave concerns about the Commission approving a partial stipulation which arose from exclusionary settlement talks.²²⁰ The Court has also reversed the Commission when reasonable means for settlement participation were not found.²²¹ Also, the Commission has rejected a stipulation on a lack of serious bargaining when there were side agreements and the evidence did not establish the presence and participation of parties during settlement negotiations.²²²

²¹⁷ Tr. Vol. 18 at 4573; Tr. Vol. 19 at 4810, 4812.

²¹⁸ Tr. Vol. 19 at 4814.

²¹⁹ P3/EPSCA Ex. 11 at 1-2.

²²⁰ *In Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St. 3d 229; 661 N.E.2d 1097; 1996 Ohio LEXIS 181; 1996-Ohio-224

²²¹ *Ohio Consumers' Counsel v. PUC*, 109 Ohio St. 3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶¶ 18-19 (Ohio 2006) (finding that Commission exceeded its authority in approving a rate-stabilization plan because it did not ensure a reasonable means for customer participation where there was an absence of a signed stipulation by all customers).

²²² *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA, 2007 Ohio PUC LEXIS 703, *104, Order on Remand (October 24, 2007) (rejecting the stipulation because "[b]ased on provisions in the side agreements, requiring parties to support the stipulation, and given the limited record evidence regarding the continued presence and participation of the supportive parties during negotiations, there is insufficient evidence to support a finding that the parties engaged in serious bargaining."). See, also, *Ohio Consumers' Counsel v. PUC*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 86 (Ohio 2006) (holding that discovery should be permitted into side agreements among the parties to determine whether the stipulation was the product of serious bargaining).

The evidence related to the AEP Ohio/IEU side agreement is akin to exclusionary settlement discussions, particularly in light of how the side agreement between AEP Ohio and Sierra Club was handled at the same time in opposite fashion. As a result, the Commission should find that one or more parties gained an unfair advantage in the bargaining process, and as a result, the Stipulation is not the product of serious bargaining among capable, knowledgeable parties.

B. The PPA proposal is the center of the Stipulation and it will not benefit ratepayers and is not in the public interest

Inasmuch as this proceeding is a request for approval of AEP Ohio's PPA proposal, the Stipulation too centers on the PPA proposal. In the preceding sections of this Initial Brief, P3/EPSC raised numerous arguments against the modified PPA proposal as stipulated and will not repeat them here. P3/EPSC raise multiple legal, policy and economic arguments against the PPA proposal as a whole. The bottom line is that there is overwhelming and convincing evidence demonstrating that AEP Ohio's PPA proposal is not reasonable, will not benefit ratepayers, and is not in the public interest. Moreover, all of the other terms of the Stipulation do not turn this PPA proposal into a reasonable proposal.

C. Multiple terms of the Stipulation are simply money inducements for agreeing with the PPA proposal, and they will not benefit ratepayers and are not in the public interest

A simple review of the Stipulation demonstrates that AEP Ohio has agreed to make payments and other changes for specific intervening parties in exchange for their agreement with the modified PPA proposal:

- AEP Ohio will donate \$500,000 to a research and development program for clean energy technology.
- AEP Ohio will provide \$400,000 in EE/PDR funding each year to the OHA;
- AEP Ohio will provide up to \$600,000 each year in additional EE/PDR funding under an annual energy efficiency program for OHA members

- AEP Ohio will pay \$200,000 to OPAE for the Community Assistance Program.
- AEP Ohio will decrease its Alternative Feed Service rates for OHA members (\$2.50 per kilowatt). This rate adjustment is estimated to to save OHA members approximately \$100,000 **each year**, thus saving the OHA members significant amounts of money.²²³
- OPAE was designated as manager of the Community Assistance Program for 2017 under an \$8 million budget, for which it will be paid a five percent management fee roughly in the amount of \$400,000.²²⁴

Assuming an even eight-year period (for simplicity) is involved and the maximum dollar amounts are triggered, these monetary inducements give a few specific Signatory Parties tremendous direct economic windfalls, in exchange for their support of the modified PPA proposal:

<u>First Year:</u>
\$ 500,000 research program ²²⁵
400,000 OHA EE/PDR funding
600,000 additional OHA EE/PDR funding
200,000 Community Assistance Program
+ 100,000 AFS rate change
Total = Up to \$1,800,000
<u>Following 7 Years:</u>
\$2,800,000 (\$400,000 in OHA EE/PDR funding each year)
4,200,000 (up to \$600,000 additional OHA EE/PDR funding each year)
700,000 (\$100,000 AFS rate change each year)
+ 400,000 (OPAE management fee)
Total = Up to \$8,100,000
Grand Total = Up to \$9,900,000

In addition, in a separate side agreement, AEP Ohio will pay IEU \$8 million, which is related in part to IEU's agreement to not oppose this PPA proposal.²²⁶

²²³ Tr. 18 at 4551.

²²⁴ Tr. 18 at 4558-4559.

²²⁵ It is not clear from the Stipulation when this payment will be made. For purposes of this illustration, it was assumed to be made in the first year.

Altogether, this evidence demonstrates that AEP Ohio has used the Stipulation to arrange for certain parties to receive millions of dollars in exchange for their support or non-opposition to the modified PPA proposal. Nothing in these monetary payments or grants outweighs the significant legal, policy and economic concerns with the modified PPA proposal or makes it reasonable to approve the modified PPA proposal.

D. Multiple terms of the Stipulation are hardly commitments on AEP Ohio's behalf, and bring forth minimal benefits (if any), and as such, they will not benefit ratepayers and are not in the public interest

There are many other terms in the Stipulation which provide minimal benefits (if any) and, when compared with the modified PPA proposal, they do not outweigh the significant legal, policy and economic concerns with the modified PPA proposal. They include:

- AEP Ohio agreed to advocate in good faith before PJM and FERC for market enhancements (Section III.B.1).
- AEP Ohio will provide public, annual updates to the Commission on the state of the wholesale electricity markets. (Section III.B.2). The Commission would likely have access to such information through federal filings from AEP Ohio, despite this commitment. Plus, the Commission could require AEP to provide such updates. In fact, the Commission need not just obtain AEP Ohio's view on the state of the wholesale electricity markets.
- AEP Ohio has agreed to include certain items the application for its future ESP III extension (Section III.C). It remains to be seen if any such proposals become part of a future ESP.
- AEP will work with OHA to develop and automate benchmarks for Energy Star (Section III.D.2.b).
- AEP will prioritize circuits for any Volt-Var Optimization deployments (Section III.D.2.d). This is something that is appropriate to do when providing just and reasonable service.
- AEP Ohio will provide continuous energy improvement programs for rural hospitals (Section III.D.2.f).
- AEP Ohio intends to maintain its corporate headquarters in Columbus, Ohio (Section III.D.6). An intension to maintain a headquarters in a specific location is not a commitment.
- AEP Ohio will form a working group to discuss allowing EE providers to competitively bid to supply EE projects (Section III.D.14).

²²⁶ P3/EPSCA Ex. 11 at 2.

- AEP Ohio will include in a future carbon emission reduction plan filing AEP Corporation's activities and plans (Section III.E). AEP Ohio would be likely to follow its corporate's plans in any future filing.
- AEP Ohio will implement programs to promote fuel diversity and carbon emission reductions to address potential environmental regulations (Section III.F). There is no detail with this commitment. Also, to the extent that the environmental regulations will require fuel diversity and carbon emission reductions, AEP Ohio would have to be required to do this anyhow.
- AEP Ohio will explore avenues to empower consumers through grid modernization initiatives, including advanced metering infrastructure, Distribution Automation, Volt-Var optimization, etc. (Section III.G). AEP Ohio has had a grid modernization application pending at the Commission for 2.5 years (Case No. 13-1939-EL-RDR) and nothing has progressed in the two years after comments were filed. This commitment in the Stipulation is nothing new.

By bringing forth such minimal benefits (if any), these provisions in the Stipulation do not make it reasonable to approve the modified PPA proposal or Stipulation. These terms will not benefit ratepayers and are not in the public interest, especially when linked to AEP Ohio's PPA proposal.

E. Other terms in the Stipulation are unreasonable and unlawful

There are eight other independent provisions in the Stipulation that are troublesome and unreasonable. First, the Stipulating Parties agree that, if a longer term capacity product to address State resource adequacy needs is not approved by September 1, 2017, "the Commission will solicit comments from interested parties no later than October 30, 2017, addressing the State's long term resource adequacy needs." (Section III.B.3) The Stipulating parties cannot agree to require the Commission to take certain action. This provision is simply improper and these Signatory Parties are knowledgeable enough that they cannot agree to a term that the Commission must abide by.

Second, a Basic Transmission Cost Rider pilot is to be included in AEP Ohio's extension application (Section III.C.9). The Stipulation refers giving certain customers the opportunity to

opt-in to a “mechanism under the new Basic Transmission Cost Rider.” There is nothing else to explain the provision. Mr. Allen’s direct testimony (in support of the stipulation) only repeated the same words as contained in the stipulation. As result, this part of the Stipulation is so vague and unclear, the Commission cannot find it reasonable and in the public interest.

Third and fourth, the Stipulation contains two terms that are blatantly discriminatory and unjust. In Section III.C.12, AEP Ohio will include a pilot program to establish a bypassable Competition Incentive Rider (“CIR”) as an addition to the SSO non-shopping rate above the SSO auction price. The Stipulation declares that only AEP Ohio and Signatory Parties can discuss the CIR rate. Also, AEP Ohio agreed to develop a pilot for supplier-consolidated billing (Section III.D.7). This pilot is only available for a Signatory Party who is a CRES provider. These provisions are unduly discriminatory and unjust because they exclude participation by other interested stakeholders simply because they did not sign the Stipulation. All CRES providers will not have an equal opportunity to discuss the CIR rate or participate in the supplier-consolidated billing pilot. The basis for participation is who signed the Stipulation.²²⁷ The Commission cannot approve unduly discriminatory terms.

Fifth, the Stipulation includes a provision under which AEP Ohio agreed to include a proposal for an “automaker credit” (not to exceed a total of \$500,000 annually) in its ESP extension filing (Section III.C.8).²²⁸ Upon further questioning about this provision, the following exchange took place:²²⁹

²²⁷ This is distinguishable from other situations wherein an opportunity was available to the first X percent. In those situations, the Ohio Supreme Court has held that all have had an equal opportunity to take advantage of the special offering and, as such, there is no undue discrimination or preference. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 87, 765 N.E.2d 862 (2002); *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (2006).

²²⁸ AEP Ohio does not have such a rider/credit in place now. Tr. Vol. 19 at 4762 This provision is strikingly similar to an automaker credit provision in the stipulation in the pending FirstEnergy electric security plan proceeding (“FirstEnergy ESP IV”). *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer*

Q. [Ms. Bojko] So now with that, is there – would you put this in place in 2018 after the expiration of the current ESP term or would you put the automaker credit in place immediately?

A. [Mr. Allen] The company's proposal would be to include this rider – or this credit as a new rider that would go in place upon the Commission's implementation of the ESP – the ESP extension order. It would not need to wait until June of 2018. It would go in place as soon as the Commission approved, allowing that rider to go into place.

The Stipulation reflects AEP Ohio's intention to propose the automaker credit as ESP component. Mr. Allen's testimony reflects an intention by AEP Ohio to possibly implement the rider in the current ESP III term. This is another example of a modification to the current ESP III that is impermissible. R.C. 4928.143 does not permit this approach. Given the evidence in this proceeding regarding the automaker provision, the Commission should find that it is an unreasonable provision.

Sixth, the Stipulation (Section III.D.4 and 5) mandates that certain costs will be transferred from the EE/PDR rider to the EDR rider. Section III.D.4 states that “[u]pon approval of the Stipulation, 50% of the EE/PDR rider costs for transmission and sub-transmission voltage customers will be transferred to the EDR rider through May 31, 2024.” Section III.D.5 states that “[u]pon approval of the Stipulation, 50% of the IRP credits from the EE/PDR Rider will be transferred to the EDR Rider, to more accurately reflect the economic development benefits of these credits charge for demand-metered customers.” Both of these provisions mandate tariff changes unrelated to the PPA Rider, will change the existing ESP III-approved IRP tariff²³⁰ and cannot be changed by the Commission through this proceeding.

Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan, Case No. 14-1297-EL-SSO, Stipulation (filed December 1, 2015).

²²⁹ Tr. Vol. 19 at 4762.

²³⁰ Rider IRP was a contested issue in the ESP III case that was resolved by the Commission. *See, ESP III Opinion and Order at 36-40 (February 25, 2015) and Second Entry on Rehearing at 7-9 (May 28, 2015).*

Seventh, the Stipulation at Section III.J.1 (page 33) includes ESP transition terms that will be binding on the Commission if it accepts the Stipulation. R.C. 4928.143(B)(1) allows the Commission to include any transitional conditions in an ESP that has a term longer than three years in the event the Commission terminates the ESP plan as a result of its statutorily required review under R.C. 4928.143(E). AEP witness Allen acknowledged that Section III.J.1 contains transitional conditions and that it was his expectation that “[t]he Commission would be accepting these terms” if it approves the Stipulation unmodified.²³¹ The Commission, however, has no authority to approve ESP transitional conditions in a proceeding that has not complied with the statutory and rule requirements of an ESP proceeding.²³² This proceeding, also, is not an ESP proceeding and the Commission has no authority and cannot approve ESP terms. Simply put, the Stipulation in this non-ESP proceeding cannot lawfully mandate a change in an existing portion of the current ESP III or create terms that will be binding in a future ESP.

Eighth, in Section III.D.9 and III.D.10, AEP Ohio will apply to convert Conesville Units 5 and 6 and Cardinal Unit 1 to natural gas co-firing, and that cost recovery related to those projects shall be through the PPA rider. The Stipulation further reflects that both Conesville units will retire, refuel or repower to 100% natural gas by the end of 2029. Similarly, the Cardinal unit will retire, refuel or repower this unit to 100% natural gas by the end of 2030. Approval of these provisions would permit recovery via the PPA rider beyond the current ESP III term, and beyond the anticipated ESP III expansion period. P3/EPSCA recognizes that no specific cost recovery is being approved in this proceeding for these conversions and that another different case(s) will involve that question. However, the Stipulation language, if approved, would authorize the PPA rider beyond what has otherwise been requested in this case, including

²³¹ Tr. Vol. 19 at 4613, 4616.

²³² Those statutory and rule requirements include notice, newspaper publication, and conferences. See, R.C. 4928.141(B) and Rules 4901:1-35-04 and 4901:1-35-05, Ohio Administrative Code.

many more years. The Commission cannot reasonably conclude today that the PPA Rider shall be the cost-recovery mechanism for costs related to projects that have not been even proposed to the Commission.

In summary, the Stipulation contains unlawful and unreasonable terms that should not and cannot be approved by the Commission. Moreover, as to the PPA Rider itself, Ohio law requires that charges for utility services must be just and reasonable – R.C. 4905.22 expressly states, “no unjust or unreasonable charge shall be made or demanded for, in connection with any service * * *.” The Stipulation puts in place a rider that would lead to unjust and unreasonable charges.

The evidence in this record demonstrates that, as a package, the Stipulation is unreasonable, not in the public interest, and violates any important regulatory principles. Lastly, the Stipulation is not the product of serious bargaining among capable, knowledgeable parties because certain parties were excluded from settlement terms that resulted in the AEP Ohio/IEU side agreement. Accordingly, the Stipulation should be rejected.

IX. THE COMMISSION SHOULD NOT APPROVE THE PPA PROPOSAL ABSENT ASSURANCES THAT AEP OHIO WILL SEEK TO MAXIMIZE REVENUES THAT OFFSET RATEPAYER OBLIGATIONS

If the Commission finds it has authority to approve the PPA proposal, the Commission should not ignore the harm to the wholesale markets and to ratepayers that will result from AEP Ohio’s PPA proposal. As noted earlier, AEP Ohio is currently subject to a Commission directive to sell into the PJM markets the energy, capacity and ancillary services that it purchases from OVEC.²³³ The Commission was clear in its directive about the OVEC entitlement.²³⁴

²³³ *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order (December 4, 2013).

²³⁴ *Id.* at 8-9 (footnote omitted).

AEP Ohio shall cause the energy from its OVEC contractual entitlements to be sold into the day-ahead or real-time PJM energy markets, or on a forward basis through a bilateral arrangement. Any forward bilateral sales must be done at a liquid trading hub at the then-current market wholesale equivalent price. Intercontinental-Exchange or a singular publicly available document shall be used as a form of measure of the then-current market wholesale equivalent pricing. Staff, or, at the Commission's discretion, an independent auditor, shall semi-annually audit AEP Ohio's records to ensure compliance with this provision.

AEP Ohio *intends* to sell the energy, capacity and ancillary services that it will purchase into the PJM markets.²³⁵ AEP Ohio has also stated that, if that energy, capacity or ancillary services do not “clear” the auctions, then it will sell them via bilateral contracts.²³⁶

The record evidence demonstrates, however, that AEP Ohio has no incentive to maximize revenues from its sales of energy and capacity procured under the PPA proposal since it will be made whole by the Rider regardless of its earnings from sales to PJM or bilaterally. RESA witness Bennett pointed out that, given the way the PPA proposal is crafted, the incentive to AEP Ohio is to not do anything unreasonable, and there is no direct financial incentive to AEP Ohio that requires maximization of profit. That does not necessarily translate into optimizing or maximizing revenues.²³⁷

Mr. Bennett explained this point further:²³⁸

In this case, something that could be considered reasonable is not necessarily a maximized or optimizing strategy. It can be considered reasonable, and any competent and forthright commission could say, yes, it is reasonable, and there is no indictment there. But is it necessarily completely maximizing the return on the unit? Not necessarily.

* * *

AEP Ohio would be directing the bidding of these units in a way where their goal would be to do everything in a reasonable manner. Sounds good.

²³⁵ Tr. Vol. 18 at 4617.

²³⁶ *Id.*

²³⁷ Tr. Vol. 22 at 5563-5565, 5567.

²³⁸ Tr. Vol. 22 at 5565-5566.

But, again, in an unsubsidized market, it's not just reasonableness. It's do I, am I, can I, do I run my unit in a way that maximizes profitability or at least covers my costs in all cases?

The issue with the way this PPA is structured is that's no longer the incentive. The incentive is not for market behavior that makes sure that you cover your costs because that's what the market's based on. The market is based on rational behavior, the bidding of marginal costs, behavior that seeks to cover those costs and earn a profit. What this PPA does is it removes that incentive.

So something could be reasonable, not maximizing your profits could be deemed reasonable, but it's not how the market would work without the subsidy.

The Commission should not approve the PPA proposal on the basis of mere hopes that AEP will minimize ratepayers' net obligation under the Rider. Without any assurance as to how AEP will bid in PJM markets or whether it would seek to clear those markets at all, any analysis of the net costs to ratepayers is entirely speculative. In order to provide a maximum benefit to ratepayers, AEP Ohio must engage in best efforts to maximize revenues from the PJM market.

X. THE POST-STIPULATION PROCEDURAL SCHEDULE FAILED TO ADHERE TO DUE PROCESS REQUIREMENTS

The Stipulation was filed at 4 p.m. on December 14, 2015, in this proceeding, after the hearing record had closed. Twenty-four hours later, at 4:05 p.m. on December 15, 2015, the Attorney Examiner ordered the following:

- (a) Testimony in support of the stipulation to be filed within 1.5 hours of the entry.²³⁹
- (b) Testimony in opposition to the stipulation to be filed in less than two weeks of the entry.
- (c) Re-opened written discovery, with the last of written discovery requests to be served less than two weeks of the entry.
- (d) The hearing recommences within less than three weeks of the entry.

²³⁹ Although not applicable to P3/EPSCA, it is unclear how the Commission could expect supporting parties to file their testimony in support of the stipulation within 1.5 hours of the entry.

A joint request to modify the schedule was filed by nine opposing parties the very next day (December 16), but never ruled on by the Commission. Parties were given an immensely short period of time, during the holiday season, to locate available experts, prepare testimony, make discovery requests, answer discovery requests, participate in depositions, and prepare for hearing. Furthermore, the issues at hand changed because the proposed Stipulation includes numerous terms that raises many new issues and topics that had never been part of the first phase of the case.

The above-noted procedural schedule was unfair and too brief, in and of itself. However, another critical factor is: the Commission has a second, even bigger case, also involving a PPA issue, and it was going through the same process at the very same time (FirstEnergy ESP IV, Case No. 14-1297-EL-SSO). That case too had reached a partial stipulation, and the hearing record was reopened. A procedural schedule for FirstEnergy ESP IV case had been issued on December 9, six days prior to the procedural schedule issued for this case.

A comparison of the two procedural schedules in the two reopened cases is as follows:

Event/Deadline	Case No. 14-1297-EL-SSO	Case Nos. 14-1693-EL-RDR et al.
Testimony in support of the stipulation due	December 15, 2015	December 15, 2015
Written discovery reopened	Yes, requests permitted until December 24, 2015	Yes, requests permitted until December 28, 2015
Testimony in opposition to the stipulation due	December 30, 2015	December 28, 2015
Hearing recommences	January 14, 2016	January 4, 2016 (the first business day of the new year)
Initial Brief due	February 12, 2016	February 1, 2016
Reply Brief due	February 19, 2016	February 8, 2016 (7 days later)

The Commission was fully aware of the conflicting/overlapping schedules for the two cases – it created them. Additionally, the Commission was fully aware that both cases are of enormous importance to the electric industry stakeholders – supporters and opposition alike.

Before the second phases of these cases, they had already involved an extremely large number of parties, numerous expert witnesses, and many long days of hearing. Also, both cases have caught the attention of the public.²⁴⁰ Following the stipulation in this matter, it was blatantly unfair and prejudicial to subject the opposing parties to an abbreviated expedited schedule, knowing that the two case schedules conflicted. Furthermore, the opposing parties did not ask for an unreasonable or lengthy extension of the procedural schedule imposed in this matter. Moreover, to not even rule on the extension request,²⁴¹ left multiple parties scrambling needlessly. P3/EPISA and others requested at the beginning of the resumed hearing for a continuance, but that request was denied.²⁴²

The briefing schedule was too short by most standards – especially given the significance of the issues involved and allowing only one week for reply briefs. Again, it is important to recognize that many parties have had even less time for brief writing because many parties were participating at the FirstEnergy ESP IV hearing (which took place January 14-January 22, 2016). P3/EPISA objected to the established briefing schedule for this case, but to no avail.²⁴³

Lastly, P3/EPISA notes that the procedural schedule for the second phase of this case was fully within the Commission’s discretion – there is no statutory deadline for it. While AEP Ohio urged an expedited schedule, the fact remains that due process requires an ample opportunity to be heard in the matter.²⁴⁴ There is not a “hard and fast” rule for due process.²⁴⁵ Implicit in a

²⁴⁰ P3/EPISA note that many members of the public have filed letters in the docket of this case (as well as in Case No. 14-1297-EL-SSO).

²⁴¹ Also, an application for an interlocutory appeal was filed on December 23, 2015, and it has never been ruled on either.

²⁴² Tr. Vol. 18 at 4461-4463.

²⁴³ Tr. Vol. 22 at 5662-5663.

²⁴⁴ *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (citation omitted)). *See, also, State v. Mateo*, 57 Ohio St.3d 50, 52, 565 N.E.2d 590 (1991) (holding that the essence of due process is notice and a meaningful opportunity to be heard).

meaningful opportunity to be heard is the opportunity for preparation of that evidence, including direct expert testimony and arguments.²⁴⁶ Given all of the above, the procedural schedule (including the briefing schedule) did not give parties a fair and ample opportunity to prepare for the second phase of the case or prepare final arguments for the Commission's consideration, thus denying parties their due process rights for such a significantly important Commission proceeding.

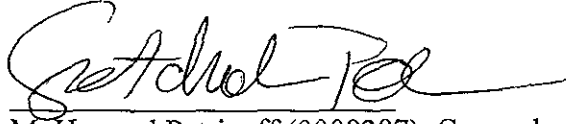
XI. CONCLUSION

AEP Ohio proposes to expose all of its ratepayers to all the risks – known and unknown – of 3,100 MWs of generation for numerous years – up to May 31, 2024, despite the fact that the Commission only approved Rider PPA for the term of the ESP III. AEP Ohio bears the burden of proof in this proceeding, but it has not provided evidence that demonstrates that this PPA proposal will amount to a hedge or to provide rate stability for AEP Ohio's ratepayers. Nor did AEP Ohio establish that the PPA proposal is reasonable or in the public interest. There are numerous reasons why the PPA proposal does not comport with Ohio law. Moreover, a review the various terms in the Stipulation demonstrates that it is not reasonable, is not in the public interest and was not the product of serious bargaining. For all of the foregoing reasons, the Commission should reject AEP Ohio's requests regarding both the OVEC and AEPGR components of the PPA proposal during both the remainder of the current ESP III and for the other stipulated years thereafter. Additionally, the Commission should reject the Stipulation.

²⁴⁵ *Palmer v. Columbia Gas of Ohio*, 479 F. 2d 153, 1973 U.S. App. (6th Circuit) LEXIS 9819, 72 Ohio Op. 337, ("the question of what constitutes due process of law can only be answered in relation to the circumstances of each particular case; due process varies with the subject matter and the requirements of each situation.")

²⁴⁶ See, e.g., *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 141 Ohio St. 3d 113, 2014-Ohio-4364, 22 N.E.3d 1040, ¶¶ 34-35 (Ohio 2014) (finding that the limitation of argument to 15-20 minutes was not an opportunity to present evidence).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Howard Petricoff", with a long horizontal flourish extending to the right.

M. Howard Petricoff (0008287), Counsel of Record

Michael J. Settineri (00073369)

Gretchen L. Petrucci (00046608)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, OH 43215

614-464-5414

mhpetricoff@vorys.com

mjsettineri@vorys.com

glpetrucci@vorys.com

*Counsel for PJM Power Providers Group and
the Electric Power Supply Association*

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 1st day of February 2016 upon all persons/entities listed below:


Gretchen L. Petrucci

stnourse@aep.com
mjsatterwhite@aep.com
msmckenzie@aep.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
myurick@taftlaw.com;
mkurtz@bkllawfirm.com
dboehm@bkllawfirm.com
jkyler@bkllawfirm.com
tony.mendoza@sierraclub.org;
schmidt@sppgrp.com
tdougherty@theoec.org
joliker@igsenergy.com
ghull@eckertseamans.com
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com
tobrien@bricker.com
jlang@calfee.com
talexander@calfee.com
jeffrey.mayes@monitoringanalytics.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
kurt.helfrich@thompsonhine.com
scott.campbell@thompsonhine.com
stephanie.chmiel@thompsonhine.com
ricks@ohanet.org
bojko@carpenterlipps.com
William.michael@occ.ohio.gov
Jodi.bair@occ.ohio.gov
Kevin.moore@occ.gov

DStinson@bricker.com
laurac@chappelleconsulting.net
gthomas@gtpowergroup.com
stheodore@epsa.org
mdortch@kravitzllc.com
kristen.henry@sierraclub.org
msoules@earthjustice.org
sfisk@earthjustice.org
msmalz@ohiopoveritylaw.org
mfleisher@elpc.org
cmooney@ohiopartners.org
mhpetricoff@vorys.com
mjsettinieri@vorys.com
glpetrucci@vorys.com
werner.margard@puc.state.oh.us
steven.beeler@puc.state.oh.us
twilliams@snhsllaw.com
rsahli@columbus.rr.com
charris@spilmanlaw.com
ghiloni@carpenterlipps.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
chris@envlaw.com
jennifer.spinosi@directenergy.com
jvickers@elpc.org
ckilgard@taftlaw.com
rseiler@dickinsonwright.com
todonnell@dickinsonwright.com
drinebolt@ohiopartners.org
orourke@carpenterlipps.com

TIMELINE OF MAJOR EVENTS

Time Period	Event
1999	Amended Senate Bill 3 was enacted to establish a competitive retail electric market in Ohio.
July 2008	Amended Senate Bill 221 became effective, modifying aspects of the competitive retail electric market in Ohio.
2012	AEP Ohio committed to fully divest its generation assets to comply with Ohio's corporate separation requirements in Section 4928.17, Ohio Revised Code, which had been enacted more than a decade earlier. ²⁴⁷
2013	AEP Ohio was unable to divest its rights to purchase generation from plants owned by the Ohio Valley Electric Corporation ("OVEC") of which AEP Ohio is one of the "Sponsoring Companies". ²⁴⁸
December 2013	AEP Ohio was permitted to retain the OVEC generation rights ("OVEC entitlement"), but AEP Ohio was obligated to sell the generation into the competitive market. The retail rate impact related to the OVEC entitlement was deferred to the AEP Ohio's next electric security plan proceeding. ²⁴⁹
December 2013	In its ESP III, AEP Ohio sought to establish a new rider to have its ratepayers bear the burden of the effects of a long-existing OVEC power purchase agreement ("PPA"). ²⁵⁰
End of 2013	Generating units were transferred to AEPGR. ²⁵¹
October 2014	AEP Ohio filed another PPA proposal in Case Nos. 14-1693-EL-RDR et al. ²⁵²
February 2015	The Commission rejected AEP Ohio's OVEC PPA in the ESP III, but established a placeholder Rider PPA.
May 2015	AEP Ohio amended its PPA proposal in Case Nos. 14-1693-EL-RDR et al.
December 2015	AEP Ohio filed a proposed Stipulation and Recommendation in Case Nos. 14-1693-EL-RDR et al.

²⁴⁷ *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order (October 17, 2012) and Entry on Rehearing (April 24, 2013). AEP Ohio's application stated: "AEP requests swift approval of this Application so that it can fulfill the mandate of R.C. 4928.17 and terminate OPCo's decade-long 'interim plan' of functional separation. Corporate separation is also a fundamental element of the Company's modified Electric Security Plan (modified ESP II), filed concurrently with this Application in Case No. 11-346-EL-SSO, et al., that will lead to full market-based pricing of generation service for retail customers and will promote retail shopping in Ohio."

²⁴⁸ *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Application at 1-2 (October 4, 2013).

²⁴⁹ *Id.*, Finding and Order at 8-9 (December 4, 2013).

²⁵⁰ *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 Nos. 13-2385-EL-SSO et al.

²⁵¹ Tr. Vol. 18 at 4528-4529.

²⁵² *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR et al.

P3/ESPA Joint Initial Brief
Case Nos. 14-1693-EL-RDR et al.
Attachment B

Summary of the PPA Proposal Plants

Plant and Unit	Annual Capacity	Ownership %	Ownership Capacity	Type	Year in Service	Operator	Planned Retirement
Cardinal Unit 1	592 MWs	100%	592 MWs	Baseload	1967	Cardinal Oper. Co.	2033
Conesville Unit 4	779 MWs	43.5%	339 MWs	Baseload	1973	AEPGR	2033
Conesville Unit 5	405 MWs	100%	405 MWs	Intermediate	1976	AEPGR	2036
Conesville Unit 6	405 MWs	100%	405 MWs	Intermediate	1978	AEPGR	2038
Stuart Unit 1	577 MWs	26%	150 MWs	Baseload	1971	DP&L	2033
Stuart Unit 2	577 MWs	26%	150 MWs	Baseload	1970	DP&L	2033
Stuart Unit 3	577 MWs	26%	150 MWs	Baseload	1972	DP&L	2033
Stuart Unit 4	577 MWs	26%	150 MWs	Baseload	1974	DP&L	2033
Zimmer Unit 1	1,300 MWs	25.4%	330 MWs	Baseload	1991	Dynegy Inc.	2051
Kyger Creek 5 Units	1,086 MWs (nameplate)	19.93%	216 MWs (based on nameplate)		1955	OVEC	Unknown
Clifty Creek 6 Units	1,304 MWs (nameplate)	19.93%	260 MWs (based on nameplate)		1955	OVEC	Unknown

Sources: AEP Ohio Ex. 2 at KDP-1 page 7; AEP Ohio Ex. 5 at 3-4; AEP Ex. 4 at 3-4; AEP Ohio Ex. 10 at WAA-3 page 1; Tr. Vol. 1 at 88-89, 122, 259-262, 268-270, 272; P3/EPSC Ex. 10 at 31; AEP Ohio Ex. 16 at 104; Sierra Club Ex. 12 at 1.