BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF
BY
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There is so much bad news for Ohioans in AEP Ohio's settlement that the problems vie with each other for the attention they deserve. But one of the worst problems we identified (on Brief) as needing PUCO disapproval is that federal regulators may require the subsidized power plants to bid into markets at prices that will not clear. (PJM Market Monitor Brief at 8-9.) That means Ohioans would pay AEP Ohio much more than our projection of $700 each. Now Ohio Energy Group ("OEG"), a signer of the settlement no less, has rightly expressed its concern that this eventuality "would dramatically raise the level of costs collected [from customers] through the PPA Rider." (OEG Brief at 20.) OEG wants the PUCO to "reserve the right to reevaluate, modify, or terminate the PPA rider…." (*Id.*) Not a bad idea. But the PUCO should not interfere with the market in the first place. Here's the point from Dr. Hisham Choueiki, PUCO Staff witness. Says he: "It's a fully functionally competitive market in Ohio, a generation service, **so there is no need for anything else on the generation side.**" (Hearing Transcript at Vol. XVI, p. 3915:17-22. (Dr. Choueiki)) (emphasis added).) Good advice for protecting a million Ohioans.

I. INTRODUCTION

In their initial briefs, the parties that signed the Joint Stipulation and Recommendation ("Joint Stipulation" or "Settlement") are avoiding the hearing record, to the detriment of all consumers who must pay the unwarranted subsidy for uneconomic generation and other provisions included in the Settlement. Judging by their initial briefs, the Signatory Parties act as if the five weeks of evidentiary hearing never occurred.

AEP Ohio goes so far as to ask the Public Utilities Commission of Ohio ("PUCO") to ignore a seminal and threshold issue in this case: Does the PUCO have jurisdiction or is it preempted by federal law? The answers are no and yes.

The Ohio Supreme Court has been very clear that AEP Ohio and the Signatory Parties may not ignore the record.[1] The Ohio Supreme Court has made very clear that it is "necessary and appropriate" for the PUCO to consider germane law to decide its own jurisdiction in the first instance.[2] That AEP Ohio and the Signatory Parties are navigating away from the record should make clear to the PUCO that there is a lack of record support for approving AEP Ohio's proposals. That is matched by the lack of support in law.

Signatory Parties' initial briefs confirm what we said on brief. The Joint Stipulation is a hodgepodge of cash and cash equivalents given to parties in exchange for support — or merely for the perception of support (*see* Sierra Club's and others many

[1] *See, e.g., Tongren v. PUC*, 85 Ohio St. 3d 87 (1999); *see also* R.C. 4903.09.

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

qualifying footnotes) for AEP Ohio's PPA. The stipulators have attempted to defend certain settlement terms that are in their interest and not the interest of the broader public.

They have not even attempted to defend the Joint Stipulation as a "package" under the settlement standard. This omission confirms our position (Brief at 55) that the PUCO should not apply the three-prong test that it has historically applied to settlements (or at least not apply the test as a package). It affirms that AEP Ohio and the Signatory Parties are doing exactly what the PUCO has warned against and said it will not tolerate – paying parties with other peoples' money in return for signing a settlement.

AEP Ohio mischaracterizes, misunderstands, selectively and inaccurately interprets, and sets up straw men in its critique of the evidence of the Office of the Ohio Consumers' Counsel ("OCC"). But the evidence from all the parties – AEP Ohio, OCC, and others – points in the same direction: Denial of AEP Ohio's proposal.

II. RECOMMENDATIONS

A. The PUCO would ignore the jurisdictional issue (as AEP Ohio recommends) at its and consumers' peril; instead, the PUCO should address the issue first.

AEP Ohio invites the PUCO to act as the detectives in Twain's "The Stolen White Elephant,"[3] who searched for a stolen elephant oblivious to the fact that it was right there. The PUCO should not be oblivious to the elephant in the room. It should, and must, address whether it has jurisdiction. In fact, just recently, the PUCO recognized the importance of determining in the first instance if it has jurisdiction.[4] In this case, it does not.

[3] Twain, Mark, "The Stolen White Elephant," (Osgood 1882).

[4] *See In the Matter of the Complaint of Mark A. Whitt v. Nationwide Energy Partners, LLC,* Case No. 15-697-EL-CSS, Opinion and Order at p. 6, 8 (November 18, 2015).

AEP Ohio asserts that the PPA Rider's effects on the wholesale market should not be considered by the PUCO.[5] But those issues are front and center before it.[6] OCC, and others, show that they require the conclusion that the PUCO's jurisdiction is preempted.[7] The PUCO should, and must, decide the jurisdictional issue.[8] As the Ohio Supreme Court has explained, it is "necessary and appropriate" for the PUCO to consider germane law to decide its own jurisdiction in the first instance.[9] Upon such consideration here, the PUCO can come to but one conclusion: It lacks jurisdiction.[10]

B. AEP Ohio's examples of "cost-based" generation offered into wholesale markets by generators in other states, cooperatives, and municipalities is misplaced, as it compares apples to oranges; the PPA Rider is a customer-funded subsidy.

As noted by AEP Ohio, non-stipulators explain that the PPA Rider is an impermissible subsidy that is inconsistent with the existing wholesale market structures of PJM Interconnection, LLC ("PJM").[11] That is, allowing the PPA Units' subsidized

[5] *See* AEP Ohio Brief at 134-36. Conversely, the Ohio Energy Group explicitly asks the PUCO to make a finding that the PPA Rider's costs are projected to be below-market in anticipation of federal challenges to it. *See* Post-Hearing Brief of the Ohio Energy Group at 21-22. In addition to confirming that the Signatory Parties are not of one mind, Ohio Energy Group's request cannot be granted given the evidence before the PUCO. *See, e.g.*, Direct Testimony of James F. Wilson (OCC Exs. 15 and 34) filed September 11, 2015 and December 28, 2015, respectively (projecting a multi-billion dollar cost for the PPA Rider).

[6] *See, e.g.*, Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network at 16-24 (PUCO's jurisdiction preempted); *id.* at 106-112 (AEP Ohio's proposal will undermine competitive markets).

[7] *See, e.g., id.* at 16-24; Initial Brief of The Ohio Manufacturers' Association Energy Group at 16-20.

[8] *See* Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network at 16-17.

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

[10] *See, e.g.*, Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network at 16-24; Initial Brief of The Ohio Manufacturers' Association Energy Group at 16-20.

[11] *See* AEP Ohio Brief at 133 (citing, e.g., IMM Ex. 3 at 2; OCC Ex. 12 at 8-16; OMAEG Ex. 29 at 6; OCC Ex. 11 at 3; RESA Ex. 1 at 3). In doing so, AEP Ohio is itself recognizing what the Ohio Energy Group

generation to compete against unsubsidized generation in the PJM markets will distort and undermine the PJM markets. AEP Ohio attempts to explain away this fact by citing many purported examples of cost-based generation offering into PJM without distorting or undermining the PJM markets.[12] Generation resources owned by Dominion, that receive cost-based compensation under Virginia's traditional cost-of-service retail regulation, participate in PJM's markets.[13] Municipal utilities and cooperatives, such as Eastern Kentucky Power Cooperative ("EKPC"), also participate in PJM's markets and receive cost-based compensation.[14] AEP Ohio's logic in citing these examples is flawed for several reasons.

First, AEP Ohio and its generation affiliate (AEPGR) operate in a deregulated state (Ohio). Dominion operates in a regulated state. This is a vital fact. As RESA Witness Bennett put it:

> it's an apples and oranges comparison to look at cost of service for a generation asset in a vertically-integrated state that hasn't made the decision to become a competitive state, and a cost of service ratemaking for something that is an unregulated asset that's part of an unregulated subsidiary that's now being transitioned into a cost of service ratemaking.[15]

Dominion, as a regulated utility, must follow certain rules that AEP Ohio and AEPGR would not under AEP Ohio's proposal.

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apparently cannot. It asserts that the PUCO should make an express finding that there is no definitive evidence that approving the PPA Rider will distort PJM markets. *See* Post-Hearing Brief of the Ohio Energy Group at 3. There is an abundance of evidence that the PPA Rider will distort the PJM markets. *See, e.g.*, Direct Testimony of Ramteen Sioshansi (OCC Ex. 12) filed September 11, 2015; Direct Testimony of Joseph E. Bowring (IMM Ex. 2) filed December 28, 2015.

[12] AEP Ohio Brief at 133; 135-37.

[13] AEP Ohio Brief at 136.

[14] *Id.* at 136-137.

[15] Hearing Transcript at Vol. XXII, p. 5546:1017.

Further, the PPAs proposed by AEP Ohio are different than Dominion's generation PPAs. P3/EPSA Witness Cavicchi explained that Dominion's PPAs are developed through competitive bids.[16] P3/EPSA Witness Cavicchi went on to describe that in that situation, "the requirements that the seller undertakes are very substantial, and in my experience quite a bit different than an agreement that wasn't subject to a competitive process like the power purchase agreements here that AEP Ohio is proposing to enter into with its affiliate, with AEP Generation Resources."[17]

Dominion's situation is also different than AEP Ohio's here because Dominion, as P3/EPSA Witness Cavicchi explained, is a regulated utility. It has rates set based on a test-year.[18] And "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."[19] Under AEP Ohio's PPA Rider proposal, which entails a "cost-plus" contract with costs charged to consumers, AEPGR would not have the same cost-control incentives.

AEP Ohio's comparison between its PPA proposal and EKPC's participation in PJM markets is also flawed. Most notably, AEP Ohio, as an investor-owned utility, seeks to maximize shareholder (owner) value. Its shareholders (owners) and its customers are not the same. EKPC's incentives are different. It is a non-profit entity owned by 16 electric distribution cooperatives that are in turn owned by their customers. EKPC's

[16] *See id.* at Vol. XXI, p. 5292:13-15.

[17] *Id.* at Vol. XXI, p. 5292:22-5293:4.

[18] *See id.* at Vol. XXI, p. 5293:16-18.

[19] *Id.* at Vol. XXI, p. 5293:19-24.

member-owners are its customers. EKPC's incentives are fundamentally different than AEP Ohio's. AEP Ohio, in contrast to EKPC, will seek to maximize profits even if its methods for doing so distort and undermine the PJM markets – and harm consumers.

AEP Ohio contends that PJM's Independent Market Monitor ("IMM") confirmed AEP Ohio's position that cost-based compensation for generation has not and will not disrupt the PJM markets. In support of this argument AEP Ohio quotes the IMM's testimony that "'every auction that has been conducted in PJM 'has produced competitive results, and the behavior of the participants was competitive.'"[20] AEP Ohio's assertion is misleading.[21] It takes the Market Monitor's testimony out of context. The Market Monitor's full response to a question posed by PUCO Commissioner Haque is as follows:

> COMMISSIONER HAQUE: Can everyone hear? Okay. Great. Dr. Bowring, just one quick question and I'll ask you to respond to this question generally. I am not talking about specific companies, specific units, but the units that have -- thank you, your Honor -- the units that have bid and cleared CP auctions to this point. In your opinion have those units been bid competitively based upon your thoughts, understanding, notion of competitive bidding practices?
>
> THE WITNESS: So let me answer two ways. One is that under the existing rules, units – all units have bid competitively. But if -- if you think about a competitive offer from a subsidized unit being at less than what it would be without the subsidies, then that's not true in every case. So some units -- the offers of some units reflect those subsidies; that is permitted under the current rules.
>
> COMMISSIONER HAQUE: So if I clarify that question by saying those units that do not presently receive the subsidies that have been articulated by you and Mr. McKenzie for examination, does that -- can you respond to that?

[20] AEP Brief at 135-136 (citing Hearing Transcript at Vol. XXI, p. 5256).

[21] The assertion that the PPA Rider in the Joint Stipulation is better than that originally proposed because its term is shorter is also misleading. In what is perhaps a Freudian slip, and no doubt foreshadowing things to come, AEP Ohio in addressing the financial need factor of the ESP III Opinion and Order says that the PPA Rider will increase "the probability that these generating units will remain operating *through their useful lives* . . . ." *See* AEP Ohio Brief at 34 (italics added).

> THE WITNESS: Yes, of course. Yes. And so we do a detailed review in realtime and ahead of time, as well as after the fact, of every auction and, yes, it's been our conclusion that every capacity auction, including the most recent capacity performance action for '18-'19 delivery year was --produced competitive results, and the behavior of participants was competitive.
>
> COMMISSIONER HAQUE: Thank you, Dr. Bowring.[22]

There, the Market Monitor makes a clear distinction between a generating unit that is receiving a subsidy, like the PPA Units, and a generating unit that is not receiving a subsidy. He states that an offer into the PJM markets from a subsidized generator is not necessarily competitive. AEP Ohio's suggestion -- that the Market Monitor was making a sweeping statement that all generation units (including units that receive subsidies) can bid without distorting markets — is misleading and inaccurate.[23]

C. AEP Ohio's Amended Application and Settlement should be evaluated and denied by the PUCO without using the three-prong test for settlements, but the Amended Application and Settlement should be denied to protect consumers even if the settlement test is used.

1. In the interest of justice for a million consumers, the PUCO should evaluate the proposals of parties without using the three-prong test for settlements.

The test historically applied to settlements has three prongs:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating parties?

2. Does the settlement package violate any important regulatory principle or practice?

[22] Hearing Transcript at Vol. XXI, p. 5255:12-5256:18.

[23] Misleading is a theme in AEP Ohio's initial brief. It asserts that the reduced return on equity (profit) in the Joint Stipulation will "produce savings for customers of $86 million[.]" *See* AEP Ohio Brief at 36; *see also id.* at 100-101. In reality, reducing the return on equity (profit) simply means that consumers can keep more of their own money, not "save" it due to the reduction.

3. Does the settlement, as a package, benefit ratepayers and the public interest?[24]

AEP Ohio asserts that the three-prong test should be applied here.[25] It should not be applied here. Instead, as ELPC Witness Rebago explained, "the Stipulation cannot be found to be in the public interest absent a careful review of each of its terms – individually, in addition to as an interactive whole."[26] Upon that careful review, ELPC Witness Rebago concluded that "the record lacks testimony that fleshes out the elements of the settlement in a way that allows the Commission to reach a decision about whether this package is in the public interest based on the merits."[27]

Other than Staff,[28] five signatory parties filed initial briefs. Neither Interstate Gas Supply, Inc. ("IGS") nor Direct Energy Services, LLC ("Direct Energy") even attempt to

[24] *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992). AEP Ohio's assertion that the focus under the first prong is only on negotiating parties, not signatory parties, is wrong. *See, e.g., In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, 2005 PUC Lexis 694, *10-11 (Case No. 05-276-EL-AIR) (responding to argument that signatory parties lacked diversity of interests, PUCO noted that "the signatory parties do represent a diversity of interests"); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, Pursuant to Revised Code Section 4929.11, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May be Required to Defer Such Expenses and Revenues for Future Recovery Through Such Adjustment Mechanisms*, 2007 PUC Lexis 437, *35-36 (Case No. 05-144-GA-UNC).

[25] *See* AEP Ohio Brief at 25-26.

[26] *See* Direct Testimony of Karl R. Rabago (ELPC Ex. 19) filed December 28, 2015 at 4.

[27] *See id.*

[28] The Post-Hearing Brief submitted on behalf of the Staff of the Public Utilities Commission of Ohio largely ignores the record. It cites to the Hearing Transcript once. Otherwise, it restates the Joint Stipulation's provisions and AEP Ohio Witness William A. Allen's Direct Testimony. This is inexplicable given Staff's acknowledgement that in connection with the first phase of this case, AEP Ohio responded to over 1,100 data requests, supplemented over 70, parties participated in a month of evidentiary hearings, and 37 witnesses testified at the hearing. *See* Post-Hearing Brief submitted on behalf of the Staff of the Public Utilities Commission of Ohio at 6. Of course, the record is even more voluminous given the data requests, witnesses, and evidentiary hearing regarding the Joint Stipulation. Although Staff asserts that "the evidence of record supports and justifies a finding that [the Joint Stipulation's] terms are just and reasonable[,]" Staff does not analyze the record. *See id.* at 4; *see also id. generally.* This is brought into stark relief by Staff's assertion that the Joint Stipulation's benefits are "self-explanatory." *See id.* at 11. If they were self-explanatory, the more than 1,100 data requests, 40 witnesses, and 4 weeks of evidentiary hearing must have been, what, meaningless?

defend the Joint Stipulation or analyze the record fully.[29] Instead, they discuss provisions of the Joint Stipulation benefiting them – a customer referral program, the inaptly and cynically named "Competition Incentive" Rider (which is neither about competition or an incentive, but is anti-consumer), Supplier Consolidated Billing, and smart meter deployment.[30] The Mid-Atlantic Renewable Energy Coalition ("MAREC") does not cite the record or evaluate the Joint Stipulation.[31] Instead, it asserts that the PUCO should approve the Joint Stipulation so more renewable energy tax advantages can be realized.[32] The Post-Hearing Brief of the Ohio Energy Group is long on argument but short on record support – citing the Hearing Transcript merely five times over 22 pages.[33] Ohio Energy Group clearly focuses on the Joint Stipulation's provisions "important to large energy-intensive customers" – its members – such as obtaining consumer subsidies for the IRP program and automaker credit.[34]

Buckeye Power, Inc.'s Post-Hearing Brief is a different side of the same coin. Rather than support a particular provision benefiting it, Buckeye Power, Inc. goes out of

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[29] *See* Joint Initial Brief of Interstate Gas Supply, Inc., Direct Energy Services, LLC, and Direct Energy Business, LLC.

[30] *See id.* at 5-9. The Retail Energy Supply Association, Constellation Newenergy, Inc., and Exelon Generation Company LLC explained that the "Competition Incentive" Rider and the Supplier Consolidated Billing Program are actually "discriminatory and unjust." *See* Initial Brief of Retail Energy Supply Association, Constellation Newenergy, Inc., and Exelon Generation Company LLC at 56-57. The Ohio Manufacturers' Association Energy Group explained that "[a]ll costs associated with [the Supplier Consolidated Billing Program] should be borne by the beneficiaries of the program, not spread, in part, across all customer classes." *See* Initial Brief of The Ohio Manufacturers' Association Energy Group at 55.

[31] *See* Post-Hearing Brief of the Mid-Atlantic Renewable Energy Coalition.

[32] *See id.*

[33] *See* Post-Hearing Brief of the Ohio Energy Group.

[34] *See id.* at 7-11. As the Ohio Manufacturers' Association Energy Group pointed out, "there is no logical reason for why AEP-Ohio proposes to broaden IRP-tariff eligibility and increase the credits provided to a narrow class of beneficiaries" other than obtaining signatures on the Joint Stipulation. *See* Initial Brief of The Ohio Manufacturers' Association Energy Group at 58-61.

its way to inform the PUCO that it is *not* supporting – indeed, has "removed itself from" – those parts of the Joint Stipulation that impact it.[35]

These initial briefs confirm ELPC Witness Rebago's conclusion that "[t]he [Joint] Stipulation appears to be a deal to allow the Company to recover costs for the proposed PPA in return for the many elements of the deal unrelated to the core PPA."[36] The PUCO has warned against the practice of paying signatory parties, stating that, "parties to future stipulations should be forewarned that such provisions are strongly disfavored by this Commission and are highly likely to be stricken from any future stipulation submitted to the Commission for approval."[37] Yet, as pointed out by ELPC Witness Rebago, and OCC Witness Haugh,[38] AEP Ohio has presented the PUCO with a Joint Stipulation that does exactly that. It is a hodgepodge of handouts to individual signatory parties in return for supporting the PPA Rider, not a package.

a. Prong 1: The settlement fails the first prong because it lacks the serious bargaining and the diversity of interests required for PUCO approval.

Based on AEP Ohio's own evidence, and that of OCC and others, OCC showed in its initial brief that the first prong is failed because the Joint Stipulation contains numerous, material unknowns, and is so vague and ambiguous, that the Signatory Parties were not knowledgeable of the settlement's results. Signatory Parties' many footnoted

[35] *See* Buckeye Power, Inc.'s Post-Hearing Brief at 20-22.

[36] Direct Testimony of Karl R. Rebago (ELPC Ex. 19) filed December 28, 2015 at 4:7-8.

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

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

opt-outs[39] from material provisions in the Joint Stipulation demonstrate a lack of diversity among Signatory Parties, as does the fact that residential customers are not represented. Those same residential customers are left to pay for the Joint Stipulation's handouts. AEP Ohio and the Signatory Parties are using other people's money.

The undefined, impractical standards by which AEP Ohio's commitments will be evaluated confirm a lack of serious bargaining. The Joint Stipulation was not a seriously bargained for agreement, but a compilation of cash equivalents and inducements for parties to sign it (to be paid by consumers who oppose the Joint Stipulation).

i. The Joint Stipulation is not the settlement it's advertised to be, is more of an agreement to disagree, and therefore fails the first prong of the settlement test.

The so-called Settlement is, in material respects, more of an agreement to disagree than an agreement. For example, Sierra Club, IGS, and Direct Energy have footnoted-out of some of the most material terms that AEP Ohio needs in the settlement.[40] In addition, Industrial Energy Users-Ohio agreed not to oppose the Joint Stipulation, and received $8 million.[41] The Industrial Energy Users did not agree; they merely committed to not oppose the Settlement.

These non-agreements (or agreements to disagree) are not the serious bargaining contemplated by the first prong of the settlement standard. And they're not representing diverse interests that reached agreement.

[39] Sierra Club has 12, Direct Energy 6, IGS 6, OPAE 1, and Buckeye Power, Inc. 1.

[40] OCC/APJN Brief at 37 *et seq.*

[41] *See* P3/EPSA Exhibit 11, admitted at Hearing Transcript Vol. XX, p. 5313.

The non-agreements do not give the PUCO (and the Ohio public) the benefit of the serious give and take that is bargaining for a compromise solution. Instead, they reflect the lack of serious bargaining that is an easier path, including for the utility, than an actual settlement resolution. The PUCO should not mistake such agreements for an actual settlement. And the furnishing of cash or cash equivalents in the "settlement" process, by the utility, should not be mistaken for broad public policy achievements.

The PUCO should not be distracted or misled by the advertisement of the document as the settlement it is not. The many footnotes-out in the fine print (Sierra Club itself has 12 footnotes of non-agreement) reveal the truth. The alleged diverse interests such as environmental groups and competitors have not had a serious bargaining for consensus. They could not reach consensus. Accordingly, the settlement fails the first-prong of the settlement standard.

b. Prong 2: The Joint Stipulation, as a package, violates important regulatory principles or practices, which results in harm to consumers.

Based on AEP Ohio's own evidence, and that of OCC and others (as OCC showed in its initial brief), the second prong is failed because the Joint Stipulation contains little more than contingent "commitments" to make future filings. Such filings may or may not be approved. Their purported benefits may or may not materialize.

The Settlement would create a mess of Ohio's principles (and policy in R.C. 4928.02(A) to R.C. 4928.02(H), and others) requiring the use of markets for setting electric generation prices for Ohioans. Additionally, AEP Ohio's subsidized power plants may be required to bid into markets at prices that will not clear (per the PJM Market Monitor Brief at 8-9). That means Ohioans would pay AEP Ohio even more — much more — that the $700 projected by OCC Witness Wilson.

Even Ohio Energy Group ("OEG"), a signer of the Settlement no less, has rightly expressed its concern that this eventuality "would dramatically raise the level of costs collected [from customers] through the PPA Rider." (OEG Brief at 20). OEG wants the PUCO to "reserve the right to reevaluate, modify, or terminate the PPA rider…." (*Id.*) That's very telling, coming from a settlement signatory and a group of large customers.

But a much better idea is to avoid the need to reevaluate and terminate the Settlement by rejecting it in the first place. Dr. Hisham Choueiki, PUCO Staff witness, testified that "[i]t's a fully functionally competitive market in Ohio, a generation service, so there is no need for anything else on the generation side." (Transcript at Vol. XVI, p. 3915:17-22). That is so true. At this point in Ohio's arc of embracing competitive markets for pricing of electric generation services, regulatory principles hold no place for re-regulatory PPA proposals.

The term for 900 megawatts of renewable energy plants is another example of the stipulators' disregard for regulatory principles. As Dr. Choueiki testified for the PUCO Staff, Ohio is a "fully functionally competitive market" for generation.[42] Therefore, the regulatory principle is that Ohio consumers pay market prices for generation. Ohioans aren't supposed to pay government-imposed rates for monopoly generation projects, as Sierra Club and AEP Ohio would have it.[43] They turn Ohio policy and regulatory principles in R.C. 4928.02 upside down.

[42] Hearing Transcript at Vol. XVI, p. 3915:17-22.

[43] The PUCO has recognized as much. It rejected AEP Ohio's efforts to have customer-funded renewables in connection with AEP Ohio's Turning Point project. *See In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters; In the Matter of the Long-Term Forecast Report of Columbus Southern Power Company and Related Matters*, 2013 Ohio PUC Lexis 3 (Case No. 10-501-EL-FOR) (January 9, 2013).

In this regard, the Ohio General Assembly determined, in Senate Bill 310, to freeze the renewable energy mandates. And the General Assembly ended the in-state preference. It is not for AEP Ohio and Sierra Club to unilaterally undo what the Ohio General Assembly resolved.

The inaptly named "Competition Incentive" Rider -- which in reality undermines competition and is a disincentive for effective markets for serving Ohio consumers -- is another term that is a violation of regulatory principles. Even the Ohio Providers of Affordable Energy (whose settlement signature will ironically make energy *less affordable* for a million Ohio consumers by about $700 each or more[44]) would not sign this one. (It footnoted out.)

This term is a low-point for regulatory principles (and the misuse of the English language). At the expense of standard offer consumers, the term will have government regulators artificially increase the price of the market-based standard offer. That bit of government and marketer interference in the electricity market will help drive consumers to marketers such as, unsurprisingly, IGS and Direct Energy. That is bad for consumers.

Further, the PUCO should require a level of certitude, and a level of clarity, of stipulations. The Joint Stipulation contains so many unknowns, and is so vague and ambiguous, that it is uncertain and unclear. Its rate design is flawed because it departs from principles of cost causation and disproportionately affects residential customers.[45]

[44] *See* Supplemental Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 11:3-5.

[45] *See* Direct Testimony of Robert F. Fortney (OCC Ex. 32) filed December 28, 2015.

i. The PUCO should not evaluate the settlement as a "package."

The PUCO should not apply the settlement test to consider the Joint Stipulation as a "package" under the three-prong test.[46] The settlement is a hodgepodge (not a package) of unrelated terms, including "gimmes" to induce certain signatories to sign. The terms that are inducements to sign lack a reasonable nexus to the subject of the case, the power purchase agreement, and are not a package.

Moreover, there was no notice that this case was about consumer funding of renewable energy, driving consumers away from the standard offer, consumer payment for a mass roll-out of the smart grid, subsidies for members of an association of weatherization providers, and so on. The Settlement "package" was contrived largely for AEP Ohio's purpose of obtaining PUCO approval of its profit guarantees for Ohioans to subsidize the power plants of its corporate affiliate.

That is not a "package" that should be countenanced by the PUCO's settlement standards. Each term of this settlement should rise or fall on its own merits or demerits (and most of the terms should not even be considered in this case).

c. Prong 3: The Joint Stipulation, as a package, does not benefit consumers and is not in the public interest.

i. The Joint Stipulation fails the settlement test's third prong.

The Joint Stipulation is not in the public interest because consumers would actually be worse off under it than they would be were only the PPA Rider approved. And the PPA Rider is not in the public interest because it is estimated to cost AEP Ohio's

[46] In addition to OCC and Appalachian Peace and Justice Network making the same point in their initial brief, other parties did, too. *See, e.g.,* Initial Brief of The Ohio Manufacturers' Association Energy Group at 22-23 ("The balkanized nature of the Stipulation makes it virtually impossible to know the 'package' of purported benefits that the Signatories are requesting for approval.")

1.3 million customers $1.9 billion ($700 per customer) over the 8-year term of the Settlement.

Just as the Settlement terms contravene regulatory principles under the second prong of the PUCO's settlement test, the terms also are contrary to the public interest under the test's third prong. For one matter, the terms would deprive consumers of the benefits of electric markets. As stated, the settlement would wreak havoc on Ohio's policy (in R.C. 4928.02) for the use of markets to benefit Ohio consumers.

Worse, Ohioans could have to pay AEP Ohio even more — much more — than the $700 projected by OCC Witness Wilson. The reason is that AEP Ohio's subsidized power plants may be required to bid into markets at prices that will not clear. (PJM Market Monitor Brief at 8-9.)

Even Ohio Energy Group ("OEG"), a signer of the settlement no less, has rightly expressed its concern that this eventuality "would dramatically raise the level of costs collected [from customers] through the PPA Rider." (OEG Brief at 20.) OEG wants the PUCO to "reserve the right to reevaluate, modify, or terminate the PPA rider…." (*Id.*) That's very telling, coming from a settlement signatory and a group of large customers.

But a much better idea for benefiting consumers is to avoid the need in the first place to reevaluate and terminate the settlement by rejecting it. Dr. Hisham Choueiki, PUCO Staff witness, testified that "[i]t's a fully functionally competitive market in Ohio, a generation service, so there is no need for anything else on the generation side." (Transcript XVI at 3915:17-22).) That is so true. At this point in Ohio's arc of embracing competitive markets for pricing of electric generation services, the public interest holds no place for re-regulatory PPA proposals. AEP Ohio's application and the Settlement

should be rejected, to preserve the benefits of markets for Ohioans and to protect the public interest.

The term for 900 megawatts of renewable energy plants is another example of the settlement's disregard for customer benefits and the public interest. As Dr. Choueiki testified for the PUCO Staff, Ohio is a "fully functionally competitive market" for generation.[47] Therefore, the public interest is that Ohio consumers pay market prices for generation; they aren't supposed to pay government-imposed rates for generation by a monopoly utility, as Sierra Club and AEP Ohio would have it. They turn Ohio policy in R.C. 4928.02 upside down. Also, as a public interest matter under the third prong, it is not clear how to evaluate the meaning of the renewable commitment given the complexities involved in whether the 900 MW of renewable energy would be built.

The inaptly named "Competition Incentive" Rider -- which in reality undermines competition and is a disincentive for effective markets for serving Ohio consumers -- is another term that violates the public interest and deprives consumers of the benefits of markets. Even the Ohio Providers of Affordable Energy (whose settlement signature will make energy *less affordable* for a million Ohio consumers by about $700 or more[48]) would not sign this one. (It footnoted out.)

This term for increasing AEP Ohio's market-based standard offer is a low-point for the public interest (and the misuse of the English language). At the expense of standard offer consumers, this term will have government regulators artificially increase the price of the market-based standard offer. That bit of government and marketer

[47] Hearing Transcript at Vol. XVI, p. 3915:17-22.

[48] *See* Supplemental Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 11:3-5.

interference in the electricity market will help drive consumers to marketers such as, unsurprisingly, settlement signatories IGS and Direct Energy. That is bad for consumers.

Further, the Joint Stipulation is not in the public interest because it contains so many unknowns – especially related to costs – that leave consumers unprotected. The Joint Stipulation is so vague and ambiguous that it will plunge consumers of all types into an endless wave of litigation, and there are no meaningful standards by which AEP Ohio's commitments will be judged. [49]

Its purported benefits are overstated. For example, the PPA Rider is not necessary for customers to realize any rate hedging benefit.[50] And the Joint Stipulation is a mere hodgepodge of unrelated provisions containing cash or cash equivalents paid for by other people (consumers) provided to Signatory Parties in return for supporting the PPAs and the PPA Rider.

ii. AEP Ohio's proposals fail the ESP III Opinion and Orders' factors and requirements.

Based on AEP Ohio's own evidence, and that of OCC and others, OCC showed in its initial brief that AEP Ohio has failed to meet its burden under ESP III's factors and

[49] AEP Ohio recognizes the importance of clarity and the high risk of litigation in its absence. *See* AEP Ohio Brief at 18 (asserting that subsection (B)(2)((b)-(c) of the ESP statute are inferior to the PPA as an option for ensuring generation in Ohio because "those provisions contain so many vague, untested concepts that would cause litigation and delay").

[50] Relatedly, AEP Ohio asserts that passing up the opportunity to approve the PPA Rider will subject Ohio consumers to volatility. *See* AEP Ohio Brief at 17. As OCC pointed out, given all the forecasts, true-ups, and over and under collection adjustments and yearly/quarterly reconciliations, it is more likely that AEP Ohio's PPA Rider will increase rate volatility. *See* OCC's Initial Brief at 21 and notes 82-87.

requirements set out by the PUCO. The PPA Units are not in financial need.[51] AEP Ohio's proposed 10.38 percent return on equity (profit) for deregulated generation is unjust, unreasonable, unprecedented, and will harm consumers. Based on the same evidence, the PPA Units are not necessary in light of future reliability concerns, including supply diversity.[52] PJM is responsible for, and capable of, ensuring reliability and resource adequacy.[53] And the PPA Units do not contribute to supply diversity – they are coal-fired units in a coal-dominated state.[54] Again based on the same evidence, AEP Ohio has failed to show the PPA Units' compliance with current environmental regulations and a plan for complying with future environmental regulations.[55] Also based on the same evidence, AEP Ohio has failed to show the impact that closing the PPA Units would have on electric prices and the resulting effect on economic development in the state.[56] It produced no evidence regarding the impact on electric prices, and no credible evidence on economic impact caused by PPA plant closures.

[51] AEP ESP III, Case No, 13-2385-EL-SSO, Opinion and Order at 25 (first factor). During the evidentiary hearing in the first phase of this case, AEP Ohio's President was presented with multiple investor presentations showing how much AEP's assets increased in value and that the PPA Units are "well-positioned from a cost and operational perspective to participate in the competitive market[.]" *See* OCC's Brief at 71-72. During cross-examination at the hearing and in its initial brief, AEP Ohio relied on an investor presentation to call into question the testimony of Dynegy Witness Ellis. *See* AEP Ohio Brief at 93-94. It appears that OCC and AEP Ohio are in accord that the PUCO should give great weight to what companies say in their investor presentations.

[52] The ESP III Opinion and Order's at 25 (second factor).

[53] *See, e.g.,* Brief for Amicus Curiae PJM Interconnection, L.L.C. at 9-12.

[54] AEP Ohio asserts that the PPA Rider will help transform it into the "utility of the future." *See* AEP Ohio Brief at 7. Such assertion is contrary to the evidence. The PPA Rider will subsidize older, inefficient, coal-fired generation in a state already dominated by coal. *See* OCC Initial Brief at 78.

[55] The ESP III Opinion and Order at 25 (third factor).

[56] The ESP III Opinion and Order at 25 (fourth factor).

AEP Ohio has not provided for rigorous PUCO oversight, full information sharing, and allocating financial risk as required.[57] There is no public participation and transparency. There are limitations and restrictions on the information to be shared with the PUCO, and no rights to information for other interested parties. The very substantial costs associated with PUCO invocation of the tools that AEP Ohio asserts allocates risks to it render them unrealistic and ineffective and harmful to consumers. Consumers bear all the risk associated with the PPA units.

iii. The PUCO should not evaluate the settlement as a "package."

As stated, the PUCO should not apply the settlement test to consider the Joint Stipulation as a "package" under the three-prong test.[58] The settlement is a hodgepodge (not a package) of unrelated terms, including "gimmes" to induce certain signatories to sign. These terms are tailored to the individual parties to be induced to sign, and should not be confused with benefits to customers generally or the public interest. The terms that are inducements to sign lack a reasonable nexus to the subject of the case, the power purchase agreement, and are therefore not a package.

Moreover, there was no notice that this case was about consumer funding of renewable energy, consumer payment for a mass roll-out of the smart grid, subsidies for members of an association of weatherization providers, and so on. The Settlement "package" was contrived largely for AEP Ohio's purpose of obtaining PUCO approval of the profit guarantees for Ohioans' to subsidize the power plants of its corporate affiliate.

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[57] The ESP III Opinion and Order at 25-26 ("additional requirements").

[58] In addition to OCC and Appalachian Peace and Justice Network making the same point in their initial brief, other parties did, too. *See, e.g.,* Initial Brief of The Ohio Manufacturers' Association Energy Group at 22-23 ("The balkanized nature of the Stipulation makes it virtually impossible to know the 'package' of purported benefits that the Signatories are requesting for approval.")

That is not a "package" that should be countenanced by the PUCO's settlement standards. Each term of this settlement should rise or fall on its own merits or demerits (and most of the terms should not even be considered in this case).

D. OCC Witness Wilson's market-based figures showing consumer impacts of the Settlement are properly calculated, contrary to AEP Ohio's critique.

AEP Ohio claims that OCC Witness Wilson's figures (showing consumer impacts) are unreliable because futures prices do not represent economic principles of demand, supply, and the resulting price.[59] This is not true. OCC Witness Wilson explained that future prices "reflect a consensus of market participants' expectations of future prices, reflecting their expectations and forecasts of supply, demand and price."[60] Although market participants pursue a range of objectives through futures transactions, "their hedging actions will reflect and represent their expectations and forecasts of prices in the coming months and years, *because the futures contract is simply an alternative to paying those prices.*"[61]

Further, and contrary to AEP Ohio's assertions, there is sufficient liquidity in electric energy forwards.[62] OCC Witness Wilson decided to use the AEP-Dayton Hub day-ahead prices – "AEP-Dayton Hub day-ahead were the right prices to use for [his] analysis."[63] AEP Ohio did not challenge the propriety of OCC Witness Wilson's choice. And its challenge to the level of liquidity is belied by the fact that there are multiple exchanges on which futures are traded, additional contracts for the real-time market with

[59] AEP Ohio Brief at 85-86.

[60] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 11:14-16.

[61] *Id.* at 11:117-12:2 (italics added).

[62] *See* AEP Ohio Brief at 87.

[63] *See* Hearing Transcript at Vol. XV, p. 3815:6-10.

large volume and similar prices to those used by OCC Witness Wilson, and other hubs geographically close and well interconnected to the electricity grid.[64] So when AEP Ohio attempts to challenge liquidity, it inappropriately looks at "only a small part of a much larger picture."[65]

AEP Ohio is also wrong in its assertion that OCC Witness Wilson's market-figures are inaccurate because neither party in a futures transaction is concerned with the actual future price of energy.[66] As OCC Witness Wilson explained clearly: "Both parties to a futures transaction have engaged in the transaction precisely because they are concerned about future price levels. The transaction allows them to protect themselves from undesirable price movements, at least for the portion of their sales or purchases covered by the transaction."[67] In fact parties to such a transaction "likely evaluated future market conditions very carefully before entering into the transaction."[68]

AEP Ohio asserted that financial participants (who AEP Ohio describes as "speculating")[69] are not concerned with the actual future price of energy. But OCC Witness Wilson pointed out that financial participants engage in future transactions because they believe that prices will move in one direction or the other. "[T]hey too are taking a position based on their evaluation of future market conditions."[70]

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[64] *See id.* at p. 3814:4-17.

[65] *See id.* at 3814:2-19. Importantly, OCC Witness Wilson checked the prices from these other sources in connection with his analysis. *See id.* at 3815:6-10. He found them to be "very close." *See id.*

[66] AEP Ohio Brief at 86 (citing AEP Ohio Ex. 50 at 3).

[67] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 12:9-12 (emphasis in original).

[68] *Id.* at 12:12-14.

[69] *See* AEP Ohio Brief at 85.

[70] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 12:16-18.

AEP Ohio Witness Bletzacker's assertion that long-term natural gas futures are "tethered" to current spot market prices is trotted out by AEP Ohio.[71] But AEP Ohio conveniently leaves out AEP Ohio Witness Bletzacker's rationale for the assertion – the "tethering" is due to storage.[72] This omission is no doubt explained by AEP Ohio's recognition that AEP Ohio Witness Bletzacker's rationale is, in OCC Witness Wilson's words, "nonsense."[73] Storage is not used to protect against possible future price increases – "it is far too valuable and costly to use in that manner."[74] Because natural gas storage

[71] *See* AEP Ohio Brief at 87-88.

[72] *Compare id.* (no mention of storage) *with* Rebuttal Testimony of Karl R. Bletzacker (AEP Ohio Ex. 50) filed October 27, 2015 at 4-5 (asserted "tethering" is "primarily due to the ability to purchase and store spot market natural gas and to sell at cost-based seasonal spreads.")

[73] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 14:14-22.

[74] *See id.*

is cycled on an annual basis, it may, to some extent, connect winter prices to summer prices.[75] But storage does not "tether" future prices to current prices.[76]

AEP Ohio asserts that the market-based futures prices are not accurate because they do not take into account the impact of the Clean Power Plan or other CO_2 emissions costs.[77] Wrong again. First, it is not possible for AEP Ohio to determine whether future prices do or do not reflect a particular anticipated policy change, like the Clean Power Plan.[78] That is information personal to each participant in a futures transaction. Second, AEP Ohio provides no evidence, just a baseless claim, for why futures market participants would ignore the potential impact of the Clean Power Plan or other CO_2 policy in their decisions to engage in transactions at certain prices.[79] Futures prices reflect market participants' expectations of future prices based on all relevant supply and demand factors, including CO2 policy, if they consider it relevant.[80] It would be completely irrational and potentially disastrous for futures market participants to ignore such concerns.

OCC Witness Wilson did not "use futures prices from the twelve-month period November 2019 through October 2020 as the futures prices for the next 50 months[,]" as AEP Ohio argues.[81] Instead, he "accepted the pattern reflected in AEP Ohio's energy price forecast[.]"[82] He then *scaled* AEP Ohio's energy prices to match, on average,

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[75] *See id.*

[76] *See id.*

[77] AEP Ohio Brief at 89.

[78] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 13:9-11.

[79] *Id.* at 13:14-16.

[80] *Id.* at 13:17-10.

[81] *See* AEP Ohio Brief at 90.

[82] *See* Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at 54:4-12.

forward prices.[83] So for the years 2020-2024 OCC Witness Wilson *still used* AEP Ohio's forecasted energy prices, but adjusted them for his analysis based on the ratio,[84] or relationship,[85] between 2019-2020 forward prices and AEP Ohio's 2019-2020 prices – the best evidence available.[86]

OCC Witness Wilson explained that the "sanity check" for the price assumptions he used was the best one – the "consensus of market participants."[87] So AEP Ohio's assertion that OCC Witness did not employ a "sanity check" is wrong.[88] In fact, OCC Witness Wilson pointed out that using AEP Ohio's preferred "sanity check" – applying his methods to the entire PJM market[89] – would not be one at all.[90]

E. AEP Ohio's focus on market prices is relevant if the PPA Units are offered into the PJM market and actually clear that market; the worst case scenario for consumers is that the PPA Units don't clear.

AEP Ohio's focus on OCC Witness Wilson's energy price estimates are relevant to the discussion if, and only if, the PPA Units are offered into the PJM markets and those units clear. OCC's $1.9 billion estimated cost to consumers presumes a revenue stream to offset the PPA Unit costs. The worst case scenario for consumers is those plants are offered into the market and they don't clear (as we and OEG warned). That eventuality (the PPA Units do not clear) would mean that there are no capacity (as well as energy) revenues from the market to offset the costs and guaranteed profit of those units.

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[83] *See id.* at 51:4-52:5.

[84] *See* Hearing Transcript at Vol. XV, p. 3817:23-3818:3.

[85] *See id.* at p. 3819:10-19.

[86] *See id.* at p. 3819:4-9 ("There aren't forward prices for those months [November 2020 through December 2024] for AD Hub day-ahead.")

[87] *See* Redacted Public Version of Hearing Transcript at Vol. XXII, p. 5521:12-19.

[88] *See* AEP Ohio Brief at 90-91.

[89] *See id.*

[90] *See* Redacted Public Version of Hearing Transcript at Vol. XXII, p. 5521:12-19.

There, the worst result of what is agreed to in the Settlement will be visited on a million AEP Ohio consumers, "dramatically" (in OEG's words[91]) increasing the estimated costs charged to consumers through the PPA Rider.

PJM in its amicus brief has included arguments that the PPA Units should be offered at cost to protect the competitive market from the inherent subsidy the PPA arrangement provides.[92] To the extent these units are uneconomic to bid in at cost, that increases the likelihood that these units will not clear, and the worst case scenario for consumers becomes a reality.

F. The PUCO should exercise its considerable discretion in matters of rate design to protect consumers by relying on the regulatory principles and practices, described by OCC Witness Fortney.

AEP Ohio asserts that, because the PUCO has discretion over rate design, it should disregard OCC Witness Fortney's testimony that the Stipulators' allocation of Energy Efficiency and Peak Demand Reduction Cost Recovery Rider and Economic Development Rider violates principles of cost causation.[93] But it is *precisely because* the PUCO has discretion over matters of rate design that it should accept OCC Witness Fortney's point. That means the PUCO should reject the allocation in the Joint Stipulation of Energy Efficiency and Peak Demand Reduction Cost Recovery Rider and Economic Development Rider costs, to protect consumers.

OCC Witness Fortney explained that the Joint Stipulation's transfer of 50 percent of the Energy Efficiency and Peak Demand Reduction Cost Recovery Rider costs to Economic Development Rider causes harm to residential customers because the

[91] Post-Hearing Brief of the Ohio Energy Group at 20.

[92] Brief for Amicus Curiae PJM Interconnection, L.L.C. at 4-7.

[93] *See* AEP Ohio Brief at 152-53; *see also* Direct Testimony of Robert B. Fortney (OCC Ex. 32) filed December 28, 2015 at 3:11-5:3.

allocations of Energy Efficiency and Peak Demand Reduction Cost Recovery Rider and Economic Development Rider were originally based on principles of cost causation.[94] "Those principles are then abandoned by the [Joint Stipulation's] arbitrary transfer of 50 % of the cost recovery from the EE/PDR to the EDR."[95] OCC Witness Fortney therefore concluded:

> The Stipulation modifies the application and the amended application [relating to the allocation of EE/PDR and EDR]. These modifications cause financial harm to the residential customers of AEP Ohio by shifting additional costs into the EDR Rider to be paid, at least in part, by residential customers. Those provisions violate the fundamental rate-making principle that the customers who cause the costs should be the customers to pay for the costs. [96]

This provision is consistent with the settlement's theme of inducing signatories to support AEP Ohio's PPA proposal where the signing inducements are paid for with other people's money.

AEP Ohio's assert that OCC's position on the Joint Stipulation's reallocation of the Interruptible Power credits is "disingenuous." That assertion ignores OCC Witness Fortney's testimony.[97] During his testimony, AEP Ohio provided OCC Witness Fortney a document.[98] At AEP Ohio's request, OCC Witness Fortney read a paragraph from page 28 of the Memorandum Contra. In part, the paragraph states: "As noted by AEP, the costs of the current IRP-D credits are substantial and are born by all customers who pay the EE/PDR Rider charges. To assure that the costs of those credits are born by all

[94] *See* Direct Testimony of Robert B. Fortney (OCC Ex. 32) filed December 28, 2015 at 3:18-21.

[95] *Id.* at 3:21-22.

[96] *Id.* at 4:20-5:3.

[97] *See* AEP Ohio Brief at 153.

[98] *See id.* (discussing "Memorandum Contra Ohio Power Company's Application for Rehearing and Request for Clarification by the Office of the Ohio Consumers' Counsel" filed April 6, 2015 in Case No.13-2385-EL-SSO).

customers, the costs should be collected through the Economic Development Rider."[99] Far from being "disingenuous," the discussion between OCC Witness Fortney and AEP Ohio buttresses OCC Witness Fortney's point.

The Signatory Parties are attempting to arbitrarily and unreasonably transfer costs from the appropriate PUCO-approved mechanism (the EE/PDR rider) to another mechanism that the PUCO approved for an entirely different purpose.[100] As the PUCO reiterated in its Second Order on Rehearing in ESP III, "the IRP-D reduces AEP Ohio's peak demand and encourages energy efficiency and, therefore, it is appropriate that the costs of the program are recovered through the EE/PDR rider."[101] It thus "affirm[ed its] finding that the costs of the IRP-D should be recovered from the EE/PDR rider, until otherwise ordered by the Commission."[102]

The record reflects that the Joint Stipulation's transfer of costs from the EE/PDR rider to the EDR violates previous PUCO orders. That violation occurs by arbitrarily and unfairly transferring a large portion of those costs to AEP Ohio's residential customers. OCC Witness Fortney's testimony affirms this. OCC's position is well made.

1. OCC Witness Fortney's opinion about how the PPA Rider's costs are allocated under the Joint Stipulation importantly protects consumers.

AEP Ohio asserts that OCC Witness Fortney offers nothing more than "unsupported opinions" about the allocation of the PPA Rider's costs.[103] OCC Witness

[99] *See* ESP III, OCC Mem. Contra AEP Ohio AFR filed April 6, 2015 at 28.

[100] *See* Direct Testimony of Robert B. Fortney (OCC Ex. 32) filed December 28, 2015 at 3:21-22.

[101] ESP III at Second Order on Rehearing at 12 (May 28, 2015).

[102] *See id.*

[103] *See* AEP Ohio Brief at 153-54.

Fortney has 27 years of experience in Ohio regulation.[104] AEP Ohio's response to OCC Witness Fortney's opinion is merely that it is "unsupported." This undeveloped response underscores that AEP Ohio has no credible response to OCC Witness Fortney's testimony about the proposed allocation of the PPA Rider's costs under the Joint Stipulation.

AEP Ohio has no credible response to OCC Witness Fortney's discussion regarding the allocation of the PPA Rider costs, either. AEP Ohio asserts that OCC Witness Fortney's testimony should be disregarded because it lacks analysis of his recommendation's impact on customer bills.[105] OCC Witness Fortney recommended during the evidentiary hearing on this matter that the PPA Rider's costs should be based on an energy allocation.[106] Contrary to AEP Ohio's assertion, OCC Witness Fortney in his Direct Testimony specifically pointed out the impact of his recommendation on customer bills. The percentage that residential customers would pay based on an energy allocation would be much less than the straight demand allocation proposed in the Joint Stipulation.[107] The testimony to which AEP Ohio cites purportedly standing for the proposition that OCC Witness Fortney did not perform any analysis as part of his testimony does not relate to his recommendation for energy allocation.[108]

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[104] *See* Direct Testimony of Robert B. Fortney (OCC Ex. 32) filed December 28, 2015 at 2:1-12.

[105] *See* AEP Ohio Brief at 154.

[106] *See, e.g.,* Hearing Transcript at Vol. XXI, p. 5378:9-11.

[107] *See* Confidential Direct Testimony of Robert B. Fortney (OCC Ex. 33) filed December 28, 2015 at 5:13-6:5.

[108] *Compare* Hearing Transcript at Vol. XXI, p. 5378:9-11 (recommending energy allocation) *with id.* at 5380:18-5382:9 (no analysis regarding allocation based on combination of demand and energy).

G. AEP Ohio ignores the substance of OCC Witness Dormady's testimony, which confirms that AEP Ohio's proposals are harmful to consumers and should be denied.

AEP Ohio has not criticized the substance of OCC Witness Dormady's testimony. That result likely is because AEP Ohio cannot criticize the testimony. Instead, AEP Ohio creates straw men.

AEP Ohio asserts that OCC Witness Dormady does not know the three part test's components, has no background or history on the test, and is unsure whether the test requires diversity of interests.[109] But OCC Witness Dormady did not testify to, and was not offered to testify about, any of those subject matters.

Rather, OCC Witness Dormady explained that he is an economist.[110] His credentials as an economist at the John Glenn College of Public Affairs at The Ohio State University on economic impacts, energy, and environmental matters are unimpeachable, as demonstrated by the fact that AEP Ohio did not even attempt to call them into question.[111] It is those matters – fundamental to energy policy generally, and specifically to concepts such as sound regulatory principles and public interest – to which OCC Witness Dormady testified.[112]

AEP Ohio next asserts that OCC Witness Dormady's testimony was "limited" to criticizing the economic base model AEP Ohio used to address the economic impact factor from ESP III. And AEP Ohio asserts that he conceded that there would be "some"

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[109] *See* AEP Ohio Brief at 27, n. 6.

[110] *See* Hearing Transcript at Vol. XXII, p. 5624:14.

[111] *See* Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015 at 1:7-2:15 (describing Dr. Dormady's credentials and real-world experience consulting on economic impacts of environmental and energy policies).

[112] *See id.*; *see also* Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 36) filed December 28, 2015.

economic impact were the PPA Units closed.[113] But what OCC Witness Dormady showed, which went undisputed by AEP Ohio, is that AEP Ohio's economic base model is not credible, it is not fit for the purpose to which AEP Ohio put it, and it is not even used by AEP Ohio to address the ESP III economic impact factor.[114] In light of OCC Witness Dormady's undisputed testimony on such matters, and that AEP Ohio bears the burden of proof, AEP Ohio's proposals should be rejected because the PUCO has *no* record evidence on the ESP III economic impact factor.[115]

That OCC Witness Dormady acknowledged that closing the PPA Units would have "some" economic impact only serves to confirm his credibility. *Of course it would*.[116] But AEP Ohio's obligation was not to show that closing the PPA Units would have "some" economic impact – particularly given the PPA Rider's potential $2 billion cost.[117] Instead, the PUCO required AEP Ohio to show "[t]he impact that a closure of the generating plant would have on *electric prices* and the resulting effect on economic development within Ohio."[118]

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[113] *See* AEP Ohio Brief at 55-56.

[114] *See* Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 10) filed September 11, 2015.

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

[116] As OCC Witness Dormady said, such impact could be negative – or positive. *See* Hearing Transcript at Vol. IX, p. 2329:6-15.

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

[118] *See* ESP III Opinion and Order at 25 (italics added).

AEP Ohio says that OCC Witness Dormady's criticisms of various provisions of the Joint Stipulation are "premature" because they can be addressed in a future proceeding.[119] But it is the inherent uncertainty in such proposals, and delaying to the future the ultimate decision to address them, that OCC Witness Dormady explained causes the Joint Stipulation to fail the first prong:

> The lack of any preliminary (let alone thorough) study, assessment, or evaluation of many of the provisions and individually-tailored carve outs contained within the Stipulation would indeed have precluded the signatories from capably and knowledgeably bargaining.[120]

Further, to the degree that AEP Ohio cites its "commitment" to make such proposals sufficiently in the public interest to pass the settlement test's third prong, the PUCO should consider the proposals. A "commitment" to make a bad proposal is not in the public interest and will harm consumers. OCC Witness Dormady showed that AEP Ohio is committed to making bad proposals.[121]

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[119] *See* AEP Ohio Brief at 154-55 (Competition Incentive Rider, converting Conesville Units 5 and 6, and renewable energy proposals). It should come as no surprise that some parties advocate now, in this proceeding, that AEP Ohio proposals that will be made in the future should be approved. *See, e.g.,* Post-Hearing Brief of the Ohio Energy Group at 8-11. Further, AEP Ohio's invitation to the PUCO to "punt" on the vast majority of the Joint Stipulation's provisions because they can be addressed in a future proceeding should be declined. The potential cost for denying a provision subject to a future filing is so high that, in reality, the PUCO will have a hard time doing it. For example, if the PUCO denies AEP Ohio's request to include in its extended ESP any of the provisions and features specified in Section III.C of the Joint Stipulation, any adversely affected Signatory Party agrees to work in good faith with AEP Ohio to develop new provisions. *See* Joint Ex. 1 at 37I. If such Signatory Parties are unable to reach agreement, each of those Signatory Parties may petition the PUCO for appropriate relief. *See id.* Such relief is proposed to be "limited to the equivalent value of the specific provision that is not included in the Company's extended ESP." *See id.* Accordingly, OCC Witness Dormady's testimony (as others') should be considered here.

[120] Direct Testimony of Dr. Noah C. Dormady (OCC Ex. 36) filed December 28, 2015 at 18.

[121] *See id.* at 8-13 (Competition Incentive Rider); *id.* at 5-7 (converting Conesville Units 5 and 6); *id.* at 16-17 (renewable energy proposals).

H. AEP Ohio misses the point of OCC Witness Duann's testimony, which confirms that deregulated generation such as the PPA Units should not get a guaranteed rate of return (profit) that captive retail consumers must pay.

OCC Witness Duann explained that no rate of return (profit) should be included in the PPA.[122] AEP Ohio characterizes this recommendation as "nonsensical" because equity capital has a non-zero cost.[123] AEP Ohio misses the point. Whether equity capital has a non-zero cost is beside the point of OCC Witness Duann's recommendation. Instead, as OCC Witness Duann put clearly, there should be no rate of return (profit) included in the PPA because:

> AEPGR is an unregulated power producer and its return (or profit) is, and should be, decided in the marketplace. AEP GR is not entitled to any specific level of a guaranteed return on equity. Regarding the return on capital investments, AEPGR should be treated the same as any other unregulated power producer in Ohio.[124]

Let the market decide deregulated AEPGR's profit, OCC Witness Duann says, not government.

AEP Ohio characterizes OCC Witness Duann's recommendation that, if a PPA Rider is approved, the return on equity (profit) should be set no higher that AEPGR's average cost of debt (long-term and short-term), as "irrational."[125] This, according to AEP Ohio, is because equity capital faces greater risk than debt and, therefore, has a higher cost.[126] Again, AEP Ohio misses the point. As OCC Witness Duann explained:

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[122] *See* Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 4:2-10.

[123] *See* AEP Ohio Brief at 37.

[124] *See* Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 4:2-10.

[125] *See* AEP Ohio Brief at 37.

[126] *See id.*

> [U]nder the proposed PPA, all of the business and financial risks to AEPGR are transferred to captive retail customers. As a matter of fairness and for the protection of AEP Ohio's customers, I propose the ROE applicable to the PPA Units be set no higher than AEPGR's average cost of debt . . . .[127]

Under the PPA proposal, OCC Witness Duann points out that AEPGR bears no risk. Thus, it is AEP Ohio's characterization of OCC Witness Duann's recommendation that is irrational, not the recommendation.

I. AEP Ohio critiques the showing by OCC Witnesses Hixon and Haugh that AEP Ohio's proposals would cause the MRO versus ESP to fail, but AEP Ohio's claims lack record support.

R.C. 4928.143(C) requires that the PUCO reject an ESP unless it finds that the plan, including its pricing and all other terms and conditions, and any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that a market rate offer under R.C. 4928.142.[128] AEP Ohio believes that the MRO test finding made in the ESP III decision is still applicable and adopting the Joint Stipulation will only enhance it.[129] Though the PUCO determined that AEP Ohio's ESP was more favorable in the aggregate than the expected results under an MRO, the PUCO must now consider the significant impact that the PPA Rider will have on that result. Only quantitative factors should be used for that assessment, under Ohio law.[130]

AEP Ohio argues that OCC Witnesses Hixon and Haugh focus on only one half of the relevant MRO versus ESP test. AEP Ohio contends that the PUCO can engage in both a quantitative and qualitative analysis to make its determination under the test. If

[127] *See* Direct Testimony of Dr. Daniel J. Duann (OCC Ex. 8) filed September 11, 2015 at p. 7:5-13.

[128] R.C. 4928.143(C)

[129] AEP Ohio Brief at 131.

[130] The Ohio Supreme Court has clarified that when the PUCO is making its determination under the MRO versus ESP test, only the price determined under R.C. 4928.143(B)(1) and the nine specific cost factors listed in R.C. 4928.143(B)(2)(a)-(i) should be considered. *See In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512 (2011).

the PUCO were to approve the Joint Stipulation, the cost to customers would be approximately $580 million and the benefits flowing to customer $53 million, leaving a net cost to consumers of $527 million for the current ESP. AEP Ohio critiques OCC's Witnesses Hixon and Haugh, but offers no rationale to support qualitative benefits that outweigh the $527 million cost to consumers of the ESP, were the Joint Stipulation approved. AEP Ohio stated that that the OCC's position disregards the PPA Rider's substantial benefits,[131] but makes absolutely no mention of what those benefits would be that outweigh the $527 million cost to consumers.

There are, at a minimum, 34 promises contained in the Joint Stipulation.[132] AEP Ohio would have the PUCO count the 34 promises in the MRO versus ESP test.[133] But were the PUCO to include the 34 promises in its MRO versus ESP analysis, they would only make the ESP *fail* the MRO versus ESP test. The 34 promises will increase costs to customers, thereby driving the cost of the ESP well beyond the $527 million.

There will be costs converting Conesville Units 5 and 6 to gas co-fired units. They are not accounted for.[134] There will be an additional yet-to-be-accounted-for cost impact on consumers of reducing AEP Ohio's reliance on coal/lignite generation from 74 percent in 2005 to 48 percent in 2026.[135] There will be a cost to consumers for increasing energy efficiency/demand response from less than one percent in 2005 to six percent in

[131] AEP Ohio Brief at 132.

[132] *See* Joint Ex. 1; *see also* OCC Initial Brief at 32-36; AEP Ohio Brief at 9 ("AEP Ohio only committed to *propose* various terms in its ESP III extension.") (italics in original).

[133] AEP Brief at 132 ("That position[referring to Hixon's testimony], of course, disregards the PPA Rider's substantial benefits, which the Commission must consider both in deciding whether to approve the rider and in considering the rider's impact on the MRO test").

[134] *See* OCC Brief at 33, eighth bullet point.

[135] *See id.* at 32, second bullet point.

2026.[136] There will be a cost to consumers for the battery resources that AEP Ohio will include in future filings.[137] There are 34 of these promises that AEP Ohio believes are "benefits" that OCC Witnesses Hixon and Haugh fail to account for. But the promises come at a cost to consumers, and that cost is unknown but will not be insignificant.

The Joint Stipulation, including the PPA Rider, would cause the current ESP to fail the MRO versus ESP test by at least $527 million. Adding AEP Ohio's purported "benefits" will only more clearly show that the ESP, plus the Joint Stipulation, is not more favorable in the aggregate and will harm consumers.

J. Residential customers are not represented in the Joint Stipulation, so there is not the required diversity under the first of the three prongs of the settlement test, and AEP Ohio's assertion that OCC has signed stipulations with footnotes is meaningless.

AEP Ohio criticizes OCC Witness Haugh who found that there is a lack of diversity in the Joint Stipulation because residential customers are not represented by any signatory party.[138] OCC Witness Haugh explained: "The Ohio Partners for Affordable Energy are not representatives of residential customers. That organization represents organizations that provide weatherization services to low-income customers."[139] OPAE is not advocating on residential customers' behalf regarding the unjust and unreasonable rates and charges that they may have to pay if the PUCO approves the Joint Stipulation.[140]

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[136] *See id.* at 33, third bullet point.

[137] *See id.* at 33, fifth bullet point.

[138] AEP Ohio Brief 27.

[139] Direct Testimony of Michael P. Haugh (OCC Ex. 33) filed on December 28, 2015 at p.7:5-8.

[140] *Id.* p. 7:8-11.

Upon cross-examination at the hearing OCC Witness Haugh was asked if the PUCO Staff looked out for residential customers. He responded: "residential customers are not being represented as a – as a class. As an individual class. My job, working for the residential consumer advocate, is to look out for the best interests of residential customers."[141] Put differently, Staff looks after the interests of *all* constituencies – utilities, industrial, commercial, and residential customers – without preference or prejudice for any one. The Signatory Parties do not represent the residential consumers of Ohio. Residential consumers are the ones that will be unfairly burdened with paying the majority of the PPA Rider's unwarranted costs.

AEP Ohio contends that because OCC has entered into settlements that have included footnotes, OCC cannot make a claim that the footnotes in the Joint Stipulation cause it to fail the PUCO's three-prong test.[142] But when OCC Witness Haugh was cross-examined by AEP Ohio, he was not presented with any stipulation that OCC had signed that contained footnotes. OCC Witness Haugh asked to be provided with an example – "if you could point me to a particular one" – but none was given.[143]

It would have been of no moment were he provided with one. The number of footnotes and the significant provisions of paramount importance that the footnotes opt the signatories out of in the Joint Stipulation prevent the settlement from meeting the PUCO's settlement standard. The Sierra Club, Direct Energy, and IGS "agree not to oppose" a statement in the Joint Stipulation that says that it "is supported by adequate data and information; as a package, the Stipulation benefits customers and the public

[141] Hearing Transcript at Vol. p. 5428:18-22.

[142] *See* AEP Ohio Brief at 27.

[143] Hearing Transcript at Vol. XXI., p.5436:4.

interest; provides direct benefits to residential and low income customers; and represents a just reasonable resolution of all issues in this proceeding; violates no regulatory principle or practice; and complies with and promotes the policies and requirements of Title 49 of the Ohio Revised Code."[144] Sierra Club "is not participating" in a provision of the Joint Stipulation that states that the parties agree that the Joint Stipulation preserves and advances the positive results of the MRO versus ESP test.[145] The Joint Stipulation provides that "Sierra Club and its counsel are not obligated to support the reasonableness of the Stipulation before the Commission."[146]

Here, the Signatory Parties "signed" the settlement for their financial benefits while not bargaining for real agreement that, had it been reached, might have given the PUCO a better settlement proposal for consumers. OCC Witness Haugh did not assert that footnotes are inherently wrong. Instead, OCC Witness Haugh confirmed that the footnotes cause the Joint Settlement to fail the first prong of the settlement test.[147]

K. Unable to argue the law or facts, AEP Ohio resorts to personal criticism of OCC Witness Jackson and misleads about her testimony.

AEP Ohio makes an assertion regarding the third of the PUCO's four factors for evaluating PPAs, being environmental compliance. (We do not concede that the factors are lawful or reasonable.) AEP Ohio claims that "the record established by AEP Ohio in demonstrating that the PPA Units are complying with environmental regulations[]"

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[144] OCC Brief at 37, Joint Ex. 1 at 2 and fn. 1.

[145] *Id*. at 39, Join Ex. 1 at p. 34 and fn. 15.

[146] OCC Brief at 39, Joint Ex. 1 at p. 37 and fn. 17.

[147] Direct Testimony of Michael Haugh (OCC Ex. 33) filed December 28, 2015 at 7-8. Though AEP Ohio asserts that the Signatory Parties "ultimately reached agreement on the Stipulation[]" that is in fact not accurate in light of the footnotes. *See* AEP Ohio Brief at 4. Buckeye Power, Inc.'s initial brief confirms that the Signatory Parties did *not* reach agreement on the Joint Stipulation. *See* Buckeye Power, Inc.'s Post-Hearing Brief at 20-22. The agreement is, in reality, more of an agreement to disagree.

causes Intervenors' challenge to AEP Ohio's efforts to meet the PUCO's third factor to fail.[148] But AEP Ohio is, once again, outside the record of evidence. It is *precisely* the record established by AEP Ohio that causes its effort to meet the third factor to fail.[149] According to AEP Ohio's own testimony, the breadth and scope of current and pending environmental regulations are unknown, compliance costs are unknown, and environmental compliance plans and their associated costs are unknown.[150]

1. OCC Witness Jackson is well qualified to express expert opinions on the topics of her testimony.

Because it cannot defend the record established in its own case, AEP Ohio attacks OCC Witness Jackson's credentials and characterizes her testimony as an "academic approach."[151] AEP Ohio apparently believes that an engineer, a generation plant employee, a maintenance person, or someone who visited the PPA Units would be more qualified than OCC Witness Jackson.[152] But the ESP III Opinion and Order's environmental compliance factor requires knowledge of a different type, which OCC Witness Jackson clearly has. The factor is:

> Description of how the generating plant is compliant with all *pertinent environmental regulations* and its plan for compliance with *pending environmental regulations*.[153]

[148] *See* AEP Ohio Brief at 49.

[149] *See* OCC Brief at 81-83.

[150] *See id.*

[151] *See* AEP Ohio Brief at 49-50.

[152] *See id.* at 49 (criticizing OCC Witness Jackson for not being an engineer, never having worked in a generation plant, never maintained a generation plant, and never visiting the PPA Units).

[153] *See* ESP III Opinion and Order at 25 (italics added).

Knowledge of operational details of a generating plant is germane, and OCC Witness Jackson has that knowledge. But the emphasis from the ESP III Opinion and Order is clearly on *current and pending environmental regulations.*

OCC Witness Jackson has over a decade of experience analyzing federal and state regulations, policies, and environmental planning documents for a wide range of clients.[154] In her current position, OCC Witness Jackson applies her experience to evaluate the impacts of policies and regulations on the electric sector, the costs impacts of electricity production options, and the environmental assumptions used by utilities in major regulatory filings.[155] Previously, OCC Witness Jackson analyzed the impacts of proposed federal, state, and local regulations, policies, and environmental compliance plans, focusing on air emissions and energy.[156] OCC Witness Jackson received post-graduate education through a preeminent program – Master of Environmental Law and Policy from Vermont Law School.[157] She has been published on environmental and energy related matters no less than 21 times.[158] Clearly, OCC Witness Jackson has the expertise, based on knowledge and experience, to opine meaningfully on matters related to current and pending environmental regulations facing coal-fired generation such as the PPA Units.[159]

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[154] *See* Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at 1-2.

[155] *See id.* at 1.

[156] *See id.*

[157] *See id.* at 2.

[158] *See id.* at Exhibit SEJ-1, pp. 2-3.

[159] The AEP Ohio in its initial brief attacks OCC Witness Jackson's knowledge and experience, it is noteworthy that they did not seek to prevent her from testifying. Indeed, it cites her as authority for its position on certain matters. *See* AEP Ohio Brief at 48.

2. AEP Ohio misleads about OCC Witness Jackson's testimony.

Further, AEP Ohio's criticism of OCC Witness Jackson's "lack of specific knowledge of the PPA Units" fails.[160] Though AEP Ohio asserts that OCC Witness Jackson's concern that the PPA Units could need cooling towers for environmental compliance is not based on unit-specific knowledge, the exact opposite is true.[161] On the subject, OCC Witness Jackson testified specifically that "[t]he calculations I made are using plant-specific data that is publicly available."[162]

AEP Ohio's criticism of OCC Witness Jackson's concerns regarding Zimmer Unit 1 fails, too.[163] OCC Witness Jackson was not discussing "changes needed at Zimmer to reduce SO2."[164] Instead, she pointed out that Zimmer Unit 1 appears not "to be performing well compared to what is achievable[, so] a nonattainment designation . . . will likely require additional capital expenditures[.]"[165] She explained specifically at the hearing:

> I think this statement is referring to looking at the emission rates of sulfur dioxide that are reported in the clean air management database – Clean Air Markets database that is maintained by the EPA, and seeing that the SO2 rates at Zimmer are actually quite a bit higher than most units, including the other PPA Units . . . .[166]

Consistent with the ESP III Opinion and Order's environmental impact factor, OCC Witness Jackson was looking at the environmental effect of Zimmer Unit 1's operation,

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[160] *See* AEP Ohio Brief at 49.

[161] *See id.*

[162] *See* Hearing Transcript at Vol. XIV, p. 3561:19-24; *see also id.* at p. 3561:25-3562:2 (data plant-specific to PPA Units).

[163] *See* AEP Ohio Brief at 50.

[164] *See id.*

[165] *See* Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at 21:5-10.

[166] *See* Hearing Transcript at Vol. XIV, p. 3566:4-10.

not the operation of its technology *per se*.[167] The purported changes that could be made to Zimmer Unit 1's operations addressed in AEP Ohio's initial brief serve only to confirm OCC Witness Jackson's ultimate point on the matter: "A nonattainment designation under the 1-hour SO2 standard will likely require additional capital expenditures at the Zimmer plant."[168]

OCC Witness Jackson reached a conclusion that it seems very likely that additional NOx controls will be required at Clifty Creek Unit 6. AEP Ohio criticized that conclusion. AEP Ohio's points are misguided and misleading.[169] AEP Ohio calls her conclusion "speculation" because the OVEC report she relied upon (according to AEP Ohio) uses different words.[170] OCC Witness Jackson, however, made it very clear that the OVEC report was *not* the sole source for her conclusion:

> I would not say that's [the OVEC report] the only basis. I would say that makes it fairly obvious that even the operators at the plants think it's necessary. I reviewed the emission's data from Unit 6 and also what may be required based on current and upcoming regulatory obligations and feel that I agree that an SCR [selective catalytic reduction] may be required on Unit 6.
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> ***
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> Yes; very likely [that an SC may be required on Unit 6].[171]

AEP Ohio also had criticism of OCC Witness Jackson's reliance on certain data regarding ozone non-attainment areas. AEP Ohio's criticism is again misguided and

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[167] *See id.* at 12-15.

[168] *See* Direct Testimony of Sarah E. Jackson (OCC Ex. 13) filed September 11, 2015 at 21:9-10.

[169] *See* AEP Ohio Brief at 50-51. In yet another example of misleading, AEP Ohio asserts that the Joint Stipulation's severability provision "will ensure that ESP III will continue in an orderly fashion in the unlikely event that a court invalidates the PPA Rider." *See* AEP Ohio Brief at 72. But AEP Ohio Witness Allen confirmed that, were the provision invoked, "debate" about the Joint Stipulation's meaning would be required. *See* Hearing Transcript at Vol. XIX, p. 4719:7-4720:1.

[170] *See* AEP Ohio Brief at 50-51.

[171] *See* Hearing Transcript at Vol. XIV, p. 3569:3-12.

misleading. The data was not "outdated" or in some way not "current."[172] As OCC Witness Jackson explained, the data she relied on regarding non-attainment areas "was released with the ozone standard as I reviewed it at the time of my testimony[.]"[173] Read in context, the cross-examination to which AEP Ohio cites demonstrates simply that OCC Witness Jackson used the best, and only, available data to her at the time she analyzed matters of ozone non-attainment.[174] She did not consider, and could not have considered, data from the future not yet available. For AEP Ohio to criticize OCC Witness Jackson for that serves only to confirm that it cannot criticize the substance of her testimony.[175]

III. CONCLUSION

AEP Ohio's Settlement and application would cost Ohio's retail customers a projected $1.9 billion ($700 per customer) over the eight-year PPA term. The cost to Ohioans would be "dramatically" more money (as OEG states) if federal officials require the power plants to bid into markets at their cost and the plants receive no revenue to offset the consumer subsidies under AEP Ohio's proposed PPA. Additionally, the settlement's re-regulatory proposal would diverge from Ohio's policy for using markets to determine electric generation prices (instead of government regulators imposing

[172] *See* AEP Ohio Brief at 51.

[173] *See* Hearing Transcript at Vol. XIV, p. 3582:19-24.

[174] *See id.* at pp. 3580:18-3582:24.

[175] It also confirms AEP Ohio's hypocrisy. On the one hand, when it suits it, AEP Ohio defends its use of the 2013 Fundamentals Forecast instead of the more recent 2015 Fundamentals Forecast because "what you have to do in a regulatory proceeding you have to get a snapshot you have to stop at some point." *See* Hearing Transcript at Vol. XVIII, p. 4667. "It is appropriate to rely upon information that is available when an application is filed, and it is accepted practice in regulatory proceedings to do so." AEP Ohio Brief at 81. But then on the other hand, when it does not suit it, AEP Ohio criticizes others (here, OCC Witness Jackson) that use "information available when an application is filed." AEP Ohio's hypocrisy is heightened because, unlike when AEP Ohio ran its model to forecast the PPA Rider in connection with the first phase of this proceeding, the 2015 Fundamentals Forecast *was* complete before AEP Ohio Witness Allen prepared AEP Ohio Ex. 52, WAA-2. *See id.* at Vol. XIX, p. 4665:21-4667:22.

prices). The PUCO should take a stand for Ohio policy, markets and the consumer protection that state policy for markets provides to a million AEP Ohio consumers.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic transmission, this 8th day of February 2016.

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Summary: Brief Reply Brief by the Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network electronically filed by Patti Mallarnee on behalf of Michael, Wm Mr.