

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	Case No. 14-1693-EL-RDR
Proposal to Enter into an Affiliate Power)	
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
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

Kimberly W. Bojko (0069402)
Ryan P. O'Rourke (0082651)
Carpenter Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
bojko@carpenterlipps.com
o'rourke@carpenterlipps.com

Counsel for the OMAEG

TABLE OF CONTENTS

I. Introduction.....	1
II. Discussion.....	3
A. AEP Ohio fails to show that the Stipulation is the product of serious bargaining among capable, knowledgeable parties.....	3
B. AEP Ohio’s statements on the financial need of the plants are inconsistent with its parent’s position.....	6
C. The oversight and review features of the PPA Rider contained in the Stipulation are insufficient to protect consumers and not in the public interest	8
D. A balanced resource portfolio is needed	11
E. The Stipulation fails to provide rate stability to customers	13
F. AEP Ohio’s analogy to Dominion and other recipients of cost-based rates is inapt	16
G. The Stipulation undermines economic development.....	18
H. The Stipulation’s severability provision illustrates that AEP Ohio has no interest in sharing risk with its customers.....	20
I. The IRP tariff provisions are anticompetitive.....	21
J. <i>Pike County</i> does not permit the Commission to intrude on FERC’s exclusive authority to oversee the wholesale market.....	23
III. Conclusion	24

I. Introduction

AEP Ohio describes the Joint Stipulation and Recommendation (Stipulation) offered for adoption in this case as a “unique opportunity.”¹ This “unique opportunity” invites the Public Utilities Commission of Ohio (Commission) to encroach on the exclusive powers of the Federal Energy Regulatory Commission (FERC) to oversee the wholesale markets, requests an unprecedented \$1.9 billion customer-funded bailout of a fleet of aging and uneconomic coal plants, and deigns to usher in a new era of re-regulation of generation services in direct contradiction to the General Assembly’s market-based directive embodied in S.B. 3. These unprecedented features are bad enough. But bundling them with a package of rate discounts and payments to be enjoyed by a narrow class of beneficiaries to the exclusion of other customers provides an even more compelling case for why the Stipulation should be emphatically rejected.

While the harms presented to each customer class are significant, the damage caused by the Stipulation may be felt most acutely by Ohio’s manufacturers. The manufacturing class is one of the top consumers of electricity in the state, which means that any impacts arising from future increases to electricity prices will have an outsized, negative effect on their operations. One study has found that a 1¢/kWh increase in the price of electricity translates to a 2.2% decrease in gross product generated.² The Commission has a statutory mission under R.C. 4928.02(N) to safeguard “Ohio’s effectiveness in the global economy.”³ Ensuring a competitive atmosphere for Ohio’s manufacturers will go a long way towards ensuring that R.C. 4928.02(N)’s policy directive is met.

¹ AEP Ohio Brief at 1.

² OMAEG Ex. 19 at 11 (Dr. Hill Direct).

³ R.C. 4928.02(N).

If there were any doubts about the anticompetitive effects associated with the Stipulation, the Commission need only look to the briefs submitted by PJM Interconnection, LLC (PJM) and the Independent Market Monitor (IMM). PJM fears that adoption of the Stipulation will portray Ohio as a place where investment in new generation is discouraged.⁴ Similarly, the IMM opines that the Stipulation will shift costs and risks from shareholders onto customers and distort competitive incentives in the wholesale markets.⁵ With no real answer to these claims, AEP Ohio falls back on accusing those opposed to its proposal as “blindly pursu[ing]” competition for competition’s sake. But if anyone is closing their eyes to the ramifications of what is being presented in this case, it is not PJM, the IMM, or anyone else who acknowledges the demonstrated success of competition in the generating markets in introducing new, reliable sources of supply, and in lowering electricity costs for the broadest group of manufacturers, households, and businesses.

In spite of AEP Ohio’s strained efforts at trying to convince the Commission otherwise, the Stipulation is not about promoting system reliability, retail-rate stability, or economic development. The reality is that for all the complexity this case entails, the question presented for resolution is fairly simple: should ratepayers be required to bailout a fleet of aging and uneconomic coal plants for the benefit of shareholders and the investment community? The answer is plainly no.

⁴ PJM Amicus Brief at 5.

⁵ IMM Brief at 2.

II. Discussion

A. AEP Ohio fails to show that the Stipulation is the product of serious bargaining among capable, knowledgeable parties.

AEP Ohio grossly overstates the duration and robustness of the settlement process. For all its rhetoric about the negotiations and untold benefits that customers will allegedly receive under the Stipulation, AEP Ohio studiously avoids discussion of a major flaw of its settlement process: at no point during the negotiations was it disclosed to *all* parties that AEP Ohio and its affiliate had reached side deals with IEU-Ohio and the Sierra Club.⁶ Under the terms of the side deal with IEU-Ohio, AEP Ohio agrees to make an \$8 million irrevocable payment to IEU-Ohio in consideration of the mutual covenants contained therein, including the non-opposition in this case and IEU-Ohio's agreement to dismiss several cases it is involved in with AEP Ohio, including appeals and cases that it initiated, but which affect other participants.⁷ Although the payment is said to "relate[] primarily to the cases listed in Paragraph 1" of the agreement, the agreement expressly contemplates that IEU-Ohio will take a non-opposing position in this proceeding as a condition of the "Global Settlement Agreement" and requires IEU-Ohio to take specific action in this proceeding.⁸ It is also important to note that the side deal was executed on the same day as the Stipulation was filed in this proceeding and that the side agreement becomes null and void if the "PPA Stipulation is not finalized and filed with the PUCO."⁹ Moreover, given IEU-Ohio's staunch opposition to the construct of AEP-Ohio's PPA Rider filing

⁶ Vol. XVIII, Tr. at 4572-4573; Vol. XIX, Tr. at 4808-4815, 4820.

⁷ P3/EP SA Ex.11 at 1-2. See also OMAEG Ex. 31, Attachment JAS-1 (Seryak Direct)).

⁸ Id.

⁹ Id. at 2.

throughout this proceeding and in AEP Ohio's prior ESP 3 proceeding,¹⁰ it takes no imaginative leap to infer that the \$8 million payment forms an implicit part of the bargain that motivated IEU-Ohio to adopt a non-opposing position here.

Similar to the side deal with IEU-Ohio, Sierra Club's side deal was also executed on the same day that the Stipulation was filed in this proceeding.¹¹ This side deal commits AEPGR to undertake certain commitments associated with the operations of the Affiliate PPA Units.¹² In exchange, Sierra Club commits to signing the Stipulation.¹³ The agreement goes on to provide that it is null and void if the Stipulation is not approved or is rejected in a legal proceeding.¹⁴

The failure to bring the IEU-Ohio and Sierra Club side deals to the attention of the parties in a *meaningful way* renders the Stipulation unfit for adoption. Transparency and fair dealing are foundational elements under this prong of the test. If these elements are missing—as they are here—the Stipulation cannot be approved. The Supreme Court of Ohio has underscored the importance of “open settlement discussions” and explained that undisclosed side deals are “relevant to deciding whether negotiations were fairly conducted.”¹⁵ The problem with secretive agreements of the sort reached between AEP Ohio (and its affiliate) and certain parties to the proceeding is that it undermines the “integrity” of the negotiations and risks “one or more parties * * * gain[ing] an unfair advantage in the bargaining process.”¹⁶ Following this guidance, the

¹⁰ *In the Matter of the Application of Ohio Power Company for Authority to establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, et al.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (February 25, 2015) (*ESP 3 Order*).

¹¹ OMAEG Ex. 26 at 6.

¹² *Id.* at 2-3.

¹³ *Id.* at 4.

¹⁴ *Id.* at 6.

¹⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 86.

¹⁶ *Id.* at ¶ 85-86.

Commission has reasoned that “the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to the stipulation * * * and * * * [w]e now expressly reject the stipulation on such grounds.”¹⁷

Applying this precedent, the Stipulation must similarly be rejected. The failure to disclose side deals not only deprived the non-signatory parties of critical information they could have used to evaluate their positions, but also tainted the integrity of the settlement process. The argument that the side deal was incapable of being disclosed any earlier than the day the Stipulation was filed lacks merit. Clearly, AEP Ohio, its affiliate, IEU-Ohio, and Sierra Club had been in settlement talks for more than one day and, just as drafts of the Stipulation were circulated and discussed with parties, so should have been the side deals. At a minimum, the substance of the side deals or the mere fact of their existence is something that should have been disclosed. Publicizing a side deal after a stipulation is filed does not permit a party to meaningfully evaluate the disclosed information and its impact on the party’s negotiating position. It is likewise immaterial that IEU-Ohio’s status in this proceeding is that of a non-opposing party rather than that of a signatory party. Any argument predicated on that distinction elevates form over substance. During the hearing on the Stipulation, IEU-Ohio actively participated in the hearing, cross examining opponents of the Stipulation and PPA Rider.¹⁸ Clearly, IEU-Ohio is not exactly agnostic about whether the Stipulation is approved.

¹⁷ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, et al.*, Case No. 03-93-EL-ATA, et al., Order on Remand at 27 (October 24, 2007).

¹⁸ Vol. XX, Tr. at 5124.

Simply put, whether AEP Ohio wants to acknowledge it or not, the failure to disclose the \$8 million IEU-Ohio side deal and the Sierra Club side deal prevents the Commission from finding that serious bargaining occurred among capable, knowledgeable parties. For this reason alone, the Stipulation should be disapproved.

B. AEP Ohio’s statements on the financial need of the plants are inconsistent with its parent’s position.

At page 94 of its brief, AEP Ohio latches on to what it believes is an inconsistency in Dynegy’s position on market volatility and therein urges the Commission to “treat Dynegy’s true corporate position as Dynegy’s actual position on price volatility.”¹⁹ OMAEG has no intentions of wading into this debate—Dynegy is certainly more than capable of addressing this issue on its own. But if AEP Ohio is truly interested in keeping parties honest about their litigation positions, it should follow its own advice.

In its brief, AEP Ohio claims that the PPA units “have a significant financial need, at least in the near term.”²⁰ AEP Ohio’s statement is not entirely surprising, given that the first factor from the Commission’s *ESP 3 Order* calls for an evaluation of “the financial need of the generating plant * * * .”²¹ What is surprising, however, are the statements from AEP Ohio’s parent company, which puncture the notion that the PPA Units are on the economic bubble and in financial need of a customer-funded bailout.

During a May 2015 investor meeting, the parent explained that AEPGR’s generation fleet (inclusive of the Affiliate PPA Units) “is well-positioned from a cost and operational perspective

¹⁹ AEP Ohio Brief at 94.

²⁰ AEP Ohio Brief at 34.

²¹ *ESP 3 Order* at 25.

to participate in the competitive market.”²² The parent doubled-down on these statements in June 2015 and September 2015, repeating to investors once again that the AEPGR generation fleet “is well-positioned from a cost and operational perspective to participate in the competitive market.”²³

The statements from AEP Ohio and its parent are at war with themselves. Depending on the audience, the message changes. The Commission should not countenance this chameleon-like behavior. Either the plants are—as AEP Ohio says—on the economic bubble and in financial need or they are—as the parent says—well-positioned to compete in the market. In keeping with AEP Ohio’s own advice for Dynegy, the Commission should treat the position of AEP Ohio’s parent as AEP Ohio’s actual position in this proceeding and find that there is no financial need to bailout the plants with customer funding.

Inconsistencies aside, financial need should be assessed on the basis of a unit’s ability to compete in the wholesale markets. As the IMM explained, “AEP [Ohio] is requesting that the plants and the contracts be returned to a version of the cost of service regulation regime that predated the introduction of competitive wholesale power markets.”²⁴ Indeed, with the passage of S.B. 3, the General Assembly called for “competition in the supply of generation services * * *.”²⁵

If all that is required to prevail under the “financial need” factor from the *ESP 3 Order* is a showing that a unit is unfit to withstand the demands of competition, it should be retired.

²² OCC Ex. 5 at 23.

²³ OCC Ex. 6 at 28; OCC Ex. 7 at 28.

²⁴ IMM Ex. 2 at 4 (Dr. Bowring Supp. Direct).

²⁵ *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, ¶ 2.

Accepting AEP Ohio's theory would open up the door to an endless succession of affiliate PPAs and deter new entry.²⁶

C. The oversight and review features of the PPA Rider contained in the Stipulation are insufficient to protect consumers and is not in the public interest.

Not only are the oversight and review provisions of the Stipulation cursory, they are also exclusionary. If there were any doubts about AEP Ohio's position on the ability of intervenors to participate in the substantive review and audit of the PPA Rider, as well as the opportunity to receive information about the PPA Rider, its brief put those doubts to rest. Not once does AEP Ohio even hint at the possibility of allowing intervenors to participate in a process that is allegedly sufficient to protect ratepayers from imprudent conduct and misdealings among affiliates.²⁷ The exclusionary procedure envisioned by AEP Ohio is decidedly against the public interest. If customers bear 100% of the risk of the PPA Units' performance as well as 100% of the PPA Rider's costs, it stands to reason that they should be afforded an opportunity to obtain information for the purpose of examining whether the charges associated with the PPA Rider are unjust or unreasonable as contemplated by R.C. 4905.22. If the Commission is inclined to allow AEP Ohio to begin populating the PPA Rider, it should grant participatory rights to intervenors authorizing them to evaluate AEP Ohio's administration of the PPA Rider.

Leaving the interests of intervenors aside, the conciliatory air given by AEP Ohio that it is committing to fully cooperate with the Commission and Staff wholly ignores the broad powers vested in the Commission to oversee the operations of public utilities. Under R.C. 4905.06, the Commission:

²⁶ OMAEG Ex. 29 at 6 (Dr. Hill Supp. Direct).

²⁷ AEP Ohio Brief at 58-69.

has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. * * * The [C]ommission, through the public utilities commissioners or inspectors or employees of the [C]ommission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety.

Relatedly, R.C. 4095.15 mandates that every “public utility shall furnish to the [Commission], in such form and at such times as the [C]ommission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.”

OMAEG could give other examples of the broad statutory powers vested in the Commission to oversee the operations of public utilities, but those two statutes suffice to show that insofar as any retail-rate related issues with the PPA Rider are concerned, the Commission (and derivatively its Staff) would be authorized to review, audit, and obtain information associated with AEP Ohio’s administration of the PPA Rider regardless of whether the Stipulation provided for it or not. At bottom, the air of conciliation given by AEP Ohio should be given no weight; it has given up virtually nothing by agreeing to allow oversight of the PPA Rider.

To be sure, the powers granted to the Commission extend only to entities within its jurisdiction, which means that AEPGR and OVEC would be immune from Commission

regulation. This is problematic, as illustrated by the draft contract between AEP Ohio and AEPGR. Under the draft:

[AEPGR] shall keep, or shall cause to be kept, all necessary books of record, books of account, and memoranda of all transactions involving the [Affiliate PPA Units], in conformance, where required, with the FERC's Uniform System of Accounts.²⁸

No mention is made of the Commission's or Staff's ability to access this information or opine on the prudence of AEPGR as operator of the Affiliate PPA Units.

The agreement involving AEP Ohio's entitlement to the output of the OVEC PPA Units is materially the same with respect to information sharing:

[OVEC] shall, at all reasonable times, upon the request of any Sponsoring Company, grant to its representatives reasonable access to the books, records and accounts of [OVEC], and furnish such Sponsoring Company such information at it may reasonably request, to enable it to determine the accuracy and reasonableness of payments made for energy supplied under this agreement.²⁹

Again, no provision is made to share or review the information with the Commission and Staff.

It is unreasonable to exclude intervenors from the oversight, review, and information-sharing process regarding costs that those intervenors or member companies will be forced to pay. Worse still is that the Commission and Staff appear to be excluded in certain respects as well. AEP Ohio's half-hearted efforts to live up to the *ESP 3 Order's* oversight, review, and information-sharing provisions provide yet another reason for why this Stipulation should be rejected.

²⁸ P3/EPSCA Ex. 10 at 17.

²⁹ Sierra Club Ex. 3 at 18.

D. A balanced resource portfolio is needed.

OMAEG and AEP Ohio are on common ground about the role that fuel diversity plays in maintaining resource adequacy. Broadly speaking, all generating resources (i.e., traditional and renewable) should be a part of Ohio's generation mix. But AEP Ohio exaggerates the importance of coal to Ohio as a fuel resource.³⁰ Overreliance on one fuel source is not in the public interest.³¹

The problem is that AEP Ohio never comes to grips with the reality that Ohio is already heavily invested in coal. As AEP Ohio witness Thomas testified, 100% of the generating assets included in the Affiliate and OVEC PPAs are coal-fired.³² Moreover, Ohio's generation mix in 2013 was 58% coal and 29% natural gas.³³ If the Affiliate PPA units retired and were replaced by natural gas units, Ohio's generation mix would be 50% coal and 29% natural gas, which would still leave coal in a predominant position over all other fuel resources.³⁴ Diversity is not served by privileging coal above all other resources. Heterogeneity of resources, not homogeneity, is the proper path forward to meet Ohio's fuel needs.

AEP Ohio next errs in cherry-picking a couple days from the Polar Vortex to support its argument that coal is more reliable than gas.³⁵ AEP Ohio's diminutive sample-size does little to prove its point. But in any event, whatever merit there is to the argument that natural gas units

³⁰ AEP Ohio Brief at 38.

³¹ OMAEG Ex. 19 at 28-29 (Dr. Hill Direct) ("Ohio's power supply mix will not be less diverse if the plants are retired.").

³² Vol. IV, Tr. at 1206.

³³ OCC Ex. 12 at 28 (Sioshansi Direct).

³⁴ Id.

³⁵ AEP Ohio Brief at 39.

contributed to the performance problems associated with the Polar Vortex,³⁶ those problems have been addressed by FERC's adoption of the Capacity Performance Product (Capacity Performance). IGS witness Haugen explained that under Capacity Performance, "gas generators now have a much stronger incentive to procure firm gas supply rather than interruptible supply."³⁷ He continued, noting that in accordance with Capacity Performance, "the increased payments to generators through the recent capacity performance auctions ensures that generators will have the revenue necessary, at the lowest feasible cost, to guarantee performance."³⁸

Moreover, AEP Ohio never addresses the reliability problems that a coal unit could encounter. When asked to explain the reliability characteristics of coal versus gas, the IMM explained:

It depends on the nature of the fuel delivery system for the individual plant. So if you have a coal plant on a river that depends on barge traffic that can freeze, that doesn't look as good as a gas unit which is on an interstate pipeline which has very reliable service.³⁹

All in all, each fuel resource comes with its own reliability characteristics. Integrating these characteristics into a balanced portfolio of diverse fuel resources, rather than pursuing a coal-driven agenda, is the proper course of action for the Commission to take.

³⁶ To the extent the Polar Vortex contributed to price volatility in the wholesale markets, it appears that the PPA units share the blame for this as Clifty Creek 3, Cardinal 1, Zimmer, and Stuart 3 were all either partially or wholly offline during this time. Sierra Club Ex. 37 at 58 (Chernick Direct).

³⁷ IGS Ex. 5 at 5 (Haugen Direct).

³⁸ Id. at 5-6.

³⁹ Vol. XII, Tr. at 3094.

E. The Stipulation fails to provide rate stability to customers.

AEP Ohio touts the PPA Rider as a way to address market volatility.⁴⁰ But glaringly absent from AEP Ohio's brief is any *customer-based* survey showing that (1) it is the opinion of customers that their bills are riddled with volatility and (2) steps should be taken to address this volatility. The reason for this omission is simple—the laddering and staggering mechanisms embodied in the SSO products overseen by the Commission and the long-term contracts offered by CRES providers are quite capable of tamping down market volatility. To be clear, AEP Ohio and its parent company are driving this misguided proposal, not customers.

The first clue that AEP Ohio's proposal is not being offered to serve the interests of customers lies in its extended digression about the purported volatility in the wholesale markets.⁴¹ But this is a *retail* ratemaking proceeding, not a *wholesale* ratemaking proceeding. Indeed, as P3/EPISA witness Cavicchi explains, “current retail rates are not directly linked to the much more volatile wholesale market spot prices.”⁴² Thus, regardless of whatever volatility there may be in the wholesale markets, the critical issue is whether the PPA Rider will tamp down volatility at the retail level. AEP Ohio's inability to show that this proposal was prompted at the behest of retail customers, and that there is rampant volatility at the retail level, is a telling indicator of the true motivations for why this proposal is being made. This manufactured solution in search of a problem should be firmly rejected.

⁴⁰ AEO Ohio Brief at 93-98.

⁴¹ *Id.*

⁴² P3/EPISA Ex. 12 at 4-5 (Cavicchi Supp. Direct).

It is true the Commission recognized in its *ESP 3 Order* that a “properly conceived” PPA Rider could serve as a way to temper volatility,⁴³ but the construct of AEP Ohio’s PPA Rider is ill-conceived to address this issue. AEP Ohio has no real answer to the supplemental testimony of P3/EP SA witness Cavicchi, who explains the PPA Rider will “decrease rate stability” for customers over the next eight years.⁴⁴ There are two primary drivers for why customers will see *more* volatility, not less: AEP Ohio’s unreliable forecasts and a quarterly reconciliation process.

First, the projected \$4 million credit that AEP Ohio plans to initially populate the PPA Rider with, and the projected credit of \$721 over the life of the PPA Rider, which was derived from a different forecast, have no grounding in current market fundamentals. Cavicchi explains that:

since that time when AEP Ohio originally developed the power price forecast underlying its Joint Stipulation, fuel and power market prices have declined significantly[,] wholly invalidating the entire analysis upon which the Joint Stipulation is based. There is simply no factual basis upon which Mr. Allen’s Settlement Exhibit WAA-2, which he cites as providing an estimated nominal dollar benefit of \$721 million, is in any way realistic.⁴⁵

Cavicchi continues, noting that current market conditions have shattered the predictions made in AEP Ohio witness Bletzacker’s fundamentals forecast (which provides the foundation for Ex. WAA-2): “there has been a decline in projected 2016 natural gas prices of more than 50% when compared to late 2013 when Mr. Bletzacker developed his forecast (i.e., a decline of more than \$3/MMBTU).”⁴⁶ Lower natural gas prices are expected to continue for some time,

⁴³ *ESP 3 Order* at 25.

⁴⁴ P3/EP SA Ex. 12 at 16 (Cavicchi Supp. Direct).

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 12.

and these “reduced gas prices will result in lower electric prices * * * .”⁴⁷ In other words, “Mr. Bletzacker’s forecast is now clearly wrong.”⁴⁸ Given this gulf between what AEP Ohio predicts the market will do and what the market is actually doing, the idea that customers’ rates will be less volatile is groundless. As Cavicchi explains, in view of recent data, the PPA Rider will “significantly under-collect the PPA costs during the seven months it is in effect in 2016 and result in a substantial rate increase in 2017.”⁴⁹ Thus, regardless of the initial \$4 million credit, customers’ rates will become volatile shortly after the PPA Rider is implemented. A result that is directly at odds with the aims of the *ESP 3 Order*.

OMAEG witness Seryak also explains that not only are AEP Ohio’s estimates of the benefits to ratepayers “likely over-estimated to begin with” in light of PJM’s recently revised load forecasts, but “[t]he Stipulation introduces significant amounts of new resources that will reduce revenue of AEP Ohio’s PPA plants, increasing the likelihood that the PPA rider will create costs for customers.”⁵⁰ He concludes: “It is quite possible then, that the PPA rider will not provide a hedge at all for customers, but only create costs.”⁵¹

The second element that will add to volatility is the PPA Rider’s quarterly reconciliation process.⁵² Based on an analysis of wholesale market data from 2011-2015, Cavicchi estimates that customers will experience “significant swings in rates up and down” due to quarterly reconciliations.⁵³ These swings could be as much as -3/MWh to \$10/MWh.⁵⁴ AEP-Ohio’s

⁴⁷ Id. at 12-13.

⁴⁸ Id. at 12.

⁴⁹ Id. at 16.

⁵⁰ OMAEG Ex. 31 at 10, 5-9 (Seryak Direct).

⁵¹ Id. at 10.

⁵² P3/EPSC Ex. 12 at 17 (Cavicchi Supp. Direct).

⁵³ Id. at 17.

proposed PPA Rider adopted by the Stipulation will not act as an insurance-like product to provide a significant financial hedge against market volatility as required.⁵⁵ Neither the PPA Rider nor the Stipulation provide rate stability and should be rejected.

F. AEP Ohio's analogy to Dominion and other recipients of cost-based rates is inapt.

In an attempt to stave off the argument that its PPA proposal will be anticompetitive, AEP Ohio points to generators such as Dominion in Virginia that receive cost-based rates yet participate in PJM's wholesale auctions.⁵⁶ It is the view of AEP Ohio that since no untoward bidding behavior and market distortions have been publically uncovered in these situations, it is therefore highly unlikely that any anticompetitive effects will arise out of its PPA proposal. AEP Ohio misses the point.

Under Ohio's deregulatory paradigm, "the utility shall be fully on its own in the competitive market."⁵⁷ This means that generating units must compete against each other in the markets to earn their revenues. Moreover, with the advent of retail choice in Ohio, customers have the freedom to shop for their generation supply. Unlike in Ohio, Virginia has not instituted these market-based approaches to fostering competition among generators and empowering customer choice. When asked to explain the differences between Virginia and Ohio, the IMM testified:

Dominion is * * * a full cost-of-service, regulated, vertically integrated utility, and when power plants are built in that paradigm * * * they are built and operated for the entire life under the cost-

⁵⁴ Id.

⁵⁵ *ESP 3 Order* at 25.

⁵⁶ AEP Ohio Brief at 135-139.

⁵⁷ R.C. 4928.38.

of-service regime, and retail rates are set by that regime. The difference in Ohio clearly is that units were at one point in the cost-of-service * * * paradigm, were shifted to markets, and now are proposed to be shifted back. In addition, of course, in Ohio there is retail choice, so that's really the fundamental difference.⁵⁸

What AEP Ohio fails to recognize is that—unlike Virginia and other states that still use cost-based rates—Ohio relies on competition to attract new generation investment. As PJM explains in its amicus brief, it is imperative that Ohio “be seen as a state where investment in new generation is welcomed and such investment can compete fairly with legacy investment to the state’s ongoing economic development needs.”⁵⁹ The guaranteed revenue stream contemplated by the PPA Rider could incent the PPA Units “to bid below their costs, which, in turn, will have a suppressing effect on prices and degrade the signal upon which PJM and Ohio are relying to attract new generation resources in Ohio.”⁶⁰

This chilling effect on attracting new investment could, over time, threaten reliability. To be sure, it is indisputable that resource adequacy is currently exceeding expectations.⁶¹ Nonetheless, it is appropriate to plan for the inevitable retirement of the aging PPA units. And, as AEP Ohio witness Bradish observed, without adequate generating resources, “the grid becomes susceptible to swings in power flows, voltage, and frequency that can lead to system instability.”⁶² Unnecessarily prolonging the life of aging, uneconomic coal units while discouraging investment of new generation in Ohio is not in the public interest.

⁵⁸ Vol. XII, Tr. at 3084-3085.

⁵⁹ PJM Amicus Brief at 4.

⁶⁰ Id.

⁶¹ During the 2018/2019 BRA, PJM exceeded its target reserve margin of 15.7% by 4.1%. See OMAEG Ex. 29. at Attachment EWH-5 at 1 (2018/2019 RPM Base Residual Auction Results).

⁶² AEP Ohio Ex. 7 at 5 (Bradish Direct).

Dynegy and others view the guaranteed revenue streams flowing to AEPGR and OVEC as erecting barriers to competition.⁶³ These barriers could not only prompt unaffiliated merchant generators to flee Ohio but also deter them from entering Ohio, thereby leaving an insufficient amount of generation to plug the gap left by the retirement of the PPA Units.⁶⁴ Flight of unaffiliated merchant generation away from Ohio and to other states could destabilize Ohio's power system and deal a powerful blow to Ohio's economic development needs.⁶⁵

In short, regardless of what is going on in Virginia and elsewhere, Ohio's economic development and reliability interests would be ill-served if the PPA proposal is allowed to take root.

G. The Stipulation undermines economic development.

AEP Ohio mistakes a fundamental point of procedure in responding to claims about the purported economic benefits that will accrue from the preservation of the PPA Units. Although AEP Ohio claims that there is lack of evidence regarding competing economic impact reports,⁶⁶ AEP Ohio fails to recognize that it has the burden of proof. As is the case with any application before the Commission, the burden is on the applicant to provide evidence which substantiates the application's claims.⁶⁷ If this proposal holds the promise of delivering economic benefits, it is up to AEP Ohio to prove it. AEP Ohio cannot meet its burden.

⁶³ Dynegy Ex. 2 at 4 (Ellis Supp. Direct).

⁶⁴ OMAEG Ex. 29 at 6 (Dr. Hill Supp. Direct).

⁶⁵ Id.

⁶⁶ AEP Ohio Brief at 55.

⁶⁷ See, e.g., *In re Application of Duke Energy Ohio, Inc.*, 131 Ohio St.3d 847, 2012-Ohio-1509, ¶ 8; *In the Matter of the Application of the Woodbran Realty Corp. for an Emergency Increase in Rates and Charges*, Case No. 76-173-ST-AEM, 1976 WL 407997, *2 (July 1, 1976).

To begin with, and as OMAEG pointed out in its initial brief, AEP Ohio witness Allen did not personally conduct an economic impact study, and he lacks the requisite expertise to make reliable judgments about any alleged economic impacts.⁶⁸ He does not have an economics degree.⁶⁹ He has not taken any classes on economic development and has never studied specific economic impact methodologies.⁷⁰ He has never created economic development models.⁷¹ He is not an expert in the base economic theory model, which provides the foundation for his analysis.⁷² And he did not personally prepare the economic reports and exhibits attached to his testimony.⁷³ AEP Ohio does not acknowledge, let alone attempt to rehabilitate, these evidentiary (and credibility) problems.

AEP Ohio likewise never concedes the fundamental point that closure of these coal units will not spell the end of Ohio's coal industry. Coal will continue to be a fuel source in the electric industry no matter what the outcome of this case is. Whether the coal is put to use in other plants throughout Ohio or in other states, workers in the coal industry will still have a market for their product.⁷⁴ Likewise, entry from new gas-fired generating units will bring jobs and a strong tax base that could revitalize the local economies where the units are sited.⁷⁵ The following Ohio-sited projects are in the PJM queue and could bring significant economic

⁶⁸ OMAEG Brief at 46-49.

⁶⁹ Vol. VII, Tr. at 1740.

⁷⁰ Id. at 1742.

⁷¹ Id. at 1743.

⁷² Id. at 1754.

⁷³ Id. at 1745.

⁷⁴ OCC Ex. 10 at 3 (Dr. Dormady Direct).

⁷⁵ OCC Ex. 12 at 30 (Sioshansi Direct).

benefits to the regions where they will operate: Carroll County Energy; Oregon Clean Energy Center; Clean Energy Future-Lordstown; and Middletown Energy Center.⁷⁶

In sum, AEP Ohio *overstates* the benefits associated with keeping the PPA Units afloat and *understates* the value to be gained by the entry of cleaner, more efficient natural gas generating units.

H. The Stipulation’s severability provision illustrates that AEP Ohio has no interest in sharing risk with its customers.

AEP Ohio’s claim that the Stipulation’s severability provision complies with the terms of the *ESP 3 Order* is disingenuous.⁷⁷ In its brief, AEP Ohio quotes a large portion from Section IV.D of the Stipulation which addresses severability and then claims that the quoted section meets not only the *ESP 3 Order* but also the ESP statute. But there’s a glaring omission in AEP Ohio’s portrayal of how the severability clause works. Unmentioned in AEP Ohio’s discussion on severability is the impact of the last two sentences from Section IV.D, which provides: “This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. No amounts collected shall be refunded as a result of this severability provision.”⁷⁸

This heads-I-win, tails-you-lose proposition is incompatible with the Commission’s stated directive in its *ESP 3 Order* that any future PPA Rider proposal must “allocate the rider’s financial risk between both the Company and its ratepayers.”⁷⁹ It is bad enough that customers bear all the risk in a situation where the PPA Rider is found to be *lawful*. But for AEP Ohio to

⁷⁶ Vol. VI, Tr. at 1582-1585.

⁷⁷ AEP Ohio Brief at 72.

⁷⁸ Joint Ex. 1 at 35.

⁷⁹ *ESP 3 Order* at 25.

petition the Commission to sign off on a provision that allows the Company to retain customer funds in a situation where a court finds that the PPA Rider is *unlawful* is absurd.

The Commission should strike this decidedly one-sided provision, or, in the alternative, explicitly order that any amounts recovered under the PPA Rider be made subject to refund. The Commission has taken such steps in the past and it should do so here to protect customers.⁸⁰ While OMAEG submits that rider true-up proceedings—such as the one envisioned by the Stipulation—are not subject to the prohibition against retroactive ratemaking,⁸¹ if the Commission adopts the Stipulation, it should overtly state that cost recovery under the PPA Rider shall be subject to refund.

I. The IRP tariff provisions are anticompetitive.

As a signatory party to the Stipulation, the Ohio Energy Group (OEG) discusses the virtues of the Stipulation's IRP provisions which redound to the benefit of Signatories, non-opposing parties, and pre-existing IRP-tariff customers. But OEG's discussion gives the Commission a one-sided picture of the provisions' impacts on customers.⁸²

OEG maintains that the IRP program enhances system reliability by removing load from the system during peak periods.⁸³ This much is true, but if the goal is to improve system reliability, excluding other high-load-factor customers from participating in the IRP program is the wrong way to go about achieving it. Structuring IRP-tariff eligibility in an asymmetrical

⁸⁰ See, e.g., *In the Matter of the Self-Complaint of Akron Thermal, Ltd. Partnership*, Case No. 04-1298-HT-SLF, Finding and Order at 3 (November 3, 2004) (ordering that surcharge be collected subject to refund); *In the Matter of the Inclusion of Take or Pay Costs in the Gas Cost Recovery Rates of Ohio Gas Company and Related Matters*, Case No. 89-440-GA-UNC, 1989 WL 1732113, *1 (March 21, 1989) (ordering that costs included in GCR rates be made subject to refund).

⁸¹ *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982).

⁸² OEG Brief at 8-10.

⁸³ *Id.* at 8.

fashion, as the Stipulation does, is anticompetitive because it assigns participation eligibility not on the basis of merit but on the basis of the customer's litigation position in this proceeding. It also discriminates against those who do not support proponents of the Stipulation through membership. This is hardly the way to optimize system reliability.

OEG's arguments about economic development follow the same mistaken logic.⁸⁴ As with system reliability, the IRP program can benefit economic development if structured appropriately. But selecting winners and losers on the basis of their litigation position in this proceeding rather than on their objective ability to make a meaningful contribution to economic development is the wrong way to "facilitate the state's effectiveness in the global economy."⁸⁵

OEG next tries to downplay the costs associated with implementing this program, but its efforts are unavailing. It states that as capacity market prices increase, so will the value of the offset to IRP program costs that are provided through the EE/PDR Rider. Whether capacity prices rise, fall, or stay constant remains to be seen. The simple fact is that regardless of any applicable offsets, costs are costs. Adding more costs to customers' bills does little to advance the interests of economic development. AEP Ohio witness Allen estimated that over the Stipulation's eight-year term, the amount of IRP credits *provided* to certain customers—and the amount *recovered* from other customers—could reach up to \$178.2 million.⁸⁶ These costs are significant and outweigh any benefits that may otherwise flow from the implementation of the expanded IRP program.

⁸⁴ Id.

⁸⁵ R.C. 4928.02(N).

⁸⁶ Vol. XIX, Tr. at 4751.

J. *Pike County* does not permit the Commission to intrude on FERC’s exclusive authority to oversee the wholesale market.

AEP Ohio does not dispute that FERC alone has the authority to oversee wholesale power transactions, but instead challenges the assertion that a Commission decision authorizing cost recovery under the PPA Rider would be preempted by FERC’s exclusive jurisdiction.⁸⁷ According to AEP Ohio, all the Commission is being asked to do is sign-off on the prudence of wholesale power purchases for the purpose of retail ratemaking.⁸⁸ AEP Ohio cites to a line of cases beginning with *Pike County*⁸⁹ to address the preemption issue, but those cases are unpersuasive.

In *Pike County*, the court ruled that the Pennsylvania Public Utility Commission (PPUC) was not preempted when it disallowed a utility from passing through certain wholesale purchase power costs at the retail level in light of alternative sources of power.⁹⁰ The court distinguished the functions of FERC from the PPUC, explaining that FERC examines the seller’s cost of service data in examining whether the rate charged is just and reasonable, but does not evaluate whether the buyer’s decision to purchase the power was prudent in view of other options.⁹¹

AEP Ohio’s citation to *Pike County* confuses what the Commission is being asked to do on the front end versus what the Commission is being asked to do on the back end. As the U.S. Supreme Court recently explained, FERC alone “has the authority—and, indeed, the duty—to

⁸⁷ AEP Ohio Brief at 59-60.

⁸⁸ *Id.*

⁸⁹ *Pike County Light and Power Co. v. Pa. Pub. Util. Comm.*, 77 Pa. Cmwlth. 268, 465 A.2d 735 (1983).

⁹⁰ *Id.* at 274.

⁹¹ *Id.* at 274-275.

ensure that rules or practices ‘affecting’ wholesale rates are just and reasonable.”⁹² Under the terms of the OVEC and Affiliate PPAs, AEP Ohio will buy the output from the PPA Units which will then be sold into the PJM wholesale markets. Any gains or losses that differ from the contract price for the sale of that output will then be flowed back to customers, thereby leaving the PPA Units with an amount set not by the markets overseen by FERC, but by the terms of the contracts between AEP Ohio and AEPGR and OVEC. The question is not whether the Commission is able to disallow the collection of imprudently incurred costs by AEP Ohio through retail ratemaking. Given FERC’s exclusive authority to determine whether a sale of energy at wholesale is just and reasonable, the question is whether the Commission may approve a rate that the PPA Units may charge and receive in the wholesale market.

As explained by OCC, by approving the PPA Rider, the Commission would functionally set the wholesale prices for the PPA Units by supplementing the wholesale auction clearing price with that of the PPA contract price.⁹³ Regardless of the Commission’s authority to make a disallowance after the fact under *Pike County*, it cannot up front authorize retail rate recovery that interferes with FERC’s exclusive authority to oversee rates at the wholesale level. The PPA Rider, therefore, interferes with FERC’s exclusive jurisdiction and must be rejected.

III. Conclusion

The PPA Rider will saddle captive customers with the generation costs of a fleet of aging and uneconomic coal units and threaten to erase the gains made by Ohio manufacturers and other consumers in the competitive market. That outcome is inconsistent with the General Assembly’s unambiguous market-based directive and will thwart the state’s effectiveness in the global

⁹² *FERC v. EPSA*, Case No. 14-840, Slip Opinion at 15 (January 25, 2016).

⁹³ OCC Brief at 24-27.

economy. The special privileges doled out to a narrow class of beneficiaries under the Stipulation will only add to these woes. For all the reasons stated above, as well as for the reasons given in OMAEG's initial brief, the Stipulation adopting AEP Ohio's PPA Rider should be rejected.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Ryan P. O'Rourke (0082651)
Carpenter Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
bojko@carpenterlipps.com
o'rourke@carpenterlipps.com

Counsel for the OMAEG

CERTIFICATE OF SERVICE

I certify that a copy of the Reply Brief of the Ohio Manufacturers' Association Energy Group was served via email on February 8, 2016 upon the following parties of record:

/s/ Ryan P. O'Rourke
Ryan P. O'Rourke

stnourse@aep.com
mjsatterwhite@aep.com
msmckenzie@aep.com
Christopher.Miller@icemiller.com
cmooney@ohiopartners.org
dboehm@BKLawfirm.com
dconway@porterwright.com
dwilliamson@spilmanlaw.com
fdarr@mwncmh.com
ghull@eckertseamans.com
glpetrucci@vorys.com
mjsettineri@vorys.com
haydenm@firstenergycorp.com
mhpetricoff@vorys.com
jeffrey.mayes@monitoringanalytics.com
jfinnigan@edf.org
jkylercohn@BKLawfirm.com
mkurtz@bkllawfirm.com
jlang@calfee.com
Jodi.bair@occ.ohio.gov
joliker@igsenergy.com
joseph.clark@directenergy.com
Kurt.Helfrich@ThompsonHine.com
mdortch@kravitzllc.com
mfleisher@elpc.org
mpritchard@mwncmh.com
msmalz@ohiopovertylaw.org
mswhite@igsenergy.com
myurick@taftlaw.com
ricks@ohanet.org

sam@mwncmh.com
scasto@firstenergycorp.com
schmidt@sppgrp.com
Scott.Campbell@thompsonhine.com
Stephanie.Chmiel@ThompsonHine.com
talexander@calfee.com
tdougherty@theOEC.org
tobrien@bricker.com
todonnell@dickinsonwright.com
tony.mendoza@sierraclub.org
William.Michael@occ.ohio.gov
william.wright@puc.state.oh.us
twilliams@snhslaw.com
Kevin.moore@occ.ohio.gov
Steven.beeler@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/8/2016 5:21:33 PM

in

Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM

Summary: Reply Reply Brief of The OMAEG electronically filed by Ms. Cheryl A Smith on behalf of The Ohio Manufacturers' Association