

**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.)	

REPLY BRIEF OF DYNEGY INC.

February 8, 2016

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I. INTRODUCTION

Ohio Power Company's ("AEP Ohio")'s initial brief makes it clear that it feels most at home in the cost-of-service world of a vertically integrated utility. But AEP Ohio embarked into the competitive world of merchant generation when it transferred its generation assets to AEP Generation Resources, Inc. ("AEPGR"). Now, just a short time later, its parent corporation, the American Electric Power Company ("AEP"), has waved the white flag of surrender and has started a strategic review of its competitive assets, including considering whether to divest AEPGR's generation assets.¹

While AEP's retreat is a predictable reaction to the pressures of operating in a competitive environment, AEP cannot simply use its regulated subsidiary, AEP Ohio, to return generation units back to a cost plus recovery construct that has not been authorized by the Ohio General Assembly and that will harm ratepayers and merchant generators including the other owners of the co-owned PPA units. AEP Ohio ignores that harm and justifies its PPA proposal by claiming that "... the purpose of the PPA Proposal is to stabilize rates for both shopping customers and SSO customers alike – by passing through to customers the differential between PJM market prices and a cost-based contractual price, in this case the cost-based prices of the [AEPGR] and OVEC PPAs."²

AEP Ohio also claims that its proposal follows how vertically integrated utilities procure and sell excess generation, and implies that the AEPGR units and OVEC units may otherwise close or retire leaving Ohio without the certainty of the PPA proposal. The irony is that rather than providing certainty, the PPA proposal actually increases risk for the co-owned PPA units. For example, PJM's capacity performance product is intended to drive reliability through

¹ Tr. Vol. 6 at 1231-1232.

² AEP Ohio Initial Brief at 2.

investment in the generation fleet. Co-owners of the same plants cannot make rational decisions on capacity performance when one owner (AEPGR) is agnostic to capital costs and penalties, while the other is making those decisions as PJM intended. Regardless, the PPA proposal differs greatly from generation procurement and sales by a vertically integrated utility, and the reality is that Ohio has generation certainty, the PPA units are not going to close, and new generation build is coming to Ohio.

AEP Ohio also argues that its PPA proposal is necessary to address wholesale market volatility.³ AEP Ohio's claims of wholesale market volatility, however, are vastly overstated, and Dynegy witness Dean Ellis' observations about these overstatements are accurate and supported by the record. AEP is using the guise that captive ratepayers must be protected from the "volatility" of the wholesale markets to implement its business strategy of putting the PPA units back into a cost-of-service construct while divesting itself of the non-PPA units.

AEP Ohio bundles this business plan into a Stipulation that keeps the pernicious aspects of the PPA proposal through favor trading and a secret side deal to obtain signatures and no-opposition positions from other parties in this proceeding. That behavior does not constitute serious negotiations. The Stipulation should be rejected for that reason. It should also be rejected along with AEP Ohio's application for the other reasons set forth herein and in Dynegy's initial brief.

³ AEP Ohio Initial Brief at 91.

II. ARGUMENT

A. The PPA Proposal Differs from Generation Procurement and Sales by a Traditional Vertically Integrated Utility

AEP Ohio claims that its PPA proposal is no different than the process by which traditional vertically integrated utilities procure generation for their customers.⁴ It highlights the Dominion utility in Virginia, arguing that it participates in both PJM energy and capacity markets yet simultaneously receives cost-based compensation under Virginia's traditional cost-of-service retail regulation.⁵ AEP Ohio claims that the PPA proposal will result in cost-based compensation for generation resources in "precisely the same manner" as the Dominion utility. That is not true.

AEP Ohio's PPA proposal differs from Dominion's procurement of generation on many levels. First, Dominion must procure generation for its captive ratepayers because Virginia has traditional cost-of-service retail regulation. Ohio no longer employs traditional cost-of-service regulation for generation, so AEP Ohio does not directly procure generation for its captive ratepayers. Instead generation for non-shopping customers is procured through the Standard Service Offer auctions while shopping customers rely on the retail competitive markets.

Second, generation procurement, including PPAs, is subject to competitive bidding in Virginia and other regulated cost-of-service states.⁶ The AEPGR PPA, on the other hand, was awarded without any competitive bidding and with terms that favor AEPGR.

Third, AEP Ohio will have different incentives than Dominion when it bids capacity and sells energy into the PJM markets. AEP Ohio is the middleman for the PPA proposal: it pays AEPGR, sells output into the PJM markets, and collects the difference from its captive

⁴ AEP Ohio Initial Brief at 140.

⁵ *Id.* at 136.

⁶ Tr. Vol. XXI at 5292.

ratepayers. AEP Ohio is not subject to full oversight by the Commission because it is not operating under traditional cost-based regulation, but rather under an undefined “unreasonableness” standard when selling output into the PJM markets.⁷ And under the modified PPA proposal, AEP Ohio can net disallowed capacity performance penalties against capacity performance bonuses. AEP Ohio also has no incentive to maximize energy revenues during the first four years of the PPA Rider, because its \$100 million in credits do not apply until the last four years of the over 8 year term.

Dominion, on the other hand, is subject to more oversight and greater incentives because it is a vertically integrated utility with full oversight by its state commission. P3/EPSA witness Cavicchi, who is very familiar with Virginia’s regulatory framework,⁸ highlighted the difference:⁹

- Q. [Mr. Petricoff] In your mind there’s a distinction between a generation that is covered by cost of service and cost of service state and what is being proposed in the AEP Ohio PPA?
- A. [Mr. Cavicchi] Yes. I think that the regulatory framework in states that are still fully cost-of-service regulating, they are public utilities, as monopoly providers of power supply and delivery services envision rate structures that are not typically based on cost of service by power purchase agreements. They are based on overall costs that are submitted before a regulatory body. Rates are set based on the sort of typically a test-year set of costs. Once those rates are set, the utility who is receiving those rates, in this case the vertically-integrated company which is fully regulated has a great incentive to minimize its costs so as to be able to achieve the return on equity that’s been built into its rate structure. And, in fact, it’s often the case there are even additional incentives where utilities, in this type of framework, are encouraged to make off-system sales when their supply is not being used to meet their own customers’ demands, so as to earn additional revenues that are then often shared with ratepayers.

⁷ Tr. Vol. 19 at 4792.

⁸ Tr. Vol. 21 at 5291 to 5292.

⁹ Tr. Vol 21 at 5291 to 5292.

Contrary to its claim at page 139 of its initial brief, AEP Ohio will not have the same incentive under the PPA proposal when it is bidding capacity and selling energy into the PJM markets. A true incentive would require AEP Ohio to guarantee its projections at a level that ensures ratepayers will receive an aggregate credit over the PPA proposal's term. Otherwise, lacking a proper incentive, AEP Ohio could easily engage in market behavior that would distort prices, such as offering its capacity or energy in the market at prices that do not reflect the actual cost of operations which would suppress the market clearing price for the co-owners of the PPA units along with owners of other generating units.¹⁰

B. Ohio has Generation Certainty

1. AEPGR and OVEC are not closing their plants.

AEP Ohio has maintained throughout this proceeding that the OVEC and AEPGR PPA units are on the “economic bubble” and may prematurely close.¹¹ AEP Ohio again states in its initial brief that “AEP Ohio’s testifying witnesses are uniform in their conclusions regarding energy market volatility and the very real threat that will undoubtedly be associated with closure of these coal-fired generation facilities....”¹² AEP Ohio similarly represents that it “is also concerned about the prospect of closing generation plants in Ohio – and eliminating the massive economic benefits those plants provide to Ohio’s economy[.]”¹³

AEP Ohio’s statements in this proceeding about premature closing are contrary to public statements made by AEP’s CEO and by AEP Ohio’s President and Chief Operating Officer, Pablo Vegas. AEP Ohio’s amended application referred to an April 23, 2015 investor call in which AEP’s Chief Executive Officer Nicholas Akins stated that AEP needs to get the PPA

¹⁰ Dynegy Ex. 2 Supplemental Direct Testimony of Dean Ellis at 9.

¹¹ See e.g. Company Ex. 1 at 16.

¹² AEP Ohio Initial Brief at 4.

¹³ *Id.* at 12.

question resolved first before it can make strategic decisions on the future of the PPA units including whether to invest in or sell the units.¹⁴ AEP Ohio's President, Pablo Vegas, also stated publicly that AEP would seek to divest (i.e., sell) the AEPGR PPA units if the PPA Rider is not approved.¹⁵

Moreover, the fact that AEP Ohio cannot unilaterally retire 1,692 MW of capacity included in the PPA proposal further establishes that the PPA units will not close. AEPGR owns 100% of only three PPA units – the Conesville Units 5 and 6 and Cardinal Unit 1.¹⁶ The rest of the AEPGR units are co-owned with Dynegy and DP&L, and each owner has a right of veto over any request to close the units.¹⁷ Because it cannot close these units, AEP Ohio will either sell them or continue to invest in them.

Likewise, AEP Ohio cannot unilaterally close the OVEC plants¹⁸ and is highly unlikely to close the Conesville Units 5-6 and Cardinal Unit 1. AEP Ohio holds 19.93% of the output from the OVEC units,¹⁹ and AEP Ohio witness Vegas admitted that AEP Ohio cannot retire those units based on its “minority share in OVEC.”²⁰ Conesville Units 5 -6 and Cardinal Unit 1 are part of generation plants that involve other owners, including Dynegy, DP&L and Buckeye Power (Cardinal Units 2 and 3).²¹ Those owners have a vested interest in spreading the costs of their respective shared plant facilities across all units, minimizing if not eliminating any risk of a unilaterally closing by AEPGR.

The simple fact is that AEPGR is not going to close the PPA units if the Commission rejects AEP Ohio's PPA proposal. There will be no impact on jobs, taxes and communities.

¹⁴ Company Ex. 13 at 9.

¹⁵ Tr. Vol. 1 at 100-101.

¹⁶ Company Ex. 5 Direct Testimony of Toby L. Thomas at 4.

¹⁷ Tr. Vol. 4. 1202-1203 (emphasis added).

¹⁸ Tr. Vol. 1 at 99-100.

¹⁹ Sierra Club Ex. 12 at 1.

²⁰ Tr. Vol 1. At 99-100.

²¹ Company Ex. 5 Direct Testimony of Toby L. Thomas at 4.

Furthermore, AEP cleared nearly all of its generation in PJM's latest capacity auctions, obligating those units to be in the market through the end of this decade.²² The plants will continue to operate regardless of whether the PPA proposal is approved or rejected, although there will be a real impact to jobs, taxes and communities if new generation is not sited in Ohio as a result of the PPA proposal's approval.

2. Additional generation is being developed in Ohio.

AEP Ohio acknowledges that generation units are being constructed in Ohio, but it claims that the number is low and is not equivalent to the 3,100 MW included in the PPA proposal.²³ AEP Ohio also claims that there is a "lack of future generation" being built in Ohio.²⁴ It attempts to use information from a Dynegy corporate presentation to support AEP Ohio witness Wittine's claims that "history indicates that most new generation winds up being withdrawn rather than placed in service."²⁵ Dynegy agrees that the vast majority of generation in the PJM interconnection queue does not get built for various reasons. Only a small percentage of the projects in the queue are ultimately built, but AEP Ohio's attempted spin on this fact as justification for its PPA proposal is misleading, and furthermore, AEP Ohio's claims about the "lack of future generation" in Ohio are not supported by the record.

First, the record contains a listing of new projects being developed in Ohio. In his initial direct testimony, Dynegy witness Dean Ellis provided a table summarizing the new generation units that are being developed.²⁶ AEP Ohio witness Wittine discussed the various plants under development in his direct testimony and on cross-examination, including Carroll County Energy

²² Exelon/RESA Ex. 1 at 23 and Appendix A to that testimony.

²³ AEP Ohio Initial Brief at 56.

²⁴ *Id.*

²⁵ AEP Ohio Initial Brief at 57 citing Company Ex. 11 at 2.

²⁶ Dynegy Ex. 1 at 20.

(742 MW)²⁷, Oregon Clean Energy (799 MW), Middletown (540 MW), the Lordstown Energy Center (800 MW) and the South Field Energy Facility (1,100 MW).²⁸

The table below summarizes the evidence in this proceeding regarding significant projects that are actively under construction or development.

Table 1: List of Significant Projects Under Construction or in Development²⁹

Project	Size (MW)	Location	Status
Carroll County Energy	742 MW	Carroll County	<i>Under construction</i>
Oregon Clean Energy	799 MW	Oregon, Ohio	<i>Under construction</i>
Middletown Energy	540 MW	Middletown, Ohio	<i>Under construction</i>
Lordstown Energy Center	800 MW ³⁰	Trumbull County	<i>OPSB approved</i> ³¹
South Field Energy	1,100 MW	Columbiana County	<i>OPSB application submitted</i>
Total	3,981 MW		

As the table indicates, 2,081 MW of new capacity is under construction in Ohio, which is only 1,008 MW less than the capacity included in the PPA proposal. In fact, it exceeds the 1,402 MW of capacity at the Cardinal Unit 1 and Conesville Units 5-6 by 679 MW, which are the only units that AEPGR can unilaterally close. Ohio thus has sufficient capacity coming online to hypothetically “insure” against the minimal risk that Cardinal Unit 1 and the Conesville Units 5-6 might close. Moreover, all new generation units under construction or in development will total 3,981 MW in the aggregate – well over the 3,100 MW that AEPGR has included in the PPA proposal.

²⁷ *In re. Carroll County Energy LLC*, Case No. 13-1752-EL-BGN, Opinion, Order and Certificate dated April 28, 2014 at 3.

²⁸ Company Ex. 11 Direct Testimony of Eric Wittine at 12; Dynegy Ex. 1 Direct Testimony of Dean Ellis at 20 and see P3-Ex. 3 (South Field OPSB letter).

²⁹ *In re. Carroll County Energy LLC*, Case No. 13-1752-EL-BGN, Opinion, Order and Certificate dated April 28, 2014 at 3; Company Ex. 11 Direct Testimony of Eric Wittine at 12; Dynegy Ex. 1 Direct Testimony of Dean Ellis at 20 and see P3-Ex. 3 (South Field OPSB letter).

³⁰ *In re Clean Energy Future-Lordstown, LLC*, Opinion, Order and Certificate issued Sept. 17, 2015 at 5.

³¹ See *In re Clean Energy Future-Lordstown, LLC*, Opinion, Order and Certificate issued Sept. 17, 2015.

Second, AEP Ohio's argument that the development of new generation units in Ohio is exaggerated is not convincing. AEP Ohio points to the history of the PJM queue of potential generation, which, as Dynegy witness Dean Ellis indicated, shows that only 20 percent of those project actually get built.³² AEP Ohio also points to the hurdles that new generation projects face including delays with permitting, siting and financing.³³ Dynegy does not disagree that such hurdles can exist when developing a power plant – as these types of hurdles exist for any large capital project. And, under the PJM construct with proper pricing signals, the vast majority of these projects ultimately *shouldn't* be built if they are not needed to serve consumers reliably and economically.

Dynegy disagrees, however, with AEP Ohio's statement in its initial brief that Dynegy believes new builds in this region are "greatly exaggerated."³⁴ As Dynegy witness Dean Ellis stated in his direct testimony, "[w]ith Ohio's proximity to the Marcellus and Utica shale gas formations, it is reasonable to predict that there will be significant additional generation built in Ohio." And as Table 1 above shows, 2,081 MW of new generation capacity has cleared the hurdles of permitting, siting and financing, and is now under construction in Ohio. The facts show that new builds in this region are real and not exaggerated.

Finally, it is important to remember that the competitive PJM markets for capacity and energy send price signals that inspire investment. Dynegy expects investment and new builds to come into the region, it just doesn't believe it will happen in "one big slug."³⁵ The PPA proposal

³² AEP Ohio Initial Brief at 57; Tr. Vol 10 at 2592.

³³ Id. at 57; Tr. Vol. 10 at 2592;2594.

³⁴ AEP Ohio Initial Brief at 57.

³⁵ Company Ex. 15 at 38 (Dynegy Inc. Corporate Investor Day Edited Transcript) (Hank Jones, Dynegy Inc, Chief Commercial Officer: "We are not – it is logical that new builds should come into the system. That is how – that is why this market is set up this way is to inspire investment. And we do expect new build to come, we just don't think it happens in one big slug.").

will not result in transparent price signals that inspire investment in Ohio. It will simply create another hurdle that could easily convince developers to move investments to other regions.

C. Unlike AEPGR, Dynegy Wants to Use its Ohio Generation Plants to Compete in the PJM Competitive Markets

AEP Ohio implies that Dynegy should be criticized for expanding its footprint in the PJM region.³⁶ This is simply an attempt to distract the Commission from the issues before it in this docket. In Ohio alone, Dynegy's fleet includes a number of combined cycle units as well as baseload coal units totaling 5,332 megawatts of net capacity.³⁷ That total includes Dynegy's proportionate share of the Stuart facility in Aberdeen, Ohio, the Miami Fort facility in North Bend, Ohio, the Zimmer plant in Moscow, Ohio, the Conesville plant in Conesville, Ohio, and the Killen plant in Manchester, Ohio.³⁸ And as noted above, Dynegy co-owns the Stuart Units 1-4, the Zimmer Unit 1, and the Conesville Unit 4 with AEPGR and DP&L.³⁹

Dynegy's expansion in the PJM markets is consistent with its views of the competitive electric wholesale markets. Dynegy believes in the efficient operation of markets, generally, and of the markets for wholesale electric power and electric capacity, specifically.⁴⁰ Dynegy is well-positioned to compete in those markets having a critical mass and a reliable and diverse generation fleet in markets where tight reserve margins are expected to persist and quality of assets matters.⁴¹ Dynegy also has unrivaled access to inexpensive Marcellus gas at its combined cycle natural gas fired units in Ohio, Pennsylvania, and New York, providing it with a significant competitive advantage in PJM and New York.⁴²

³⁶ AEP Ohio Initial Brief at 93-94.

³⁷ Company Ex. 16 at 103-104.

³⁸ *Id.*

³⁹ See Dynegy Ex. 1 Direct Testimony of Dean Ellis at 10 and see Dynegy Ex. 2 Supplemental Direct Testimony of Dean Ellis at 5.

⁴⁰ Dynegy Ex. 1 Direct Testimony of Dean Ellis at 2; Tr. Vol. 10 at 2552.

⁴¹ Company Ex. 15 (Dynegy Inc. Corporate Investor Day Edited Transcript) at 29.

⁴² *Id.* at 25.

While Dynegy intends to use its Ohio units to compete in the PJM markets, AEP Ohio is considering divesting its Ohio units. Toby Thomas, the Vice President of Competitive Generation at AEPGR, acknowledged this fact, explaining that “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.”⁴³ Ironically, AEP did not seek to return the PPA units to cost-of-service ratemaking over the last few years when they were more profitable.⁴⁴

AEP is fully entitled to pursue its business strategy, but it should not be allowed to return the PPA units to a hybrid cost-of-service model at the expense of the ratepayers and other Ohio merchant generators like Dynegy. Unlike AEP Ohio, Dynegy has no captive ratepayers and must rely on the competitive markets to be successful. It depends solely on the markets to provide revenue and can be harmed when subsidies suppress market prices below adequate or reasonable levels.⁴⁵

The Commission should deny AEP Ohio’s PPA proposal to avoid harming merchant generators like Dynegy, as well as AEP Ohio’s captive ratepayers. No negative ramifications will result because the PPA units are not going to “prematurely retire.” The only effect of a denial of the PPA proposal would be that the ownership of the PPA units may change.

D. AEP Ohio Exaggerates the Level of Wholesale Market Volatility

In addition to repeated threats of premature unit retirement, AEP Ohio also claims that its PPA proposal should be approved because it will protect retail customers from wholesale market

⁴³ Tr. Vol. 6 at 1231-1232 (emphasis added).

⁴⁴ Tr. Vol 1 at 236.

⁴⁵ Tr. Vol. 10 at 2575.

volatility.⁴⁶ This claim presupposes that wholesale market volatility exists at a level that requires protection. That is simply not the case based on the evidence in the record.

Dynegy relied upon historic PJM energy prices as well as a comparison to spot prices and future prices in the energy markets to show that wholesale market volatility does not rise to a level that warrants protection of retail ratepayers.⁴⁷ Dynegy’s initial brief included the following table, prepared by P3/EPISA witness Joseph Cavicchi, which shows that long term volatility based on a forward curve is simply not present.⁴⁸

**Annualized Volatility at PJM's AEP-Dayton Hub
October 2010 - October 2014**

Type	Product Duration			
	Year*	Half-Year*	Quarter*	Day
On-Peak	18%	23%	37%	274%
Off-Peak	16%	22%	33%	200%

Note: * indicates implied volatility based on forward curve; all others indicate historical volatility.

Source: Platts and Compass Lexecon analysis.

Mr. Cavicchi noted the key point from the table, i.e., that “[w]hile price volatility is relatively high for daily electric energy supply, for longer-term energy supply the volatility of prices is much lower.”⁴⁹ This is important because it is the longer-term energy supply that influences procurement for both the SSO auctions and CRES contracts. Auctions can be held for 12, 24, and 36 month products⁵⁰ and CRES contracts exist for those same periods.⁵¹ With those time periods in mind, and based on forward market price volatility, the conclusion is that price volatility does not rise to a level that warrants customer “protection.”

⁴⁶ AEP Ohio Initial Brief at 93.

⁴⁷ See Dynegy Initial Brief at 10-13.

⁴⁸ P3/EPISA Ex. 8 Direct Testimony of A. Joseph Cavicchi at Attachment AJC-1.

⁴⁹ P3/EPISA Ex. 8 Direct Testimony of A. Joseph Cavicchi at 11.

⁵⁰ See e.g. IEU-10 and IEU-11.

⁵¹ See e.g. Tr. Vol. 17 at 4238.

AEP Ohio disagrees with this conclusion, claiming that Mr. Ellis’ testimony was misleading. It claims that Dynegy’s expectations “match and perhaps exceed those of AEP Ohio’s position on market volatility,”⁵² pointing to statements from a Dynegy investor call and an accompanying presentation as evidence that Dynegy expects “price volatility and expects to profit off of that unstable market.”⁵³ AEP Ohio concludes that “[t]his evidence explains Dynegy’s vocal opposition to the rate stabilizing potential of the PPA Proposal and further justifies the rationale behind approving the Stipulation.”⁵⁴

AEP Ohio’s statements about Dynegy’s corporate material may explain why AEP Ohio is better suited to stay out of the competitive PJM markets and remain a regulated wires company. First, Dynegy’s opposition to the PPA proposal is based on the unfair advantage it gives to AEPGR and the resulting impacts on the wholesale markets. Mr. Ellis stated, “[o]ur fundamental strategy is well-functioning markets where competitors don’t receive an unfair advantage. In this particular case, we view **propping up an otherwise uncompetitive** competitor as failure to rationalize the market, failure for the market to send the proper signals.”⁵⁵ Dynegy’s opposition to the PPA proposal has nothing to do with the purported “rate stabilizing potential” of the PPA proposal or its business strategies. A rational and economic market participant’s decisions should be and are driven by activity and trends in competitive markets.

AEP, AEPGR and AEP Ohio’s reaction to changes in the wholesale markets is to retreat back into a cost-of-service construct. They do so under the guise that customers need to be protected from pricing volatility in the wholesale markets, but there will always be volatility in

⁵² AEP Ohio Initial Brief at 93.

⁵³ *Id.* at 94.

⁵⁴ AEP Ohio Initial Brief at 94.

⁵⁵ Tr. Vol. 10 at 2559 (emphasis added).

the wholesale markets simply because prices vary. What matters is the level and magnitude of that volatility. The historical volatility in the wholesale markets and the level of volatility on the energy forward curve do not support AEP Ohio's claim that customers must be protected.

AEP Ohio's exaggeration wholesale market volatility as an excuse to return the PPA units to a cost-of-service model. That, however, is not the action of a competitive market participant. It is also contrary to the Ohio General Assembly's decision to deregulate generation supply in Ohio and to impose corporate separation requirements for competitive generation services. If AEP Ohio believes in its forecasts, why is AEPGR willing to forego the \$721 million in net profits? The answer is that AEP and AEPGR don't believe in what they are trying to sell to the Commission. With that in mind, the Commission should reject the PPA proposal. AEP may not be well suited to participate in the competitive markets, but should not be rewarded for its inability to compete effectively.

E. No Serious Bargaining Took Place

AEP Ohio devotes a little over one page of its 159 page initial brief to claim that the Stipulation was a "product of serious bargaining among capable, knowledgeable parties."⁵⁶ AEP Ohio claims that there were lengthy negotiations that represented a diverse set of interests,⁵⁷ that there were numerous meetings, and that numerous settlement drafts were circulated.⁵⁸ AEP Ohio omits the fact that it did not disclose to all parties in those "numerous meetings" that it was negotiating an \$8 million side deal with the Industrial Energy Users of Ohio ("IEU"). That is a fatal blow to the Stipulation.

IEU's side deal with AEP Ohio resolved certain issues between AEP Ohio and IEU, including IEU's opposition to the Stipulation in this proceeding, in exchange for an \$8 million

⁵⁶ AEP Ohio Initial Brief at 29-31.

⁵⁷ *Id.* at 29.

⁵⁸ *Id.* at 30.

irrevocable payment from AEP Ohio to IEU.⁵⁹ AEP Ohio and IEU signed the side deal on December 14, 2015, the same day that AEP Ohio filed the Stipulation.⁶⁰ This means that AEP Ohio and IEU were engaged in negotiations **during the same time** that AEP Ohio was negotiating with the parties in this proceeding.

Rather than disclose the side deal with IEU to parties during negotiations prior to parties signing the stipulation, AEP Ohio provided the agreement to all of the signatory and non-signatory parties to the Stipulation through discovery, well after the Stipulation was filed.⁶¹ AEP Ohio's failure to disclose the IEU side deal is exactly the type of behavior that the Ohio Supreme Court has cautioned can provide a party with an unfair advantage in the bargaining process.⁶² In this case, it was AEP Ohio that gained an advantage because other parties negotiating with AEP Ohio were unaware of the IEU deal.

For example, if Staff had been made aware of the IEU side deal during the negotiations it might have taken a stronger position when negotiating with AEP Ohio on the PPA proposal. Other parties may also have changed their negotiation strategies if they had known about the side deal. AEP Ohio gained an unfair advantage in the bargaining process by hiding the side deal from all parties participating in the negotiations.

AEP Ohio does not mention the side deal at all in its initial brief. The Supreme Court of Ohio, however, has stated that side financial arrangements or other consideration to sign a stipulation are relevant to the Commission's determination of whether all parties engaged in "serious bargaining."⁶³ The fact that IEU did not sign the Stipulation is irrelevant. It is a party

⁵⁹ See P3/EPSCA Ex. 11 Global Settlement Agreement between AEP Ohio and IEU.

⁶⁰ *Id.*

⁶¹ Tr. Vol. 18 at 4573, 4812, 4814-4815.

⁶² *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio et al.*, 111 Ohio St. 3d 300; 2006-Ohio-5789 at ¶86.

⁶³ *Id.* at ¶84.

in this proceeding that opposed the PPA proposal, it has filed a letter on the docket stating its non-opposition to the Stipulation,⁶⁴ and it has executed an agreement stating the same.⁶⁵

The Commission must “determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining”⁶⁶ Simply citing the number of parties that participated in negotiations and the number of meetings, as AEP Ohio does, is not sufficient evidence. The secretive nature of this side deal, the amount (\$8 million), the fact that it resolved the issues between IEU Ohio and AEP Ohio in this proceeding, and its execution on the same day as the Stipulation are conclusive. The existence of the IEU side agreement, which purchased the non-opposition of IEU, raises serious doubts about the integrity and openness of the negotiation process surrounding the Stipulation. For that reason, it must be rejected.

III. CONCLUSION

For the foregoing reasons and for the reasons in Dynegy’s initial brief, the Commission should reject the Stipulation and AEP Ohio’s application in this proceeding.

Respectfully submitted,

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⁶⁴ See OMAG Ex. 27, letter by IEU-Ohio dated and filed in this proceeding on December 22, 2105, noting that “[a]s a non-opposing party, IEU-Ohio reserves all rights to initiate or participate in any action to enforce the Stipulation.”

⁶⁵ See P3/EPSC at Ex. 11.

⁶⁶ *Id.* at 86.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 8th day of February 2016.

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